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White Paper: Matrimonial Finance Conference: Manchester

16 May 2018

What are the golden rules of how to challenge a spouse's monthly budget on the grounds of reasonable need?

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1. The title of this paper assumes that:-
 - a. The case does not involve sharing or compensation (which may uplift quantum above the level required to meet needs); and
 - b. The payer can afford to meet those reasonable needs i.e. the challenge is not on the grounds of affordability.

REASONABLE NEEDS

2. As 'needs' is "a very broad concept with no single definition in family law"¹, in search of a starting point as to what 'reasonable needs' might encompass, it is helpful to look at the *purpose* of a needs based order:-

*"We conclude that the objective of financial orders made to meet needs should be to enable a transition to independence to the extent that that is possible in light of the choices made within the marriage, the length of the marriage, the marital standard of living, the parties' expectation of a home, and the continued shared responsibilities, (importantly, child care). We acknowledge the fact that in a significant number of cases independence is not possible, usually because of age but sometimes for other reasons arising from choices made during the marriage"*².

3. That objective is endorsed by the Family Justice council's Guidance on "Financial Needs" on Divorce³, which goes on to state that:-
 - a. The needs of the parties are a question of fact; (para 21)
 - b. *"the question of the level of which needs should be met is (usually) inexorably linked to the question of the duration for*

¹ Law Commission report No. 343 *Matrimonial Property, Needs and Agreements* [3.8]

² *Ibid* [3.67]

³ 2nd Ed, published April 2018 and circulated to the judiciary

which income needs should be met by way of periodical payments, having regard to the objective identified (above)”;
(para 21);

- c. The ‘key point’ is that in cases involving greater financial resources and standard of living, needs can be met at a higher level that would otherwise be possible. (para 23).

STANDARD OF LIVING

4. In the bigger money cases, the elasticity of needs as a concept means there must be some starting point, usually considered to be the marital standard of living, see:-

- a. Baroness Hale in Miller v Miller; McFarlane v McFarlane:

“In the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living enjoyed during the marriage...”;

- b. In Z v A, Coleridge J held that, after a consideration of the available assets, when assessing the parties’ needs, the standard of living was the *“next most significant factor in the determination”*;

- c. In S v S, Bodey J held that the wife's award should enable her to:

“continue not in the same way as before the marriage broke down, but to have a standard of life which bears a proper relation to that to which she has been accustomed and to that of the husband.”;

d. In *Rapp v Sarre*, the wife's budget was considered by the trial judge to be reasonable in light of the parties' standard of living and the available assets. The Court of Appeal held that need is a flexible concept and the trial judge was entitled to take account of the parties high standard of living during the marriage;

e. Charles J in *G v G*:

"...the lifestyle enjoyed during the marriage sets a level or benchmark that is relevant to the assessment of the independent lifestyles enjoyed by the parties"

f. Moylan J in *BD v FD*:

"In my view, the starting point for the assessment of needs is the standard of living during the course of the marriage. This was the view expressed by the Law Commission in its 2014 report, Matrimonial Property, Needs and Agreements (Law Com. No 343) (para 2.34/2.35) in respect of "very wealthy cases": "needs are still assessed primarily by reference to the marital standard of living". This does not mean that it is either a ceiling or a floor but, as Mr Howard agreed during the course of his submissions, it provides a benchmark or starting point against which to assess needs."

5. However, per Mostyn J in *SS v NS*:

"The marital standard of living is relevant to the quantum of spousal maintenance, but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence"

but

"it is a mistake to regard the marital standard of living as the lodestar."

6. Other factors relevant to the Court's assessment of need are:-

a. Length of Marriage

- a. *"In my judgment, after a short marriage to a very wealthy man it is unfair to expect that she should continue to live at the same 'rate' as during the marriage. Such an expectation is completely unrealistic..."* Bennett J in McCartney v Mills McCartney;
- b. *"... in my view the length of the marriage and the role of an ex-wife as the primary caretaker of the children of the marriage would be factors to be taken into account in determining the amount of the provision to meet that transition."* Charles J in H v H [2007];
- c. *"Nowadays a young spouse at the end of a short marriage... would normally be expected to take proper steps to make him or herself financially independent to a significant extent within a reasonable time so that by the time the children were adult the requirement for support would have at least diminished if not wholly disappeared..."* Coleridge J in M v L;
- d. Charles J in G v G:-
 - "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,*
 - 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";*

e. Moylan J in BD v FD:

"Usually, due to finite resources, it will not be possible for the marital standard of living to be maintained. Additionally, it may well not be fair for the applicant spouse to have his or her needs provided for at this level either at all or for longer than a defined period (i.e. not for life) due, for example, to the length of the marriage.

