PUMP COURT

CHAMBERS

NEEDS, FAIRNESS AND SPECIAL ('STELLAR') CONTRIBUTION

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THE QUESTIONS

Needs, fairness and special ('stellar') contribution:

How is the court assessing 'needs' and 'fairness' in the context of marital break-up?

When will it depart from the equality principle?

Is 'stellar contribution' now outmoded and unarguable?

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WHAT ARE NEEDS?

Law Commission Report (No.343) (February 2014) – Matrimonial Property, Needs and Agreements.

Glossary:
"Needs": a very broad concept with no single definition in family law.

Confusion caused by terms such as **"reasonable requirements"** ('alluring phrase' coined in O'D v O'D [1976] Fam 83),
"needs generously interpreted" (Miller v Miller, McFarlane v McFarlane [2002] 2 AC 618) and
"predicament of real need" (Radmacher v Granatino [2011] 1 AC 534).

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WHAT ARE NEEDS?

Mostyn J: SS v NS [2015] 2 FLR 1124:

"… the assessment of need is elastic, fact specific and highly discretionary."

For as King Lear said:

"O, reason not the need! Our basest beggars are in the poorest thing superfluous…"

"Needs are exceedingly hard to reason; even the poor have things superflous to their basic needs; and most luxuries are strictly unnecessary"

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WHAT ARE NEEDS?

"When a marriage breaks up, there will thenceforward be two households instead of one. The husband will have to go out to work all day and must get some woman to look after the house – either a wife, if he remarries, or a housekeeper, if he does not… The wife will not usually have so much expense. She may go out to work herself, but she will not usually employ a housekeeper. She will do most of the housework herself, perhaps with some help. Or she may remarry, in whcih case her new husband will provide for her."

Per Lord Denning Wachtel v Wachtel [1973] Fam 72 – a man, as Mostyn J notes, born in 1899. Wife awarded on divorce one third of the capital and one third of income.

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WHAT ARE NEEDS?

McCartney v Mills McCartney [2008] 1 FLR 1508 Per Bennett J:
W awarded lump sum of £16.5m taking total assets to £24.3m in case where her needs were *"a factor of magnetic importance".*

JL v SL (No 2) [2015] 2 FLR 1202 Mostyn J. at [55]:
"It might be thought that it is a truism that just under £3m in sufficient to meet the lifetime needs of a 50 year old woman living in Buckinghamshire."

Luckwell v Limata [2014] 2 FLR 168 Holman J.
H received £900,000 for the provision of *"an adequate home"* 45% to return to W when youngest child 22

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PRINCIPLES TO BE APPLIED IN ASSESSING NEED

1. In capital terms looking primarily at need for housing (including costs, furniture), transport and to discharge liabilities.

However, these categories are not exclusive. E.g. SS v NS Mostyn J provided for a 'buffer' of £10,000 and a '2 year income top up'.

In the majority of cases *"housing is the priority"* – Family Justice Council, Sorting out Finances on Divorce, December 2015. *"It can often be a good idea to try to reach a solution where one spouse stays living in the family home…"* Other capital needs identified include money to pay course fees to enable a spouse to retrain.

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PRINCIPLES TO BE APPLIED IN ASSESSING NEED

2. Need is often assessed by reference to the marital standard of living:
"the lifestyle enjoyed during the marriage sets a level of benchmark that is relevant to the assessment of the level of the independent lifestyles to be enjoyed by the parties" Per Charles J., G v G [2012] 2 FLR 48 at [136].

However, there are limits – as Mostyn J said in SS v NS [2015] 2 FLR 1124 at [35], *"It is a mistake to regard the marital standard of living as the lodestar."*

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PRINCIPLES TO BE APPLIED IN ASSESSING NEED

3. The assessment of need has to be grounded in the resources available to the parties.

As Lord Nicholls said in White v White [2001] 1 AC 596 *"Financial needs are relative... The court may also have regard to the available pool of resources".*

"Just as there are 'inheritances' and inheritances' so there are 'needs and needs'" (per Mostyn J in N v F [2011] 2 FLR 533 [17])

The assessment of need is not *"an insulated metric uninformed by factors that are centrally key to the performance of the sharing principle."* [19]

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PRINCIPLES TO BE APPLIED IN ASSESSING NEED

So one understands the award of £24.3m to Heather Mills – a world away from need, however 'generously interpreted' *"by reference to the vast scale of the Husband's resources…"* (N v F, [17])

Equally, one understands the modest scale of the awards in Granatino and in Luckwell v Limata – awards far more conservative than would have been made absent the pre-nuptial agreements in both cases – as reflective of the policy decision that these issue should be the subject of agreement at the outset of the marriage *"rather than left to become a source of disappointment or acrimony within marriage"* (Granatino)

