Family Justice Council

Guidance on "Financial Needs" on Divorce

June 2016

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Foreword by the President, Sir James Munby

FJC Financial Needs Working Group: Guidance for the judiciary on financial needs on divorce

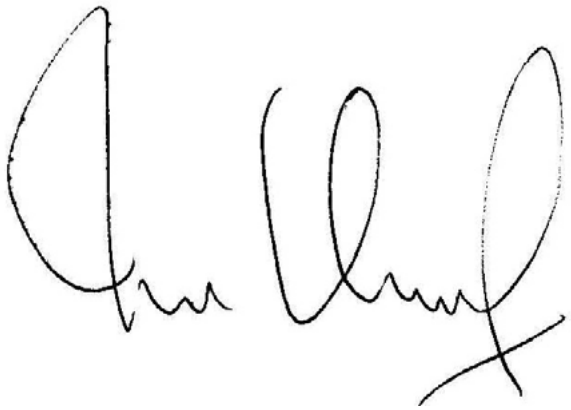
I am delighted to endorse this Guide which is intended as a useful tool for the judiciary in relation to the making of orders to meet financial needs following divorce and the dissolution of civil partnerships. This Guide, which focuses on those cases where the available assets do not exceed the parties' needs, provides a succinct summary of the law as explained and developed in the leading cases. It also includes a number of helpful case studies of common scenarios.

The Guide owes its origin to the Law Commission's observations in its 2014 report, Matrimonial Property, Needs and Agreements, concerning the evidence of significant regional differences in the levels of needs-based support likely to be awarded in different courts and the lack of transparency in this area of the law. To that end, it recommended that the Family Justice Council prepare guidance for the courts with a view to achieving both greater clarity and consistency of approach across the jurisdiction in such cases. The then Minister of State for Justice, Simon Hughes, accordingly asked the Council to take this recommendation forward. As Chair of the Family Justice Council, I asked Mrs Justice Roberts to chair a small but hugely experienced Working Group whose task was to produce this Guide. We are both extremely grateful to all the members of that Group who put into the project an immense amount of hard work in their own time without remuneration.

The same Working Group has already published a separate Guide for Litigants in Person which has been warmly received as a valuable resource and reference point. That Guide was intended to assist those seeking to negotiate their own agreements without the benefit of professional legal advice and to demystify what is potentially a complex area of law. This Guide is intended for a wider judicial audience. The Working Group 'road tested' the document with a focus group of District and Circuit judges, experienced in money work. It has been disseminated amongst the judges who regularly sit in the Family

Division of the High Court to hear financial cases. It was given a warm welcome. The consensus view was that its distribution nationally will be of significant assistance to judges without in any way diminishing the fundamental importance of judicial discretion.

I trust that other colleagues will find the Guide helpful and will consult it as a useful reference guide. The intention is that it will be revised and updated at regular intervals and, to this end, the Working Group welcomes feedback with a view to informing future revisions.



Sir James Munby
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Introduction to this guidance

Law Commission Concerns

- **Unacceptable regional disparities**
- **No statutory definition of needs**
- **More litigants in person without lawyers to manage their expectations**

About guidance

1. This guidance is addressed primarily to courts and legal advisers and is intended:

   (i) to clarify the meaning of "**financial needs**" on divorce, with particular reference to the most commonly encountered cases in which the available assets do not exceed the parties' needs (i.e. "needs-based" cases);

   (ii) to provide a clear statement of the **objective** that financial orders made to meet needs should (if possible) achieve, and to encourage consistency of approach by courts across England and Wales.

   Although, for convenience, the language of marriage/divorce is used throughout, everything discussed in this guidance applies to civil partnerships in the same way.[1]

2. As recommended by the Law Commission (Law Com No 343) *Matrimonial Property, Needs and Agreements* [www.lawcom.gov.uk/project/matrimonial-property-needs-and-agreements/], this guidance covers the following areas:

   (1) What are needs, and at what level should they be met?
   (2) The duration of provision for needs and the transition to independence.

   In the course of addressing those issues, it also addresses the overall objective for these cases, in light of which the assessment of needs and how they may best be met is undertaken.

3. This guidance does not address the interpretation and application of the principles of sharing and compensation.

[1] A table of relevant corresponding provisions in the Matrimonial Causes Act 1973 ("MCA 1973") and the Civil Partnership Act 2004 ("CPA 2004") is attached at Annex 1.

Law Commission concerns

4. As the Law Commission observed, in an area where there are no rules or strict entitlements, there is a limit to what such guidance can achieve.[2] However, the Family Justice Council agrees that such guidance would be helpful, bearing in mind, in particular, the following concerns identified by the Law Commission:

   (i) unacceptable regional disparities and geographical inconsistencies in the type of solutions that tend to be negotiated or ordered,[3] including in relation to:

      (a) the amount of maintenance negotiated or likely to be ordered in different courts, and

      (b) the duration of any order (*i.e.* whether a 'joint lives' or 'term order' is made).[4]

   (ii) the lack of a definition of "financial needs" in the law, in combination with regional variations in the way that lawyers and judges conceive of them, means that it is very difficult for members of the public to understand their responsibilities and to agree to meet them following divorce;

   (iii) the removal of legal aid from many family cases including those relating to financial provision means that more litigants in person are either approaching the courts without the help of lawyers to manage their expectations or to assist them in reaching a settlement, or are seeking to negotiate entirely outside the court system "in the shadow of the law".[5]

5. This guidance cannot and is not intended to change the law. Its purpose is to disseminate information about the ways in which the courts' discretion is currently exercised, and to encourage the consistent use of that discretion in a particular way and (if possible) with a particular objective.[6] Accordingly, when and if necessary, the Family Justice Council will review and amend this guidance in light of case law developments.

