

Evolution not revolution



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The FJC's guidance on financial needs does not propose dramatic changes, but is a very helpful guide – for practitioners and LiPs – to the current discretionary system

It has been over two years since publication of the Law Commission's report on Matrimonial Property, Needs and Agreements, Law Com No 343 (the 2014 Report). During this time the Family Justice Council has been hard at work in drafting "Guidance on financial needs on Divorce", aimed at both judges and litigants in person, on the thorny subject of what constitutes "financial needs" on divorce. In this two-year period there has also been a steady supply of "big money" cases progressing through the courts, surrounded by the usual media hype, with increasingly significant awards being made and justified on the basis of needs. A recent example is *Juffali v Juffali* [2016] EWHC 1684 (Fam), in which the High Court decided that it was fair, on a needs basis, to award the wife with capitalised maintenance of £44m and a housing fund, totalling £53m. At the other end of the spectrum are those rarely reported cases, the ones that form the bread and butter of many family law practices. These involve a very different understanding of "needs", based on a limited or modest asset base. It is this broad spectrum that has always been, and will continue to be, problematic for both lawyers and their clients working within our discretionary system.

Law Commission concerns

The FJC guidance was prompted by concerns raised by the Law Commission in the 2014 Report. In short, these were:

- The differing interpretation of needs across the country, leading to a lack of consistency in approach. Anecdotally, in some provincial regions it is felt that claims for joint lives orders (or lengthy fixed-term orders) are so unlikely to be successful that they are not pursued. Further, where such orders are sought and a claim has been made in a region where the chances of success are considered so low, practitioners have noticed a sharp increase in forum shopping, namely from the north to the south.
- The lack of a statutory definition of financial needs in the law. This is unsatisfactory when the needs argument is often the most important of all.
- The lack of transparency and accessibility, which particularly affects LiPs. Following cuts to legal aid, there has been a surge of LiPs, faced with the daunting task of navigating a complicated, unfamiliar and

sometimes unclear system. LiPs understandably struggle to assess what is meant by needs and their expectations can be wildly different from what is likely to be ordered.

The FJC guidance

There is no doubt that the FJC guidance is helpful in clarifying the meaning of needs and the different forms this may take. However, it is not a report that offers a radical solution or any ground-breaking proposals, nor should it, bearing in mind the Law Commission's conclusion that the "courts have operated the law in a way that generally yields the most practicable outcomes in the circumstances". This view was supported by the findings of the Law Commission consultation, demonstrating that there was "no consensus supporting a change in the law". The report, as intended, simply offers guidance. It does not seek to change the law, or place restrictions on the operation of judicial discretion. Importantly, it omits any proposed statutory definition of needs. The FJC was seemingly reluctant to go any further than saying that needs are usually a home and an income (including on retirement if resources permit). This is not new. What the report does is explain and explore the many (sometimes conflicting) strands that comprise a person's needs on separation, and work through the body of case law that has developed in consequence of the somewhat ambiguous legislation.

The report offers the following key points:

- Support of the Law Commission's objective for financial orders: "to meet needs to enable a transition to independence to the extent that is possible in the circumstances". The meeting of needs may dictate a departure from equal sharing.
- An exploration of why it is fair for needs to be met through financial remedies. Whilst this is familiar territory to family lawyers, this section of the report (paragraphs 17–18) provides a helpful reminder of the origins of our justification for maintenance, ie the notion of interdependence created by marriage/civil partnership and in particular, financial dependency commonly arising from the assumption of traditional homemaker/breadwinner roles.

- An attempt to define needs as far as possible, though as noted above this was limited in definition to housing, income and retirement provision if possible. It is pointed out that these are only the main components of needs, and the Law Commission's basic definition is also recited: "[needs is] a very broad concept with no single definition in family law."
- A reminder of what is and what is not accepted terminology when describing needs. "Reasonable requirements" is not deemed appropriate, and "needs (generously interpreted)" is accepted in cases where resources are significant.
- Detailed guidance on the tricky question of how to measure need. This section includes a succinct summary of principal cases, from *White v White* [2001] 1 AC 596 to *BD v FD* [2016] EWHC 594 (Fam). The starting point is obviously going to involve consideration of the resources and the standard of living in the marriage (excepting short marriages). The balancing exercise that then takes place involves the stretching of available resources to try to meet both parties' needs, with the children's needs being the first consideration. In what could be an attempt to rectify regional differences in interpretation it is stated that, in general terms, the longer a relationship, the more important lifestyle considerations will be. However, there are limits on this. Mostyn J's decision in *SS v NS* [2014] EWHC 4183 (Fam) is then cited:

