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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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REASONABLE NEED?

The first issue is whether the word “reasonable” should appear at all? The word reasonable forms no part of MCA 1973 s25(2)(b). Is the better expression “need (generously interpreted)”? [used in *Radmacher; Lauder; VB v JP; Mc Farlane v Mc Farlane*].

Or expressed as “reasonable requirements fully and generously assessed” per Bodey J in *K v L* [2010] EWHC 1234.

Per Roberts J in *Juffali v Juffali* [2016] EWHC 1684:

71. There is no statutory definition of "needs" under English law⁷. 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. In another context (nuptial agreements), the Supreme Court has spoken about "real need": see *Granatino v Radmacher* (formerly *Granatino*) [2010] UKSC 42, [2011] 1 AC 534.

ATTEMPTING TO DEFINE NEEDS

The biggest problem facing practitioners is the fluidity in the concept of need. As Mostyn J put it in *FF v KF* [2017] EWHC 1093 (fam):

18. *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.*

Despite the Law Commission considering the issue¹, the glossary defines needs as nebulously as:

A very broad concept with no single definition in family law.

One need look no further than *Juffali v Juffali* (above) and *AAZ v BBZ* [2016] EWHC 3234 to see just how elasticity of the concept of need. In *Juffali* Roberts J awarded £62m to meet 'need' and in *AAZ* Haddon Cave J assessed W's needs at £224m.

The Family Justice Council's *Guidance on "Financial Needs" on Divorce* 2nd Edition (April 2018) suggests that:

Paragraph 24: *Any assessment of "financial needs" will, in particular, be informed by, and so depend upon, an assessment of:*

- (i) *The size of the available assets and income (ie "financial resources") (S25(2(a) MCA 1973) and*

¹ Law Com No 343 *Matrimonial Property, Needs and Agreements*

- (ii) *The “standard of living” enjoyed by the family before the breakdown of the marriage (s25(2)(c)), certainly where the marriage was of more than a short duration(s25(2)(d))*

In *SS v NS (Spousal Maintenance)* [2015] 2 FLR 1124, Mostyn J stated:

35. I would emphasise the final sentence. It is a mistake to regard the marital standard of living as the lodestar. As time passes how the parties lived in the marriage becomes increasingly irrelevant. And too much emphasis on it imperils the prospects of eventual independence.

40. I would suggest that these swirling considerations cannot be pressed into a formula which provides an answer, and it is right that that should be so, for the assessment of need is elastic, fact-specific and highly discretionary. For as King Lear pointed out, needs are exceedingly hard to reason; even the poor have things superfluous to their basic needs; and most luxuries are strictly unnecessary⁵.

Most recently in *Waggot v Waggot* [2018] EWCA Civ 727 Moylan LJ succinctly addressed needs:

99. 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.

THE MARITAL STANDARD OF LIVING/ LENGTH OF THE MARRIAGE:

In an appropriate case, typically a long marriage, and subject to sufficient resources being available, courts have taken the view that the lifestyle (ie "the standard of living") the couple had together should be reflected, as far as possible, in the sort of level of income and housing each should have as a single person afterwards [Family Justice Council: paragraph 27].

The issue remains whether the Court will uphold a budget based on the marital standard of living and if so, for what period.

The Law Commission at paragraph 3.96 noted:

The transition to independence, if possible, may mean one party is not entitled to live for the rest of the parties' joint lifetimes at the marital standard of living, unless he or she can afford to do so from his or her resources.

Certainly, this was Mostyn J's view in *NS v SS* at paragraph 35:

35. I would emphasise the final sentence. It is a mistake to regard the marital standard of living as the lodestar. As time passes how the parties lived in the marriage becomes increasingly irrelevant. And too much emphasis on it imperils the prospects of eventual independence.

Moylan J in *BD v FD* [2016] EWHC 594 also emphasises that using the marital standard of living as benchmark for the quantification of needs, does not mean that needs are met at that level for life:

The use of the standard of living as the benchmark emphatically does not mean that, as referred to above, in every case needs are to be met at that level either at all or for more than a defined period (of less than life). Often, as Baroness Hale said in MILLER V MILLER; MCFARLANE V MCFARLANE [para 158]: "The provision should enable a gentle transition from that standard [the marital standard of living] to the standard that she could expect as a self-sufficient woman." In G V G, Charles J said:

"[136] 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 remarriage) 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 the financial resources that are available to the parties.

Roberts J has considered these issues in *Juffali v Juffali* (above) at paragraph 77:

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.

She summarised the principles:

79. Thus, what I collect from these decisions are the following principles:-

(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 section 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.

After a short marriage, the Court may be less inclined to endorse a budget referable to the marital standard of living.

For example, Bennett J in *McCartney v Mills McCartney*.