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[2] Law Com No 343, *Matrimonial Property, Needs and Agreements* at [3.93]

[3] Family Law Week on 27 July 2015 *Maintenance 'North / South divide' encourages rush to London* [www.familylawweek.co.uk/site.aspx?i=ed145972] which comments upon the perceived opposition in some parts of the country to the idea of providing applicants with indefinite spousal maintenance.

[4] Ibid at [1.19] and [2.45] to [2.53] – anecdotally, 'term orders' are more likely to be made by courts in the North, whereas courts in the South (and especially in London) are more likely to make 'joint lives' orders.

[5] Ibid at [1.20] to [1.23]

[6] Ibid at [3.86]

6. We agree with the Law Commission that guidance of this type cannot deal with every case, and that there may be some exceptional cases where this guidance would not necessarily produce a fair result, or clear answer.[7] In such cases, there is no substitute for the exercise of judicial discretion after proper consideration of all matters to which the court is to have regard under section 25 of MCA 1973 to ensure that a fair order is made.

7. This guidance should be read in conjunction with *Sorting out Finances on Divorce,* produced for the assistance of litigants in person and for those seeking to reach a financial settlement with or without recourse to specialist legal advice: [www.advicenow.org.uk/guides/survival-guide-sorting-out-your-finances-when-you-get-divorced]

8. *Sorting out Finances on Divorce* provides the following information about financial settlements for couples who are getting divorced or ending a civil partnership:

- A general overview of the law, dealing with
  - Making an agreement without going to court
  - What the law aims to do and takes into account – and what the parties should aim to agree
  - What sort of orders can be made
- More detailed discussion of particular topics
  - Housing and other capital
  - Maintenance and income
  - Pensions
- Some worked Examples, which illustrate how the law would generally be applied in some typical situations.
- Some FAQs, which deal with particular issues that come up on divorce, including some "myth-busting" of things that many people believe the law says but which are not true.

The Family Justice Council encourages courts dealing with litigants in person – which increasingly means all courts, exercising both first instance and appellate jurisdiction – at an early stage, to invite attention to

[7] Ibid at [3.120]

Sorting out Finances on Divorce, including the worked Examples. An annotated version of the worked Examples, which includes reference to reported cases relied on in formulating the possible outcomes, is attached to this guidance.[8]

[8] Annotated version of the worked Examples is attached at Annex 2.

The statute

The statute: MCA 1973

9. When deciding what (if any) financial orders to make under sections 23, 24, 24A, 24B and 24E, courts must have regard under section 25 of MCA 1973 to "all the circumstances of the case" (the "section 25 factors"). The first consideration is given to the welfare whilst a minor of any child of the family who has not attained the age of eighteen. When assessing "needs" courts will have regard, in particular, to the matters set out in section 25(2):

    (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
    (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;
    (c) the standard of living enjoyed by the family before the breakdown of the marriage;
    (d) the age of each party to the marriage and the duration of the marriage;
    (e) any physical or mental disability of either of the parties to the marriage;
    (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contributions by looking after the home or caring for the family;
    (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
    (h) …, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution … of the marriage, that party will lose the chance of acquiring.

10. Each of these checklist factors might, in an appropriate case, have a bearing on the parties' needs – their nature, their extent, their source – and the resources

that might be available to meet them.[9] This guidance refers to some of the checklist factors in the discussion below. Section 25 ('the clean break') must be read in conjunction with the section 25 factors. We address section 25A in the section on the duration of periodical payment orders in paragraph 48 of this Guide.

Leading cases:
White v White
Miller, McFarlane

11. Lord Nicholls in *White v White* commented as follows on the checklist factors:

> *Clearly, and this is well recognised, there is some overlap between the factors listed in section 25(2). In a particular case there may be other matters to be taken into account as well. But the end product of this assessment of financial needs should be seen, and treated by the court, for what it is: only one of the several factors to which the court is to have particular regard. This is so, whether the end product is labelled financial needs or reasonable requirements. In deciding what would be a fair outcome the court must also have regard to other factors such as the available resources and the parties' contributions. In following this approach the court will be doing no more than giving effect to the statutory scheme.*[10]

12. Lord Nicholls in *White* was of course concerned with the problem of courts in high value cases making orders which only attended to the needs – or "reasonable requirements" – of the applicant spouse, and the decision in *White* set the courts in those category of cases on a different path, guided by the "yardstick of equality of division",[11] further developed by the House of Lords in *Miller; McFarlane*.[12] In high value cases, the parties' equal shares of the capital will commonly cover and provide for their respective needs.[13] But in the type of case with which this guidance is principally concerned, equal sharing will commonly be departed from in order to meet needs, and periodical payments may be required. It is on the concept of "needs" that this guidance therefore focuses.

13. The importance of addressing needs – rather than pursuing equal sharing of assets – in lower value cases

[9] E.g. *Charman v Charman (no 4)* [2007] EWCA Civ 503, [70].
[10] [2001] 1 AC 596, 608-9.
[11] Ibid, 605.
[12] [2006] UKHL 24.
[13] See *Charman v Charman (no 4)* [2007] EWCA Civ 5043, [73].

was addressed by Baroness Hale in *Miller, McFarlane*[14] as follows:

> *136. Thus were the principles of fairness and non-discrimination and the 'yardstick of equality' established [in White]. But the House was careful to point out (see p 605f) that the yardstick of equality did not inevitably mean equality of result. It was a standard against which the outcome of the section 25 exercise was to be checked. In any event, except in those cases where the present assets can be divided and each can live independently at roughly the same standard of living, equality of outcome is difficult both to define and to achieve. Giving half the present assets to the breadwinner achieves a very different outcome from giving half the assets to the homemaker with children.*

[14] [2006] UKHL 24.