"It is a mistake to regard the marital standard of living as a 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."
- Here we see reference to the overall objective to obtain financial independence and the notion that a decline in standard of living may be expected during the journey to self-sufficiency. Before that point is reached, needs will continue to be measured following consideration of "appropriately detailed budgets" – thus the many hours spent by family lawyers in perusing a client's bank statements and assessing their expenditure are not to be a thing of the past.
- Consideration of which assets should be used to meet needs, and whether this should include non-matrimonial assets. There is nothing new here, with the unambiguous statement that "needs may be met from non-matrimonial assets" and that "there is no restriction on the source of the assets which might be deployed" in a needs-based case. When assessing how to meet income needs, the role of the court is first to stand back and consider what share of the paying party's income should fairly be paid to the other party.
- A focus on the importance of balancing both parties' needs. Naturally, this may involve Mesher orders or similar. The judiciary is directed towards two central considerations: firstly the importance of later reimbursing a party who accepts that the priority now is to suitably re-house the primary carer of the children (as is usually the case); secondly, the reassurance that a claim for a Mesher order could be refused if it is clear that the sacrificing party

is likely to build up sufficient capital in time (with there being a cross-check against overall fairness in the circumstances of the individual case).

- A steer as to the duration of maintenance orders, supported by comprehensive guidance. It may be surprising to some (especially those practising in the London area, where maintenance orders appear fairly commonplace) that the proportion of cases in which maintenance orders are made is low (albeit there is no conclusive evidence of this). Whenever assessing an income claim (including on a variation application), judges are reminded to consider all possible durations of periodical payment orders. The backdrop against which these considerations are set is the notion of ultimate independence rather than the provision of lifelong support. A range of important cases are cited, including pre-White cases (for example *Flavell v Flavell* [1997] 1 FLR 353) and various post-White cases. Importantly, the approach taken in *SS v NS* is endorsed by the FJC. Whilst the court still has an obligation to consider a clean break as soon as it is just and reasonable to do so, the statutory provision that adjustment should be made without "undue hardship" is cited and the FJC recommends that there should be a "gentle transition" towards independence with this involving a "degree of hardship" only. Helpfully, the FJC includes (at paragraph 68) a list of factors to which the court should have regard when assessing the duration of maintenance orders. Many of these are important when representing parents who are seeking work following a period spent as a homemaker; for example, previous work experience, normal childcare routine, and net financial gain after paying childcare and work related expenses.
- At the end of the report are a variety of fairly detailed, worked examples, which make for interesting reading, together with a summary of the leading authorities that could be used to support the financial remedy claims, and finally a brief but useful guide on the appropriate treatment of pensions.

Impact of the report

The report appears to have been generally well received by family lawyers. It is not a short read (at 64 pages) but a very worthwhile one. It is hoped that it will assist not just the judiciary in bringing about a greater level of consistency across the country, but also family lawyers who are called upon to assess a client's circumstances and prospects of success within this sometimes unpredictable discretionary system.

The separate LiP guide, *Sorting Out Finances on Divorce*, should also assist in managing the expectations of those without representation, providing greater clarity and transparency. Further, for the increasing numbers of family lawyers who are now faced with the challenges of dealing with an unrepresented party (79% as at April 2016 according to Resolution's ex-chair Jo Edwards, quoted in *FLW* on 5 April 2016), distribution of this guide ought to go some way in helping achieve resolution of disputes in a more timely and transparent manner.

Conclusion

Law reform is not often fast, often falling to the bottom of the list of Parliamentary duties. However, through a combination of judge-made law, expert assistance from the Law Commission and the FJC, there are continuing attempts to clarify and explain the law.

Whilst the broad concept of needs still exists, mechanisms for assessing this are accumulating. It is intended that the FJC guidance be updated periodically to both help and monitor attempts at progress made in the courts, thus providing assistance to all those working within the current system. There are to be no sweeping changes of the sort that have occurred in other jurisdictions, involving the

introduction of a "needs calculator". Despite its obvious flaws, our current discretionary system is likely to be highly defended if proposals of this sort were made.

However, as pointed out in the 2014 report, the formula for calculating needs in Canada has been well received by the courts and, taking a step into our clients' shoes for once, it may be that certainty and consistency should fall ahead of the preservation of such a high level of judicial discretion. For now though, the focus must be on ensuring that this discretionary power is used wisely and consistently throughout the country.

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