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PRINCIPLES TO BE APPLIED IN ASSESSING NEED

Indeed, Mostyn J takes this a step further in N v F:

"So if an agreement to preserve non-matrimonial property can have the effect of assessing need more conservatively (indeed in Granatino far more conservatively) than would have been the case absent that factor, why cannot the presence of pre-marital property simpliciter not have an equivalent or similar effect?" [19]

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PRINCIPLES TO BE APPLIED IN ASSESSING NEED

4. Other factors may also be relevant such as age and health (White).

In Miller Lord Nicholls refers to *"needs arising from age and disability"* as relevant despite not being 'needs generated by the marriage'.

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PRINCIPLES TO BE APPLIED IN ASSESSING NEED

BD v FD [2016] EWHC 594 (Fam) per Moylan J
11 year marriage. H 49, W 41.
4 children aged between 5 and 10.
H's assets £58m plus a life interest in £105m.
Both parties agreed it was a needs case, given that all H's wealth was inherited. Moylan J agreed.

W's capital needs put at £11.8m – including £6m for a house in the country, £3.6m for a London property, £1.1m to enable her to purchase the house occupied by her parents and £950,000 to cover the cost of furniture, furnishings and redecoration.

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PRINCIPLES TO BE APPLIED IN ASSESSING NEED

BD v FD [2016] EWHC 594 (Fam) per Moylan J
W sought £17m to provide for her income needs, based on an annual need of £500,000 pa and a non-amortising Duxbury sum.
So W sought a total of £29m.
H offered £8.2m

Moylan J:
(a) Rejected W's claim for more than one property.
(b) Put W's housing need at £3.6m – broadly the value of the FMH
(c) Allowed a further sum of £500,000 for furniture / refurbishment
(d) Made a simple Duxbury award of £5m based on an annual income need of £175,000.

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PRINCIPLES TO BE APPLIED IN ASSESSING NEED

BD v FD [2016] EWHC 594 (Fam) per Moylan J

(1) The starting point for the assessment of needs is the standard of living during the course of the marriage.

(2) This does not mean those standards provide either a floor or a ceiling, simply a benchmark.

(3) However, this does not mean that in every case needs are to be met at that level either at all, or for more than a defined period. Quoting Baroness Hale in Miller he referred to *"a gentle transition from that standard to the standard that she could expect as a self-sufficient woman".*

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PRINCIPLES TO BE APPLIED IN ASSESSING NEED

BD v FD [2016] EWHC 594 (Fam) per Moylan J

(4) The longer (i) the length of the marriage and (ii) the period of the contributions to the welfare of the marriage (which can pre-date and post-date the marriage), *"the more likely the court will decide that the applicant spouse's needs should be provide for at a level which is similar to the standard of living during the marriage."*

(5) "Further, the longer the duration of (i) and (ii) the more likely that those needs will be assessed on a lifetime's basis".

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PRINCIPLES TO BE APPLIED IN ASSESSING NEED

BD v FD [2016] EWHC 594 (Fam) per Moylan J

(6) However, *"the longer that period, the more likely that the court will not assess those needs at the marital standard of living throughout that period."*

So W's income needs were reduced from £215,000 pa to £175,000 pa to take into account that W had 50 years of life expectancy, 35 of which will be after the youngest child has reached 21.

Duxbury to be calculated on a non-amortising basis

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DEPARTURE FROM EQUALITY

The existence of minor children is often a very important factor in the assessment of needs.

Baroness Hale in Miller [128]: *"The invariable practice in English law is to try to maintain a stable home for the children after their parents' divorce."*

Adjustment away from equality may be required here - not just to meet need but also to recognise the loss of earning capacity:

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DEPARTURE FROM EQUALITY

"Too strict an adherence to equal sharing and the clean break can lead to a rapid decrease in the primary carer's standard of living and a rapid increase in the breadwinner's. The breadwinner's unimpaired and unimpeded earning capacity is a powerful resource which can frequently repair any loss of capital after an unequal distribution… Recognising this is one reason why English law has been so successful in retaining a home for the children." Baroness Hale [142]

This underpins the reluctance of many judges to make Mesher orders to readjust the balance in later years – See e.g. B v B (Mesher Order) [2003] 2 FLR 285

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DEPARTURE FROM EQUALITY

Good example of fair departure from equality on the basis of need:

Tattersall v Tattersall [2014] 1 FLR 997 CA

10 year marriage. 3 year old child. First instance judge divided capital 70/30 in favour of W who was primary carer for child.