The overall objective

Law Commission objective for financial orders

- **To meet needs to enable a transition to independence to the extent that is possible in the circumstances**
- **Needs may well, and commonly do, provide a justification for a departure from equal sharing**

14. This departure from equal sharing of assets in a needs-based case reflects the overall objective of financial remedy cases, the particular conception of "fairness" that the courts have identified.

Law Commission objective: transition to independence

15. The Law Commission describes that objective as follows:[15]

> [W]e conclude that the objective of financial orders made to meet needs should be to enable a transition to independence, to the extent that that is possible in light of the choices made within the marriage, the length of the marriage, the marital standard of living, the parties' expectation of a home, and the continued shared responsibilities (importantly, child care). We acknowledge the fact that in a significant number of cases independence is not possible, usually because of age but sometimes for other reasons arising from choices made during the marriage.

The Family Justice Council endorses that objective. As the Law Commission observed, it reflects what already happens in the vast majority of cases, and does not point to – still less, necessitate – any change in direction for the courts.[16]

16. This objective – and the common requirement to depart from equal sharing in a needs-based case in order to attain it – are reflected in the speech of Baroness Hale in *Miller*, *McFarlane*:

> *142. Of course, an equal partnership does not necessarily dictate an equal sharing of the assets. In particular, it may have to give way to the*

[15] Ibid at [3.67]
[16] Ibid at [3.68]

needs of one party or the children. 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: see, eg, the observations of Munby J in B v B (Mesher Order) [2002] EWHC 3106 (Fam); [2003] 2 FLR 285. Recognising this is one reason why English law has been so successful in retaining a home for the children.*

…

144. …In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. ***The ultimate objective is to give each party an equal start on the road to independent living****.*

[emphasis added]

The justification for meeting needs through financial remedies

Needs generated by the relationship

- **Marriage typically creates a relationship of interdependence**
- **Dependence is commonly created by the presence of children**
- **Potentially long term dependence can be created by decisions for one party to discharge family obligations at the expense of the development of employment potential**
- **It is generally right and fair that relationship generated needs should be met by the other party if resources permit**

Needs generated by the relationship; why they should be met

17. In *Miller v Miller; McFarlane v McFarlane* in relation to "financial needs", Lord Nicholls observed as follows: [17]

> *11. This element of fairness reflects the fact that to greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, homemaker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.*

Baroness Hale observed as follows:

> *137. So how is the court to operate the principles of fairness, equality and non-discrimination in the less straightforward cases? …[T]here has to be some sort of rationale for the redistribution of resources from one party to another. In my view there are at least three. Any or all of them might supply such a reason, although one must be careful to avoid double counting. The cardinal feature is that each is looking at factors which are linked to the parties' relationship, either causally or temporally, and*

[17] [2006] UKHL 24, [2006] 2 AC 618

not to extrinsic, unrelated factors, such as a disability arising after the marriage has ended.

138. The most common rationale [for granting financial remedies] is that the relationship has generated needs which it is right that the other party should meet. … This is a perfectly sound rationale where the needs are the consequence of the parties' relationship, as they usually are. The most common source of need is the presence of children, whose welfare is always the first consideration, or of other dependent relatives, such as elderly parents. But another source of need is having had to look after children or other family members in the past. Many parents have seriously compromised their ability to attain self-sufficiency as a result of past family responsibilities. Even if they do their best to re-enter the employment market, it will often be at a lesser level than before, and they will hardly ever be able to make up what they have lost in pension entitlements. A further source of need may be the way in which the parties chose to run their life together. Even dual career families are difficult to manage with completely equal opportunity for both. Compromises often have to be made by one so that the other can get ahead. All couples throughout their lives together have to make choices about who will do what, sometimes forced upon them by circumstances such as redundancy or low pay, sometimes freely made in the interests of them both. The needs generated by such choices are a perfectly sound rationale for adjusting the parties' respective resources in compensation.

18. The choices the parties made during the marriage (for example, in relation to the provision of child care and/or the loss or interruption of a career) can have a short- or long-term effect upon one party's ability to continue in employment and/or his or her capacity to return to work and/or to become wholly or partially independent and financially self-sufficient. This, in turn, requires an assessment to be made of his or her "income and earning capacity", including that which it would be reasonable to expect that party to take steps to acquire (s.25(2)(a).

What are needs, and how are they measured?