f. However, see Holman J in Murphy v Murphy:-

"What, frankly, the arguments by the husband overlook is that the having of children changes everything. Of course this wife could never have expected a "meal ticket for life" on the basis of six years of marriage and two years of cohabitation if there had been no children....But the fact of having children, and their obvious dependence in this particular case on their mother for their care, changes everything, as I have said. The economic impact on this wife is likely to endure not only until they leave school but, indeed, for the rest of her life."

b. The length of time over which payments will be made

"It has to be borne carefully in mind that there is an inter-relationship between the level at which future needs will be assessed and the period during which a court is likely to find those needs should be met by the paying former spouse. The longer the period, the more likely it is that the court will decline to assess those needs on the basis of a standard of living which replicates that enjoyed during the marriage." Roberts J in AB v FC.

c. To enable a transition to independence

(i) *The ultimate objective is to give each party an equal start on the road to independent living."* Baroness Hale in Miller; McFarlane:

(ii) Charles J in G v G:

"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) 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

(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."

7. Reflecting the relevant authorities, the Family Justice Council's Guidance summarises the following principles in terms of the assessment of need:-

- a. Needs will be measured by assessing available financial resources;
- b. The court will strive to stretch finite resources and where resources are modest the children's needs may predominate;
- c. Needs 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;
- d. A party may be expected to suffer some reduction in standard of living having regard to the overall objective of a transition to independence

- e. To measure need, and the ability to meet it, both parties will be expected to present appropriately detailed budgets to the Court

THE BUDGET

8. In any case where PP is likely, the parties' respective budgets are crucial documents:

"It is obvious that in cases such as the present the calculation of the amount of surplus income cannot be achieved without first establishing what both the payer and the payee need in order to meet their projected expenditure" McFarlane v McFarlane; Parlour v Parlour

9. When preparing a budget, the following are simple, but often overlooked **practical** points:-

- a. Ensure you have a pro forma expenditure schedule which covers all possible areas of expenditure;
- b. Use a spreadsheet package: this will avoid calculation errors (which might not otherwise be picked up until trial);
- c. Use clear headings to divide expenditure into categories: housing, travel, personal etc;
- d. Clearly differentiate between the spouse's expenditure and the expenditure relating to the children;

- e. Ensure a copy remains attached to the Form E even if other documents are omitted to achieve bundle compliance.
10. As to **substance**, needs are a question of *fact*. In *AB v FC*, whilst noting the wife confirmed she would live within whatever PP order the Court made, Roberts J said that “...*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*”. To this end:-
- a. Resist the temptation to ‘assist’ the client to formulate their budget by reference to either your own standards or to budgets in other cases – this happens all the time, but does not assist a client who may be required to justify those expenses from the witness box at a future date⁴;
 - b. The best budgets are those derived from a detailed analysis of spending from bank/credit card statements over a 12 month period to take account of seasonal expenditure (holidays, Christmas presents, school fees etc);
 - c. In a big money case, considering employing an accountant to undertake that analysis (although no need to spend £50,000 on it, as the wife did in *Juffali*);
 - d. In a case where there has been a substantial drop in spending/standard of living post-separation, it is often helpful to have a third column (in addition to the ‘current’ and ‘future’

⁴ In *F v F* Thorpe J observed that budgets in big money cases tend to be drafted by accountants and advocates and, as such, bear little relation to reality

columns set out in Form E), namely a 'matrimonial spending' column, which sets out an analysis of spending during the marriage, taken from the bank statements/credit cards;

- e. Cast a critical eye over the finalised document: all too often, accounting errors or other anomalies can creep in because the client's schedule is just attached to the Form E without it being considered objectively: in a surprisingly large number of cases, the total expenditure claimed goes way beyond the joint matrimonial income and is nothing more than a 'wish list', which will never be affordable and likely to carry little evidential weight;
- f. Ensure future expenditure schedules are consistent: if prepared for a different purpose (e.g. MPS) ensure the schedule is clearly marked as such.

CHALLENGING A BUDGET

- 11. As with many aspects of our discretionary system, challenging a budget is considered to be more of an art than a science. However 'needs' generally and expenditure in particular are questions of *fact* and in the first instance will require a forensic approach.
- 12. Taking all the pointers above and applying them to the other party's budget is always useful, so:-
 - a. If not already provided electronically in spreadsheet form, convert the other party's budget to a spreadsheet;

- b. A spreadsheet document which compares both parties' expenditure under the same headings will show immediately what are likely to be the areas of dispute;
- c. Again, consider the expenditure critically in the context of (a) the available income, (b) the matrimonial spending and (c) current actual spending as evidenced in the bank/credit card statements.