In approving the approach of the first instance judge, Black LJ said *"Effectively what she did was to start with the needs of W and E, which could not be satisfied unless W had access to more than half of the family resources… This was in accordance with her duty under s25(1) of the Matrimonial Causes Act 1973 which requires that first consideration must be given to the welfare of any minor child of the family"* [49]

DEPARTURE FROM EQUALITY

H's claim for a Mesher order dismissed:
"H's final argument is that if this court supports the unequal division of assets imposed by the judge, there should have been a Mesher order in his favour so that the imbalance would be rectified when E is an adult. It was submitted that this would have enabled E's needs as a child and young adult to be met whilst doing justice to both H and W…

There is no doubt that some judges might have made such an order. However I do not think it can be said that Her Honour Judge Wright was plainly wrong not to do so." [52 and 53]

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DEPARTURE FROM EQUALITY

However, there are limits. The court must bear in mind the needs of both parties, not just one.

Lord Nicholls in Miller [12]: *"In most cases the available assets are insufficient to provide adequately for the needs of two homes. The court seeks to stretch modest finite resources so far as possible to meet the parties' needs."*

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DEPARTURE FROM EQUALITY

Classic statement of principle per Thorpe LJ in M v B [1998] 1 FLR 53 at 60:

" In all these cases it is one of the paramount considerations, in applying the s 25 criteria, to endeavour to stretch what is available to cover the need of each for a home, particularly where there are young children involved. Obviously the primary carer needs whatever is available to make the main home for the children, but it is of importance, albeit it is of lesser importance, that the other parent should have a home of his own where the children can enjoy their contact time with him…

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DEPARTURE FROM EQUALITY

… Of course there are cases where there is not enough to provide a home for either. Of course there are cases where there is only enough to provide one. But in any case where there is, by stretch and a degree of risk-taking, the possibility of a division to enable both to rehouse themselves, that is an exceptionally important consideration and one which will almost invariably have a decisive impact on outcome."

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DEPARTURE FROM EQUALITY

If there really is not enough to meet the capital needs of both then the court may try to compensate in other ways e.g. though limiting any income order.

A v L (Departure from Equality) [2012] 1 FLR 985, per Moor J:
First instance judge divided FMH 70/30 in favour of W and pps £500 pm for 4 years.
"There is simply insufficient capital and income available to cater for the needs of both parties. The Court has to be fair to both parties but, in one sense, the only way to do that is to balance the unfairness." [5]

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DEPARTURE FROM EQUALITY

"I entirely accept that needs can justify a departure from equality but, if the court is to do so, it is necessary to consider the needs of both parties… not just the wife." [50]

"I have come to the clear conclusion that the disparity in earning capacity... combined with consideration of the parties' respective needs are good reasons to depart from equality but only on a clean break basis."

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SPECIAL (STELLAR) CONTRIBUTION

Post White there was a growing tendency for parties to attempt to build case on departure from equality by "*lauding their own contribution and denigrating that of the other party.*"

Special contribution was explained by Mance LJ in Cowan v Cowan [2002] Fam 97 in this way:
"The underlying idea is that a spouse exercising special skill and care has gone beyond what would ordinarily be expected and beyond what the other spouse could ordinarily have hoped to do for himself or herself... The first spouse's special skill and effort is special to him or her, and the individual's right to the fruits of an inherent quality of this nature survives as a material consideration despite the partnership or pooling aspect of marriage."

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SPECIAL (STELLAR) CONTRIBUTION

In Miller the House of Lords attempted to stem the tide of such cases, *"Parties should not seek to promote a case of 'special contribution' unless the contribution is so marked that to disregard it would be inequitable… The wholly exceptional nature of the earnings must be, to borrow a phrase more familiar in a different context, obvious and gross."* Lord Nicholls [67], [68].

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SPECIAL (STELLAR) CONTRIBUTION

Baroness Hale pointed to the intrinsic unfairness of such a basis of departure from equality reminding us that s.25(2)(f) points not to the contributions each party have made to their accumulated wealth but the contributions they have made (and will continue to make) to the welfare of the family:

“A domestic goddess self-evidently makes a ‘stellar’ contribution...”

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SPECIAL (STELLAR) CONTRIBUTION

In Charman Sir Mark Potter P announced, *"It was inevitable, so it seemed to us, that the notion of special contribution should have 'survived' the decision in Miller"* [79]

The Court of Appeal declined to identify a threshold requirement for such cases, a level of wealth below which 'special contribution' would have no application – wary of the risk of creating the opposite effect, i.e. a level above which the argument would always be raised.