Housing and Income

- **The main needs in most cases are for housing and present and future income**
- **Future income typically includes a need for income in retirement**
- **The court will assess the level and duration of need as a question of fact**
- **The court will decide whether the needs can best be met by capital or income provision**

The Law Commission definition of "needs"

19. The glossary in Law Commission (Law Com No 343) *Matrimonial Property, Needs and Agreements* notes that "needs" is

> *"a very broad concept with no single definition in family law"*

This is elaborated upon in Chapter 3 (Financial Needs) as follows:[18]

> *…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."*

Housing and income

20. The needs of the parties are a question of fact to be determined by the court.[19] In practice, in most cases the main components of "financial needs" will be the need for housing and the need for regular income. Housing (and other capital needs) and income needs are linked and need to be considered in the round. How these needs are most appropriately met and by what form of order, whether by capital provision or (spousal) periodical payments or both, will depend on all the circumstances of the case, in particular the extent of the available capital and income, including – where appropriate – welfare benefits, tax credits and

[18] Law Com No 343, *Matrimonial Property, Needs and Agreements* at [3.8]
[19] Annex 4 provides a table of examples from case law of different practical categories of need.

borrowing capacity, as well as existing debts.[20] Moreover, as is discussed in the last part of this guidance, the question of the level at which needs should be met is (usually) inexorably linked to the question of the duration for which income needs should be met by way of periodical payments, having regard to the objective identified (above).[21]

21. Consistent with the obligation under section 25(2)(b) of MCA 1973 to take into account needs "which each of the parties is likely to have in the foreseeable future", except where the parties are still young, it will usually be necessary to assess the parties' needs arising once they might reasonably be expected to cease working on grounds of age (i.e. on reaching state retirement age). It is a matter of discretion in each case whether retirement provision needs to be considered. Assessment of the level of needs may be affected by other "section 25 factors" (e.g. s.25(2)(h): the loss of a widow's pension rights; s.25(2)(d): the duration of the marriage), but the need for pension provision may be an important factor.[22] This need can sometimes be met from ongoing periodical payments or a capitalised lump sum. But where the payer has a significant pension, a pension sharing order (made under s.24B of MCA 1973) is likely to be the obvious and preferred method of making that provision.[23]

A note on terminology

- **The term "reasonable requirements" to describe needs is now not approved**
- **The term "needs (generously interpreted)" has gained acceptance to assist determination in higher resource cases**

22. There has been some judicial discussion of appropriate terminology to refer to "need". The old language of "reasonable requirements" was criticised for its association with the pre-*White* tendency to limit awards to applicant spouses by reference to that concept.[24] More recent case law has adopted the expression "need (generously interpreted)". Some judges have again criticised this as an impermissible judicial gloss liable to create its own confusion. However, although not appearing in the statute, the

[20] Jackson's Matrimonial Finance [9th Ed], para 5.124.
[21] Law Com No 343, *Matrimonial Property, Needs and Agreements* at [3.67]
[22] See also the note on pensions attached at Annex 3
[23] See also *Pearce v Pearce* [2003] EWCA Civ 1054; [2003] 2 FLR 114 (capitalisation of a periodical payments order under s.31(7B) MCA 1973 by pension sharing) per Thorpe LJ at [45].
[24] *White v White* [2001] 1 AC 596.

expression has gained general acceptance, for example being adopted by the majority in *Radmacher v Granatino*.[25] Other phrases have also been used, such as the suggestion that "fairness can properly be achieved through meeting one party's reasonable requirements fully and generously assessed".[26] It is doubtful that anything turns on the precise terminology used. But the key point which these expressions perhaps convey is that in cases involving more financial resources and higher marital standard of living, "needs" can be met at a higher level than would otherwise be possible.

Measuring Need

- **Need will be measured by assessing available financial resources**
- **The court will strive to stretch finite resources and where resources are modest the children's needs may predominate**
- **Need will be measured by assessing the standard of living during the relationship, generally the longer the relationship's duration the more important this factor will be**
- **A party may be expected to suffer some reduction in standard of living having regard to the overall objective of a transition to independence**
- **To measure need, and the ability to meet it, both parties will be expected to present appropriately detailed budgets to the court**

Measuring "need": available resources and standard of living

23. 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 (i.e. "financial resources") (s.25(2)(a) MCA 1973); and

    (ii) the "standard of living" enjoyed by the family before the breakdown of the marriage (s.25(2)(c)), certainly where the marriage was of more than short duration (s.25(2)(d)).

24. So in *McFarlane v McFarlane; Parlour v Parlour*, Thorpe LJ stressed that the court must be assisted to undertake a proper assessment of each (i.e. both) party's income needs: [27]

> *78. It is obvious that in cases such as the present the calculation of the amount of surplus income cannot be achieved without first*

[25] [2010] UKSC 42, [2011] 1 AC 534 per Lord Phillips of Worth Matravers at [28]. See also *Lauder v Lauder* [2007] 2 FLR 802; *VB v JP* [2008] 1 FLR 742; *McFarlane v McFarlane* [2009] 2 FLR 1322

[26] *K v L* [2010] EWHC 1234, [2010] 2 FLR 1467 at [56], per Bodey J.

[27] [2004] EWCA Civ 872, [2005] Fam 171

establishing what both the payer and the payee need in order to meet their projected expenditure…

79. In both cases the husbands failed to complete the relevant section of the Form E and in one case the husband refused subsequent requests for information.

25. And in *TL v ML and Others (Ancillary Relief: Claim against Assets of Extended Family)* Mr Nicholas Mostyn QC emphasised that on an application for maintenance pending suit: [28]

iii) In every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long term expenditure more aptly to be considered on a final hearing (F v F)[29]. That budget should be examined critically in every case to exclude forensic exaggeration (F v F).