In *G v G (Short Marriage: Trust Assets)* [2012] 2 FLR, Charles J addressed this issue as follows at paragraph 136:

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 payor), 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,

Mostyn J in *FF v KF* (above):

19. 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. Although the House of Lords preferred to uphold that award by reference to the sharing principle alone, it did not question the entitlement of the judge, in the exercise of his discretion, to assess Mrs Miller's needs thus.

QUANTIFICATION:

In *Purba v Purba* [1999] EWCA Civ 1730 [2000] 1 FLR 444, [2000] 1 FCR 652 Thorpe LJ stated:

In this field of litigation budgets prepared by the parties often have a high degree of unreality - usually the applicant wife's budget is much inflated. Most unusually, in this case the wife's budget seems to have been rather understated in many respects. It is true that one of the major items on the budget was substantial monthly expenditure for rent or mortgage. It is true that that could be said to be a superfluous item once the substantial lump sum was ordered. But the essential task of the judge is not to go through these budgets item by item but stand back and ask, what is the appropriate proportion of the husband's available income that should go to the support of the wife?

This decision should not be taken to mean that the individual items of a budget are irrelevant. Rather, it emphasises that in the exercise it is important that the court should clearly survey the wood as well as the trees.

In *H V W* [2013] EWHC 4105 (Fam) an order had been made granting the claimant wife an uncapped share (25%) of the husband's bonus on a joint lives basis.

King J (as she then was) allowed the appeal. She held at para 39:

*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 [in *AR V AR (TREATMENT OF INHERITED WEALTH)* [2012] 2 FLR 1 at para 71] described 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.*

In *AB v FC* [2016] 3285 Roberts J at paragraph 77 stated:

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.

BUDGETS:

These can be widely drawn in the right circumstances. For example, funding a hobby enjoyed during the marriage. In *S v S* [2008] 1 FLR 113 Sir Mark Potter P upheld an award to enable W to keep horses.

Similarly, the Court has sanctioned the purchase and funding of second and third homes {see for example *F v F* [1995] 2 FLR 615.

Periodical payments have been used to fund future housing needs: *AB v FC* [2016] EWHC 3285 in circumstances in which H's income was very high but there were limited capital resources.

EVIDENCE:

The most compelling evidence for a Court comes from the witness who knows their own budget.

It is essential that the witness understands where the figures have come from. There is no point including a budget for items that they cannot account for and are likely to be the subject of challenge.

Often estimating figures for future income needs will be difficult if it is likely that a house will be sold. However, simple investigations as to the level of council tax payable in the housing proposed will assist the Court to have confidence in the figures advanced.

One of the most difficult issues which arises is establishing a high income needs when there has been a long period of separation. Often during the period post separation, the level of interim provision will mean that there have been budgetary restraints imposed. Accordingly,

a budget which replicated the “standard of living” will be attacked by reference the actual levels of expenditure shown in bank statements.

This leaves the economically vulnerable party in a difficult position: do they live within their means post separation or run up debts to support a similar life style to that enjoyed during the marriage.

Certainly, using capital assets to support an alleged standard of living did not work for Heather Mills: *McCartney v Mills McCartney* [2008] 1 FLR 1508:

173. 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 p.a. put forward in her Form E in September 2006 was justifiable.

Accordingly, after a long separation, having a sound evidential basis for historic outgoings becomes even more important.

HOW TO GAIN AN EDGE/ AVOIDING THE RED PEN/ BLUE PENCIL:

No one wants to find themselves in the position of Heather Mills:

230. 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.

When preparing the budget on behalf of the paying party, be careful particularly in relation to discretionary expenditure eg clothes; holidays; weekend breaks.

There is nothing more unattractive than a parsimonious payer challenging the minutiae of their ex spouse's budget: when overdone in cross examination it has the reverse effect ie it leaves the Judge feeling more sympathetic to the ex-spouse. Also, be sure that it is consistent with their case re the extent of their resources.

On the other hand, including items of expenditure which are obviously designed to inflate a budget are designed to lose the sympathy of the Judge eg flowers at home when flowers were not bought regularly.

Remember most Judges strive to avoid pouring over a budget: it is generally quite dull. However, a cross examination on a poorly prepared budget can gain traction if gives the impression of deliberate forensic exaggeration. The problem then becomes one of credibility which will impact upon quantum across the board.

Stand back and look at the totality of the budget and make sure that it represents a fair proportion of the resources available: *SS v NS* paragraph 46:

vii) 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.

When preparing a budget it is essential to look at historical evidence from bank statements and credit card statements to ensure that the budget is accurate.

In the right case, instructing an accountant to undertake this exercise may be of assistance.

When challenging a long term budget identifying forensic exaggeration and double counting is the key. Hidden capital expenditure should also be challenged particularly where there is a to capitalisation of a pp award.

Always prepare a budget if you are the paying party: see *Rapp v Sarre* :

I consider that the judge's approach to need was open to him. It is well established in the authorities that "need" is a flexible concept and that the assessment of a spouse's "needs" includes a consideration of the way in which the parties led their lives whilst together. 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.

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