

More guidance on financial needs

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In June 2016 the English Family Justice Council (FJC) issued its 'Guidance on 'Financial Needs' on Divorce', aimed at providing the judiciary with a useful tool in relation to the assessment of 'financial needs' – that being one of the statutory factors which the court is required to consider when making a financial order on divorce. The concept of financial needs eludes a precise definition and the Law Commission's 2014 report on 'Matrimonial Property, Needs and Agreements' identified the need for greater clarity and transparency in the quantification of needs, particularly with the growing number of litigants in person and in view of evidence of significant regional disparity in the levels of needs-based support ordered at courts outside London.

The Guidance states, in simple terms, that the size of the available assets and the standard of living enjoyed by the couple before separation will have an impact on the assessment of the parties' ongoing financial needs after divorce. On those two points we are reminded that there is no restriction on the source of assets which might be deployed in order to meet needs but standard of living, whilst described as a 'benchmark' is not a 'lodestar'. Other characteristics of the relationship also come into play; the longer the marriage, the more important the standard of living will be in the assessment of needs. Choices made during the marriage are also relevant – and the Guidance refers to case law showing that where a spouse has given up a career to take care of children the court is likely to assess needs more generously and where resources allow it may be fair and appropriate to make provision for those lifestyle choices to be maintained after the marriage.

Financial orders made to meet needs should be to enable a transition to independent living to the extent that that is possible, although as identified by the Law Commission and endorsed by the guidance, 'the combination of age, length of marriage and duration out of work place may render an ambition of independence impossible'.

Essentially, notwithstanding this fulsome guidance, the real strength and depth of the English family law system is in its discretionary approach; as the guidance states 'we emphasise that each case must be considered on its merits, upon proper exercise of the court's individual discretion'. A brief review of two recent cases where the financial needs of the parties were considered in depth, gives a quick insight into the cornucopia of circumstances that come before the judiciary.

In June 2016, the case of *Estrada v Juffali* [2016] EWHC 1684 (Fam) captured the headlines because of the sheer scale of the needs-based award the wife claimed – £63mm to meet her housing needs and £127m to meet her annual budget of expenditure of £6m for the rest of her life. Much of the media attention focused on the wife's estimated income needs which included an allowance of £50,000 a year for Christmas lunch, £40,000 a year for a new fur coat and £4,000 a year for 15 pairs of sunglasses. There was judicial criticism that her budget was lacking in evidence of actual spending. While many might say the wife should be expected to meet her needs from her own wealth (£15-20m), the Judge, Roberts J, emphasised, 'I am not dealing with the 'many', I am dealing with this particular applicant in the circumstances of her marriage to this particular respondent'. She awarded Ms Estrada a settlement comprising housing fund of £18m and a fund of £44.3m to meet her income needs assessed by the Judge at £2.5m per annum stepping down by 33% in 10 years' time and by a further 25% on her 75th birthday.

The quantification of needs was also considered in the case of *BD v FD* [2016] EWHC (Fam) 594 where the wife contended that her interim maintenance should not be limited to the standard of living during the marriage, but rather the standard of living the husband could afford. She sought interim maintenance of £392,000 a year; he proposed to pay £202,000. The wife claimed that the husband was mean. She argued that he unnecessarily restricted her expenditure during the marriage and she would have wanted to – and they could have afforded to – spend more. Interestingly, the Judge, Moylan J agreed with the wife that the standard of living during the marriage was not necessary a ceiling for maintenance but there would need to be specific, powerful justification for the standard of living to be exceeded on an interim basis and there was none in that case. The court held that interim maintenance should be paid as proposed by the husband, at a rate of £202,000 a year.

From the above cases and the guidance issued by the FJC, the following points can be drawn.

1. Needs should be assessed by reference to the particular facts of the case. Where resources allow, the marital standard of living is likely to be of magnetic importance but not determinative.
2. No matter how wealthy the payer, needs-based claims are referable to assessed needs and not what the payer can afford to pay.
3. The expenditure budget should be an accurate reflection of needs, based on evidence, as these will be subject to scrutiny if the case is determined by a court.

Whilst the FJC Guidance and the recent case law has provided further commentary on needs, there is still no definition or a formula in English family law. It is easy to see the attraction of certainty that such rules or formulae might bring, but where no two cases are the same, the discretionary approach of the English family court allows judges to tailor provision to individual cases – with the underlying objective of that flexibility being fairness. Though, as in the words of Lord Nicholls in the House of Lords landmark case of *White v White* [2000] 'fairness, like beauty, lies in the eye of the beholder'.