26. Courts have consistently 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' lifestyles.[30] In a modest or "small money" case this may be unattainable, or financial provision (e.g. periodical payments) may only be ordered for a fixed term. By contrast, where there are sufficient financial resources available, it may be fair (and so appropriate) for the court to sanction a continuation of the 'lifestyle choices' made during the marriage.[31]

27. Thus, in *White,*[32] in relation to "needs", Lord Nicholls commented as follows:

36. …Financial needs are relative. Standards of living vary. In assessing financial needs, a court will have regard to a person's age, health and accustomed standard of living. The court may

[28] [2005] EWHC 2860 (Fam), [2006] 1FLR 1263 at [124]
[29] *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45
[30] (Law Com No 343) *Matrimonial Property, Needs and Agreements* at [1.16]
[31] See, for example, *S v S* [2008] 2 FLR 113 per Sir Mark Potter P (provision made for the wife to continue to keep horses)
[32] [2000] UKHL 54, [2001] 1 AC 596

> *also have regard to the available pool of resources.*

28. Similarly, Baroness Hale in *Miller, McFarlane* remarked:[33]

> *138. … In the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage (note that the House did not adopt a restrictive view of needs in White: see pp 608g to 609a).*

29. And in *G v G* Charles J observed that:[34]

> *..the lifestyle enjoyed during the marriage sets a level or benchmark that is relevant to the assessment of the level of the independent lifestyles to be enjoyed by the parties.*

30. In most cases, the limited extent of the available assets restricts what can be achieved. As Lord Nicholls observed in *Miller; McFarlane*:

> *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. Especially where children are involved it may be necessary to augment the available assets by having recourse to the future earnings of the money-earner, by way of an order for periodical payments.*

This is likely to involve meeting needs at what might be a relatively modest level. The court's priority is likely to be to provide a home for the children and one, or possibly both, of the parents.[35]

31. By contrast, in cases where there are more resources (including income) available and a higher standard of living has been enjoyed, "need" is likely to be assessed more generously.[36]

32. In an appropriate case, some reduction is permissible in the "standard of living" to be enjoyed by the payee

[33] [2006] UKHL 24.
[34] [2012] EWHC 167 (Fam), [2012] 2 FLR 48 at [136(iii)(a)]
[35] See also *M v B* [1998] 1 FCR 213 (at 220)
[36] And if the available assets in fact exceed the parties' combined needs, "need" will be subsumed within the equal sharing principle.

in the future having regard to the overall objective to enable a transition to independence.[37]

33. Accordingly, and as the Law Commission observed:[38]

> *…the transition to independence, if possible, may mean that 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.*

and, in *SS v NS (Spousal Maintenance)*, Mostyn J reasoned as follows:[39]

> *35…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.*

and in *BD v FD*, Moylan J observed as follows:[40]

> *116. Usually, due to finite resources, it will not be possible for the marital standard of living to be maintained. Additionally, it may well not be fair for the applicant spouse to have his or her needs provided for at this level either at all or for longer than a defined period (i.e. not for life) due, for example, to the length of the marriage.*
>
> *118. 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)…*
>
> *119. I must also not be taken to be saying that the marital standard of living is "the lodestar", quoting from Mostyn J's decision in SS v NS (Spousal Maintenance) [2015] 2 FLR 1124, in the sense of an unchanging guide to the assessment of needs.*

[37] See (e.g.) *SS v NS* [2014] EWHC 4183 (Fam) at [46] (see para 54 below at sub-paras (vi)-(viii))
[38] (Law Com No 343) *Matrimonial Property, Needs and Agreements* at [3.96].
[39] [2014] EWHC 4183 (Fam) at [35].
[40] [2016] EWHC 594 (Fam) at [114]

Assets from which needs may be met

- **Needs may be met from non-matrimonial resources**
- **A court in a needs case should not focus on the marital acquest, but should instead consider all the available assets**

Assets from which needs may be met

34. However, it is important to bear in mind that there is no restriction on the source of the assets which might be deployed (i.e. taken into account) in order to meet needs: the distinction between "matrimonial" and "non-matrimonial" property has no relevance here.[41]

35. Thus, in a modest or "small money" case (in which there are only limited or no surplus resources, including income), the court will primarily be concerned to assess "minimal future needs" without focussing too closely (if at all) on dividing up the "marital acquest".

> *53. …For that purpose the focus had to be upon their minimal future needs rather than observing and applying the distinction, urged on behalf of the husband and accorded considerable weight by the Judge, between the matrimonial property or "acquest" and what each of the parties brought to the marriage by way of pre-acquired property.*

per Sir Mark Potter P in *M-D v D* [2009] 1 FLR 810

The needs of both parties

- **The court will assess the needs of both parties**
- **Before requiring payments to meet need the court will stand back and consider what portion of the payer's resources should fairly go to the payee**
- **Where resources are modest the children's need for a home with their primary carer may predominate but, if possible, the court will strive to stretch resources to provide a home for children with each of their parents**
- **The court will consider the detrimental impact of requiring one party to remain on the mortgage of the other's home for an indefinite period**

[41] *White v White* [2001] 1 AC 596, at 610; see also *S v S (Non-matrimonial Property: Conduct)* [2007] 1 FLR 1496 which makes plain that 'non-matrimonial' property (i.e. pre-acquired and/or gifted and inherited property and post-separation accruals) can be taken into account if "needs" require.

