

Low to Middle Asset Cases

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Low to middle asset cases

- Needs (housing needs; day to day income needs)
- Matrimonial / non matrimonial assets
- Pensions
- Mesher and Martin orders
- Benefits
- Tenancies
- Questions

Needs – statutory provision

- Matrimonial Causes Act 1973 s25:

(2) As regards the exercise of the powers of the court under section 23(1)(a), (b) or (c), 24, 24A, 24B or 24E above in relation to a party to the marriage, the court shall in particular have regard to the following matters—

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future

- The welfare (while a minor) of any child of the family will be the court's first consideration (s25(1))

Needs – Law Commission Definitions

- Law Commission (Law Com No. 343) Matrimonial Property, Needs and Agreements:
 - 3.94: *It is well known to lawyers that “financial needs” is a very broad concept, potentially encompassing every aspect of provision of a home and for daily life, in the short and longer term*
 - 3.8: *we use the term “needs” to refer to how the law of England and Wales understands spousal support, encompassing a wide range of provision: income and capital, present and future. “Needs” includes payments made with a view to providing income, whether made on a regular basis or capitalised, but it also includes the provision of a home, including privately owned housing where that is appropriate, and provision for old age.*

Needs – judicial guidance - *WC v HC* [2022] EWFC 22 [21xii – xvi]

- *xii) Needs are an elastic concept. They cannot be looked at in isolation. In Charman (supra) at [70] the court said:*
- *"The principle of need requires consideration of the financial needs, obligations and responsibilities of the parties (s.25(2)(b); of the standard of living enjoyed by the family before the breakdown of the marriage (s.25(2)(c); of the age of each party (half of s.25(2)(d); and of any physical or mental disability of either of them (s.25(2)(e))".*
- *xiii) The Family Justice Council in its Guidance on Financial Needs has stated that:*
- *"In an appropriate case, typically a long marriage, and subject to sufficient financial resources being available, courts have taken the view that the lifestyle (i.e "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. So too it is generally accepted that it is not appropriate for the divorce to entail a sudden and dramatic disparity in the parties' lifestyle."*

WC v HC [2022] EWFC 22 [21xii – xvi] continued

- *xiv) In **Miller/McFarlane** Baroness Hale referred to setting needs "at a level as close as possible to the standard of living which they enjoyed during the marriage". A number of other cases have endorsed the utility of setting the standard of living as a benchmark which is relevant to the assessment of needs: for example, G v G [2012] 2 FLR 48 and BD v FD [2017] 1 FLR 1420.*
- *xv) That said, standard of living is not an immutable guide. Each case is fact-specific. As Mostyn J said in FF v KF [2017] EWHC 1093 at [18];*
- *"The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise".*
- *xvi) I would add that the source of the wealth is also relevant to needs. If it is substantially non-marital, then in my judgment it would be unfair not to weigh that factor in the balance. Mostyn J made a similar observation in N v F [2011] 2 FLR 533 at [17-19].*

Needs – judicial guidance for modest assets cases

- *Charman v Charman* [2007] EWCA Civ 503:
- [73] '*...in cases in which it is irreconcilable, the criterion of fairness must supply the answer. It is clear that, when the result suggested by the needs principle is an award of property greater than the result suggested by the sharing principle, the former result should in principle prevail: per Baroness Hale in Miller at [142] and [144]*'

***Cordle v Cordle* [2001] EWCA Civ 1791 (modest asset guidance)**

- 33.. *The second difficulty that needs mention is the impact that the decision of their Lordships in White v White has had upon what may be described as a routine District Judge case, such as the present. I have heard many reports of confusion and inconsistency between County Courts. The first point, that cannot be overemphasised, is that there is no rule in White v White that District Judges must produce equality of outcome unless there are good reasons to justify departure. The cross-check of equality of outcome is intended to be a safeguard against discrimination. What White v White essentially decides (as this court has emphasised in the more recent decision of Cowan v Cowan [2001] EWCA Civ 679) is that it is the first duty of the court of trial to apply the section 25 criteria in search of the overarching objective of fairness. **It seems to me that in search of that overarching objective in the typical ancillary relief case the District Judge will always look first to the housing needs of the parties.** Homes are of fundamental importance and there is nothing more awful than homelessness. **So in the ordinary case the court's first concern will be to provide a home for the primary carer and the children (whose welfare is the first consideration).** Of course in many cases the satisfaction of that need may absorb all that is immediately available. But, as in this case, **where there is sufficient to go beyond that, the court's concern will be to provide the means for the absent parent to rehouse.** That was precisely the approach of this District Judge in allowing the husband £55,000 from the anticipated proceeds of sale. **Another factor that should be considered is buttressing the ability of one or other of the parties to work. For just as homes are of primary importance, so is the ability and the opportunity to work.** It may be that as a result of the years of marriage, one or other of the parties will need some capital provision to enable him or her to get back into the labour market, or to retrain for a profession, or to modernise a skill which, through the years of marriage, has grown rusty. **Beyond that, if there be cash beyond that, then the judge has to look to what in his estimation is the fair result.***
- 34.. *These two considerations will apply in many standard cases, but they are, of course, not exclusive. The only universal rule is to apply the section 25(2) criteria to all the circumstances of the case (giving first consideration to the welfare of the children) and to arrive at a fair result that avoids discrimination.*