THE COURT'S APPROACH – "THE BLUE PENCIL"

13. A number of Mrs Justice Robert's judgments refer to a "blue pencil", although it is rarely deployed:-
- a. In *AB v FC*, it was not considered "*proportionate or appropriate*" to take the 'proverbial blue pencil' to the wife's budget;
 - b. In *Juffali*, time did not allow for a detailed 'blue pencil exercise';
 - c. On appeal in *B v B*, the DDJ at first instance was not criticised for failing to take a 'blue pencil' to the parties' budgets;
 - d. In *KA v MA*, it was not appropriate in an already lengthy judgment to undertake some form of 'blue pencil analysis' of the wife's heads of expenditure.

14. This reflects the Court's general approach as stated by Mostyn J at paragraph 46(viii) of SS v NS:

"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."

15. In terms of challenge at trial, apart from bearing in mind the general points as set out above, each case turns on its own facts. From *this* advocate's perspective the common pitfalls are⁵:-

- a. Using a 'one size fits all' approach: not every case requires a detailed cross examination of each and every item of expenditure, especially in a case where it is clear the resources are such that the Court is going to take a broad brush approach;
- b. (Hand in hand with (a) above), failing to 'read' your tribunal;
- c. (And this happens with surprising frequency), failing to critically examine your own client's schedule before cross examining the other party.

MAINTENANCE PENDING SUIT

16. The Court takes a different approach to MPS, where hearings are generally listed for two hours and on submissions only.

⁵ Every advocate will have her own examples of these to share, but perhaps not in print

17. The Court does not consider the s.25(2) MCA 1973 factors. MPS is confined to s.22, namely:-

'On a petition for divorce, nullity of marriage or judicial separation, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the petition and ending with the date of the determination of the suit, as the court thinks reasonable.'

18. There can be a number of tactical advantages to applying for MPS:-

- a. Payments may be backdated to the date of the petition
- b. Costs of interim applications are excluded from the 'no order' principle;
- c. They can be tagged onto an LSPO and vice versa;
- d. They can set a 'baseline' for future PP (in the expectation they will increase in due course (see TL v ML below));
- e. They can prevent the paying party unilaterally reducing interim maintenance during the currency of proceedings.

19. A useful authority is Mostyn J in TL v ML at paragraphs [123]-[124]:-

"[123] The leading cases as to the principles to be applied on an application for maintenance pending suit are F v F (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45, G v G (Maintenance Pending Suit: Costs) [2002] EWHC 306 (Fam), [2003] 2 FLR 71 and M v M. [124] From these cases I derive the following principles:

(i) The sole criterion to be applied in determining the application is 'reasonableness' (s 22 of the Matrimonial Causes Act 1973), which, to my mind, is synonymous with 'fairness'.

(ii) A very important factor in determining fairness is the marital standard of living (F v F). This is not to say that the exercise is merely to replicate that standard (M v M).

(iii) In every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long-term expenditure, more aptly to be considered on a final hearing (F v F). That budget should be examined critically in every case to exclude forensic exaggeration (F v F).

(iv) Where the affidavit or Form E disclosure by the payer is obviously deficient, the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources (G v G, M v M). In such a situation, the court should err in favour of the payee.

(v) Where the paying party has historically been supported through the bounty of an outsider, and where the payer is asserting that the bounty had been curtailed, but where the position of the outsider is ambiguous or unclear, then the court is justified in assuming that the third party will continue to supply the bounty, at least until final trial (M v M).

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List of authorities

B v B [2014] EWHC 4545 (Fam)

BD v FD (Maintenance Pending Suit) [2016] 1 FLR 390

F v F (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45

G v G (Maintenance Pending Suit: Costs) [2002] EWHC 306 (Fam), [2003] 2 FLR 71

G v G (Short Marriage: Trust Assets) [2012] 2 FLR 48

H v H [2007] 2 FLR 548

Juffali v Juffali [2016] EWHC 1684 (Fam)

KA v MA (Prenuptial Agreement: Needs) [2018] EWHC 499 (Fam)

M v L [2003] 2 FLR 425

M v M (Maintenance Pending Suit) [2002] 2 FLR 123

McCartney v Mills McCartney [2008] 1 FLR 1508

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Miller v Miller; McFarlane v McFarlane [[2006] UK HL 24

Murphy v Murphy [2014] EWHC 2263

Rapp v Sarre [2016] EWCA Civ 93

S v S [2014] EWHC 4732 (Fam)

SS v NS (Spousal Maintenance) [2015] 2 FLR 1124

TL v ML [2006] 1 FLR 1263

Z v A [2012] EWHC 1434 (Fam)