The needs of both parties, and the need to be fair to both

36. It is axiomatic, as section 25(2)(b) expressly provides, that the needs of each i.e. both parties must be considered. In order properly to understand the consequences of its proposed order, the court should compile a balance sheet, especially if the parties are litigants in person.[42]

37. As Moor J observed in *A v. L (Departure from Equality: Needs)*:[43]

> *50. 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. I equally accept that disparity in earning capacity can justify departure, but again this has to be considered in the context of the needs of both parties not just the wife.*

38. In relation to the quantum of periodical payments, Thorpe LJ observed in *Purba v Purba* that:[44]

> *…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 support the wife?*

39. Where resources are limited, the needs of the applicant – still typically the wife, with whom any children of the family may continue to make their primary home – will predominate. However, both parties will still need a home and an income and the financial means to maintain contact with any children of the family and share in their care.[45] And so even in such modest or "small money" cases, a balance must be struck to ensure that any order is fair. A failure to consider the "financial needs" of both parties may render an order unfair, and so liable to be set aside on appeal.[46] So too, it is important, for example, to consider the impact of the other party remaining on the mortgage (subject only to an undertaking to use 'best endeavours' to effect his or her release) if that means the other party is unable to obtain a new mortgage to rehouse and so has to rent indefinitely.[47]

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[42] *MD v D* [2009] 1 FLR 810; *Vaughan v Vaughan* [2008] 1FLR 1108; *Behzadi v Behzadi* [2009] 2 FLR 649, CA per Wilson LJ at [14]; *H v H* [2014] EWCA Civ 1523 per Ryder LJ at [35]

[43] [2012] 1FLR 985.

[44] [19999] EWCA Civ 1730, [2000] 1 FLR 444.

[45] Ibid [1.16]

[46] See e.g. *A v. L (Departure from Equality: Needs)* [2012] 1FLR 985 (*supra*)

[47] See *M v B* [1998] 1 FCR 213

Housing and the use of Mesher orders

- **If the needs of the children require one party to sacrifice an entitlement to capital in favour of the primary carer then the court will consider reimbursement to the sacrificing party through a Mesher order**
- **This may not be appropriate if the capital sacrificed can be generated through anticipated future endeavours by the sacrificing party**
- **The fairness of a Mesher order may also be undermined by the likely effects on the primary carer at the time the trigger events apply**

The use of Mesher orders

40. Given the need to be fair to both parties, it is important to stand back and consider the overall balance of the orders to be made and whether there is any need to rebalance the capital division. So, for example when considering whether to make an order transferring the principal or only asset (i.e. the former matrimonial home) into the sole name of the applicant to meet an immediate "financial need" for a home for herself and the children of the family, consideration should also be given whether to make: (i) an order for an immediate sale (with the net proceeds divided between the parties) or (ii) a "*Mesher*" order or some form of charge so that the respondent can retain a deferred interest in the property to be realised only when the applicant's need for housing at that level has ceased (most usually when the children of the family have achieved their independence). [48]

41. In *Elliott v. Elliott,* having regard to the importance of the equality of treatment identified by Lord Nicholls in *White v White*, the Court of Appeal emphasised per Thorpe LJ: [49]

> *7. … the husband's reasonable entitlement to deploy capital to house himself at the end of a long marriage during which he has worked hard, mainly in the police service, and has contributed his earnings to the building of family capital….The husband has a reasonable and discernible need for his share of the family capital at the earliest time that the needs of the children permit. As soon as the wife's*

[48] See also: *Martin v Martin* [1978] Fam. 12
[49] [2001] 1 FCR 477

responsibilities as the home-maker for the children reach a point of natural termination, at that point clearly the husband is entitled to his capital share.

42. In such a case, there will be instances in which the interrelationship of capital and income orders may justify the increase of an applicant's capital share to counter-balance the loss of an income claim. So, in *B v B (Mesher Order)*[50] Munby J refused to make a "*Mesher*" order having regard to (i) the wife's limited ability to raise capital before one of the "*Mesher*" trigger events operated and obliged her to sell her home and (ii) the likelihood the husband would generate substantial additional capital before then in any event:[51]

At the end of the day, it seems to me that there are two factors in particular which point strongly to the conclusion that there should not be a Mesher order. The first is that the wife's realistic prospects of being able to generate capital of her own between now and the date when one of the Mesher triggers would operate is small, whereas there is every reason to believe with a significant degree of confidence that well before (and it may very well be long before) a Mesher trigger operates, this husband will be able to generate a substantial degree of capital for himself over and above that capital which, in any event, remains with him notwithstanding the deputy district judge's order.

That inequality of outcome, as it seems to me it will be if a Mesher order is made, is an outcome brought about by the fact that this wife will have to devote the best part of those years of her working life which would otherwise enable her to generate capital and earn at a higher rate in later life, to the job of bringing up Will. That is, albeit in the future, a major, a very substantial, contribution which she brings to this marriage. That is a contribution which, as it seems to me, will not fairly be recognised and reflected in the award which is made if that award is subject to a Mesher charge.

The other point, as I have already mentioned, is that as it seems to me, the advantage in financial terms which will accrue to this husband were

[50] [2002] EWHC 3106 (Fam), [2003] 2 FLR 285
[51] See also: *Tattersall v Tattersall* [2014] 1 FLR 997 (in which a *Mesher* order was refused).

there to be a Mesher charge, would confer on him a benefit which, in comparison with his other likely resources, is comparatively modest. Whereas, on the other hand, the financial burden that will be suffered by the wife if there is a Mesher order requiring her to sell the house in which she and [the child] have lived at one of the suggested trigger points, will throw upon her a financial burden much more significant in terms of her economy than the corresponding financial advantage will have upon the husband's domestic economy.