Housing needs

- May not be able to meet the housing needs of both parties in low to middle assets cases
- Housing needs of the children considered first
- Ascertained by reference to number of bedrooms required
- Mortgage raising capacity evidence
- Property particulars
- Practical considerations:
 - Shared ownership schemes
 - Rental options

Day to day income needs

- Less likely to play significant role in low to middle asset cases
- Take into account standard of living enjoyed during the marriage and the available income of the parties
- Set out lists of expenditure
- Should be realistic and proportionate
- Consider credibility

Matrimonial / non matrimonial property

- No statutory definition of matrimonial property. Lord Nicholls in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 [21] "*Matrimonial property means the matrimonial home plus property acquired during the marriage otherwise than by gift or inheritance*"
- Property can become matrimonialised: *Standish v Standish* [2025] UKSC 26 [52]:
- "*There is no good reason to treat matrimonialisation as a narrow concept. It is neither narrow nor wide. Although this has not previously been clearly spelt out, what is important (leaving aside matrimonial property resting on contributions from each party) is to consider how the parties have been dealing with the asset and whether this shows that, over time, they have been treating the asset as shared between them. That is, matrimonialisation rests on the parties, over time, treating the asset as shared.*"
- Distinction less significant in low to middle asset cases – non matrimonial assets used to meet needs
- Practical considerations

Pensions

- PAG2: A Guide to the Treatment of Pensions on Divorce
- Usual orders
 - Pension sharing orders
 - Offsetting
- Special considerations in low to middle asset cases:
 - Timing and source of pension less likely to be relevant
 - PODE report – not proportionate for pensions under £100,000
 - State pensions more likely to be valuable
 - Consider impact of PSO on benefits in retirement (particularly where one party claimed child benefit)

SP v AL [2024] EWFC 72 (B):

- **40. In seeking fairness in relation to the division of pensions, to what extent should the court exclude a portion of the member spouse's pension accrued other than in the span of the marriage's duration?** The answer to this question will depend on the extent to which the case is a 'needs case' or a 'sharing case'. The PAG 2 Report suggests that "*Generally in a 'needs case' it would be wrong to apportion pensions so as to exclude the non-cohabitation/marriage element. By contrast, in a 'sharing case', where the assets and future pension benefits exceed the parties' needs, such apportionment may be appropriate*" (page 24); but the report goes on to suggest that the categorisation of a case will depend on other section 25 factors, most obviously the duration of the marriage: "*Thus, the court will have regard to the length of seamless cohabitation/marriage when determining the extent to which it is fair and reasonable to divide the 'non-matrimonial' element of any capital or any pension. All cases will be determined upon their own facts. The 'marital' element of any pension will usually be shared equally. For the reasons set out above, in needs-based cases, the timing and source of the pension saving is not necessarily relevant, but the Court will nevertheless have regard to the length (or shortness) of the seamless cohabitation/marriage in determining the extent to which the needs of the claiming party will justify a division of the pre-cohabitation/marriage element of the pension...The requirement of a nexus between the relationship and a financial need to be met by a matrimonial claim has long been recognised by the case law*" (page 26).

Mesher Orders

- 'Delaying the inevitable' where there are limited assets and young dependent children
- MCA 1973 s24(1)(b) (order for settlement of property) / s24(1)(c) (variation of settlement)
- Court postpones sale of the family home until remarriage/cohabitation or the children reach a certain age or finish tertiary education
- Equity divided upon trigger event (typically 50/50 but at discretion of the court)
- Ensures financial security for the children and parent with care
- Leaving spouse remains a co-owner
- Indemnities / undertakings
- Financial link maintained: *Azarmi-Movafagh v Bassiri-Dezfouli [2021] EWCA Civ 1184 [41], King LJ commented 'whilst they remain a useful tool in certain limited circumstances, it is only rarely that it will be felt the advantages outweigh the disadvantages of making an order designed to maintain the tie between the parties long after their divorce'*

Meshor order – transfer with charge back

- Alternative to continued ownership in joint names
- Transfer of property to occupying spouse; leaving spouse secures a charge (realisable upon triggers)
- Needs of children prioritised over creditors
- Compensates leaving spouse for loss of beneficial interest
- Closer to a clean break
- Marginally less tax efficient – new asset created (charge), may be subject to Capital Gains Tax

Benefits

- Financial remedies impact means tested benefits, eg Universal Credit, Housing Benefit
- Lump sums / property transfers are considered capital
- Means tested benefits have a capital threshold (£16,000 for Universal Credit) – lump sums / property transfers may exceed
- Spousal maintenance treated as income - replace welfare benefits pound for pound
- Non means tested benefits (PIP, DLA) unaffected
- Practical considerations

Tenancies

- Seek undertaking not to terminate the tenancy during proceedings
- Application for transfer of tenancy under MCA 1973, s24 or CPA 2004, Sch 5, para 7
- Is it worth it?
 - Consider terms of tenancy
 - Only where tenancy has security or added benefits (eg right to buy)
 - Vulnerable to landlord giving notice in ordinary AST

Questions