However, they agreed with the proposition *"the greater the wealth, the greater is the extent to which it is unmatched and to which it calls for an unmatched, or unequal, division under the sharing principle."* [89]

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SPECIAL (STELLAR) CONTRIBUTION

The Court also accepted the invitation of Singer J to offer guidance on the appropriate range of percentage adjustment even though *"the fair dispatch of some cases may require departure…"* [90]

Any adjustment must be *"significant as opposed to token"* i.e. above 55 / 45 %

Equally, *"even in an extreme case… fair allowance for special contribution within the sharing principle would be most unlikely to give rise to percentages of division of matrimonial property further from equality than 66.6% - 33.3%."* [90]

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SPECIAL (STELLAR) CONTRIBUTION

As explained by Wilson LJ in K v L [2011] 2 FLR 980:

"Thus a special contribution arises in circumstances in which a spouse's contribution, direct or indirect, to the creation of matrimonial property has been so extraordinary as to dictate a departure within the sharing principle from the ordinary consequence of equal division." [21]

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SPECIAL (STELLAR) CONTRIBUTION

In Evans v Evans [2013] 2 FLR 999 Moylan J considered a claim for special contribution in the context of marital assets of about £40m.

He asked himself the question, *"Has there been in the present case such a disparity in the parties' respective contributions during the marriage, in that the husband has made a contribution of a wholly exceptional nature, such that fairness requires that his contribution should result in his receiving a greater share of the marital wealth?"* [131]

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SPECIAL (STELLAR) CONTRIBUTION

His response:

"The answer to this question should not depend on any detailed analysis of contributions. It requires a striking evidential foundation which so clearly stands out that the question almost answers itself." [132]

High test was not met in this case.

Moylan J. deprecated an approach involving 'a general rummage though the attic' – *"This is not required, even when a case of special contribution is being advanced".*

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SPECIAL (STELLAR) CONTRIBUTION

Cooper-Holn v Holn [2015] 1 FLR 745 - Roberts J.
Judgment later described by Mostyn J as *"monumental".*

H had generated personal wealth of $1.5bn and about $4.5bn channelled into a charitable foundation.
W awarded 36.12% of the assets. Departure from equality justified by post separation accrual and special contribution.

17 year marriage. 4 children including triplets. W primary carer of the children and President and CEO of UK Charitable Foundation.

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SPECIAL (STELLAR) CONTRIBUTION

Roberts J focused on the extent of the 'vast wealth' H had created – *"there is no doubt that the accretion of significant wealth can constitute a special contribution for these purposes…"* [258]

"It is difficult to see how personal wealth in excess of $1.5bn... would not be seen as 'truly vast wealth' even by today's standards." [260]

Having been asked the question on behalf of W, *"what more could she be expected to have done in order to qualify for equal treatment…?"* Roberts J responded with a series of questions:

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SPECIAL (STELLAR) CONTRIBUTION

(1) Can it properly be said that he is the generating force behind the fortune rather than the product itself?
(2) Does the scale of the wealth depend upon his innovative vision as well on his ability to develop those visions?
(3) Has he generated truly vast wealth such that his business success can properly be viewed as exceptional?
(4) Does he have a special skill and effort which is special to him and which survives as a material consideration despite the partnership or pooling aspect of the marriage?
(5) Would it, in all the circumstances, be inequitable for me to disregard that contribution? [282]

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SPECIAL (STELLAR) CONTRIBUTION

Roberts J answered all 5 questions with a resounding ‘Yes’!

In response to the submission she also had to find H to have been a ‘genius’ – she found that he did qualify for the use of that term, *“If he does not then who does?”* [283]

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SPECIAL (STELLAR) CONTRIBUTION

Gray v Work [2015] EWHC 834 (Fam) was a case where the wealth amassed by H was £140m.

Holman J observed that there appear to have been only 3 reported cases in 12 years (Charman, Cooper-Holn and Sorrell v Sorrell [2006] 1 FLR 497) where the court has made an unequal award to reflect a special contribution.

This *"tend[s] to reinforce the exceptional (in the sense of rare) nature of successful such claims, and therefore the specialness which is required before such a claim can succeed."* [132]

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SPECIAL (STELLAR) CONTRIBUTION

Holman J rejected the claim. Hard work alone was not enough. In this case *"there was an element of being in the right place at the right time."* [154]

With reference to the use of the word 'genius' he said – *"I personally find that a difficult, and perhaps unhelpful, word in this context… [it] is properly reserved for Leonardo De Vinci, Mozart, Einstein, and others like them."* [141]

"Oscar Wilde is famously said to have [announced] that he had nothing to declare but his genius. More modest, even if exceptionally talented, people may be slow to make such a claim."

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