43. So too, in a larger or "big money" case, when assessing needs – which may or may not be met by the provision of a half share of the parties' assets[52] – consideration should be given as to whether there is scope for the applicant to "downsize" to a more modest (i.e. cheaper) property in later life and/or, for example, when any children of the family have reached independence, releasing additional capital from which to meet the applicant's (income) needs in the future. Again, every case must be considered on its own facts.[53]

44. Courts may find it useful to look at the guidance given at pages 26-27 of *Sorting out Finances on Divorce 2015*. In addition, the guidance set out in *A survival guide to sorting out your finances when you get divorced* includes useful information on the options and issues, which may be particularly helpful to direct to litigants in person appearing before the court.[54]

[52] Young v Young [2013] EWHC 3637 (Fam), [2014] 2 FLR 786 per Moor J. at [179]

[53] Examples of such an approach include: *Robson v Robson* [2011] 1 FLR 751 at [91]; *N v N (Ancillary Relief)* [2010] 2 FLR 1093 at [171]; *B v B (Ancillary Relief)* [2008] 2 FLR 1627 at [30]; *J v J (Financial Orders: Wife's Long Term Needs)* [2011] 2 FLR 280; *Vaughan v Vaughan* [2010] 2 FLR 242; *W v W (Financial Remedies)* [2013] 2 FLR 359; *McFarlane v McFarlane (No 2)* [2009] 2 FLR 1322.

[54] at pages 19-27

An overview

An overview

45. In *G v G*, having reviewed the earlier authorities, Charles J opined (in full) as follows:[55]

> *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 re-marriage) 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 all the financial resources that are available to the parties. From that it follows that:*
>
> *iii) generally, the marital partnership does not survive as a basis for the sharing of future resources (whether earned or unearned). But, and they are important buts:*
>
> *a) the lifestyle enjoyed during the marriage sets a level or benchmark that is relevant to the assessment of the level of the independent lifestyles to be enjoyed by the parties,*
>
> *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 payer), 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*

[55] [2012] EWHC 167 (Fam), [2012] 2 FLR 48 at [136]

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,

d) the marriage, and the choices made by the parties during it, may have generated needs or disadvantages in attaining and funding self-sufficient independence that (i) should be compensated, and (ii) make continuing dependence / provision fair,

e) the most common source of a continuing relationship generated need or disadvantage is the birth of children and their care,

f) a continuing relationship generated need is often reflected in a continuing contribution to the day to day care of the children of the relationship, that contribution being recognised by the continuing financial contribution of the paying spouse (which is a continuing contribution to the day to day care of the children),

g) the choices made by the parties as to the care of their children are an important factor in determining how that care should be provided and shared both by reference to day to day care and the funding of the independent households, and

h) the provisions of s. 25A must be taken into account.[56]

[56] See also: *H v H* [2007] EWHC 459 (Fam), [2007] 2 FLR 548 per Charles J at [96(ii)] and *BD v FD* [2016] EWHC 594 (Fam) per Moylan J at [112] to [125]

The duration of provision for needs and the transition to independence

Duration and the transition to independence

- **Most case outcomes tend eventually not towards life-long support but towards independence, but this is not appropriate in all cases**
- **If needs are to be met through a periodical payments order then the court must consider (whether making an initial order or a variation order) whether to make a joint lives order, an extendable term order or a non-extendable term order**
- **In deciding on the duration of any order the court will need to consider the statutory steer towards the termination of obligations at the earliest point which is just and reasonable, but termination should only occur if the payee can adjust to it without undue hardship**
- **Termination of the obligations should not be achieved at the expense of a fair result**
- **Termination of the obligations should be justified by reference to an evidential foundation, not crystal ball glazing or pious exhortation**

Duration and the transition to independence

46. As indicated, the question of the level at which needs should be met is (usually) inexorably linked to the question of the duration for which income needs should be met, which is in turn related to the **overall objective** discussed from paragraph 15 above. This is so regardless of whether the eventual outcome involves capitalised maintenance or an order for continuing periodical payments. In each instance, consideration must be given to whether ongoing periodical payments are required, and if so whether such continuing financial support should be ordered on a 'joint lives' basis (i.e. until further order) or only for a 'fixed term', with or without a 'section 28(1A) bar' preventing any application to extend the term; or whether in fact it is appropriate to order an immediate clean break.

47. In practice, most case outcomes tend eventually not towards life-long support but toward independence.[57] Indeed only a small proportion of divorces result in any award of periodical payments.[58] But every case must be considered on its merits; and the court must exercise its discretion at each (i.e. every) stage at

[57] (Law Com No 343) *Matrimonial Property, Needs and Agreements* at [2.42].
[58] MOJ statistics on periodical payments combine child and spousal periodical payments and so do not give a clear count of the latter; a recent case file survey by Woodward with Sefton (*Pensions on Divorce,* 2014) found a very low proportion of cases with periodical payments in the courts covered by that study

which the continued duration of periodical payments falls to be considered – i.e. when making the original order, when considering applications to vary or terminate an order, including applications to capitalise an order. In undertaking that exercise, the court must of course have regard to all the circumstances of the case, including the welfare whilst a minor of any child of the family and all the "section 25 factors". It follows that in some cases, a combination of age, the length of the marriage, and duration out of the work place may render an ambition of independence impossible.[59]

The clean break: s.25(A) MCA 1973

48. Section 25 of MCA 1973 must be read in conjunction with **section 25A ("the clean break")**, and, on an application to vary and/or capitalise under section 31 of MCA 1973, in conjunction with section 31(7). So far as material, section 25A of MCA 1973 provides as follows:

> **Exercise of court's powers in favour of party to marriage on decree of divorce or nullity of marriage**
>
> (1) Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under section 23(1)(a), (b) or (c), 24, 24A, 24B or 24E above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.
>
> (2) Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or

[59] (Law Com No 343) *Matrimonial Property, Needs and Agreements* at [3.49] – the majority view expressed by the Judges of the Family Division.

her financial dependence on the other party.[60]

49. Section 25A(1) and (2) of MCA 1973 embodies the 'statutory steer to an eventual clean break'.[61]

Leading cases in the House of Lords: *Miller, McFarlane*

50. In *Miller v Miller; McFarlane v McFarlane* in relation to s.25A MCA 1973, Lord Nicholls observed as follows:[62]

> *38. In one respect the object of section 25A(1) is abundantly clear. The subsection is expressed in general terms. It is apt to refer as much to a periodical payments order made to provide compensation as it is to an order made to meet financial needs. But, expressly, section 25A(1) is not intended to bring about an unfair result. Under section 25A(1) the goal the court is required to have in mind is that the parties' mutual financial obligations should end as soon as the court considers just and reasonable.*
>
> *39. Section 25A(2) is focused more specifically. It is concerned with the termination of one party's 'financial dependence' on the other 'without undue hardship'. These references to financial dependence and hardship are apt when applied to a periodical payments order making provision for the payee's financial needs. They are hardly apt when applied to a periodical payments order whose object is to furnish compensation in respect of future economic disparity arising from the division of functions adopted by the parties during their marriage. If the claimant is owed compensation, and capital assets are not available, it is difficult to see why the social desirability of a clean break should be sufficient reason for depriving the claimant of that compensation.*

In relation to s.25A(1), Baroness Hale observed as follows:[63]

> *[130]…This applies to the whole range of the court's powers, not just to the power to award future periodical payments. It assumes that the*

[60] See also s.31(7)(a) of the MCA 1973 which obliges the court to consider 'whether in all the circumstances…to vary the order so that payments are required to be made only for such further period as will in the opinion of the court be sufficient…to enable the party in whose favour the order was made to adjust without undue hardship to termination of those payments.
[61] *Matthews v Matthews* [2013] EWCA Civ 1874, [2014] 2 FLR 1259.
[62] [2006] UKHL 24, [2006] 2 AC 618 at [38]
[63] Ibid at [130]

court has decided that some award is appropriate (in practice, there are very few cases in which some readjustment of the parties' strict proprietary rights is not required, if they cannot agree it, in order to disentangle their previously entangled affairs). The court is then required to consider whether it could achieve an appropriate result by bringing their mutual obligations to an end. This is a clear steer in the direction of lump sum and property adjustment orders with no continuing periodical payments. But it does not tell us much about what an appropriate result would be.

and in relation to s.25A(2) MCA 1973, as follows:

[131]…I assume that the reference to "such a case" is to a case in which the court has decided to exercise its powers under the listed sections rather than to a case in which it has decided that it would be appropriate to exercise those powers so as to terminate the parties' financial obligations as soon as possible after the decree. If it decides to make a periodical payments order, it must consider how quickly it can bring those payments to an end. It has therefore to consider fixing a term, although in doing so it must avoid "undue hardship". This is linked to two other powers: section 28(1) allows the court to specify the duration of a periodical payments order; generally, it is open to the recipient to apply to extend the term, provided this is done before it expires; but section 28(1A) gives the court power to prohibit any application for an extension. If there is an application for an extension, the court has the same duty to consider bringing the periodical payments to an end as soon as possible: section 31(7); and it now has power to order a lump sum, property adjustment or pension sharing instead: section 31(7B). Thus if there were not the capital resources to achieve a clean break at the outset, it may be achieved later if sufficient capital becomes available.

and, generally in relation to s.25A MCA 1973 as follows:

133. Section 25A is a powerful encouragement towards securing the court's objective by way of lump sum and capital adjustment (which now includes pension sharing) rather than by continuing periodical payments. This is good

> *practical sense. Periodical payments are a continuing source of stress for both parties. They are also insecure. With the best will in the world, the paying party may fall on hard times and be unable to keep them up. Nor is the best will in the world always evident between formerly married people. It is also the logical consequence of the retreat from the principle of the life-long obligation. Independent finances and self-sufficiency are the aims. Nevertheless, section 25A does not tell us what the outcome of the exercise required by section 25 should be. It is mainly directed at how that outcome should be put into effect.*
>
> *134. Hence, these three pointers [need, compensation and sharing] do make it clear that* ***a clean break is not to be achieved at the expense of a fair result****.*

In this context the marital standard of living may be relevant even in cases where needs predominate. At paragraph 158, Baroness Hale said that

> *… the court has to take some account of the standard of living enjoyed during the marriage: see section 25(2)(c). The provision should enable* ***a gentle transition*** *from that standard to the standard that she could expect as a self-sufficient woman.*

Leading cases in the Court of Appeal: *Flavell v Flavell, C v C*

51. Two cases in the Court of Appeal, both of which pre-date *Miller v Miller*; *McFarlane v McFarlane*, consider the question of whether an applicant or (spousal) maintenance payee could, or even should, be expected to adjust without 'undue hardship', and consequently whether a 'fixed term' or 'joint lives' order is appropriate.

52. In *Flavell v Flavell*, Ward LJ underlined the need for an "evidence based" approach, and observed as follows:[64]

> *The words of the section do not impose more than an aspiration that the parties should achieve self-sufficiency. The power of the court to terminate dependency can, however, be exercised only in the event that adjustment can be made without undue hardship. There is, in my judgment, often a tendency for these orders to be made more in hope than in*

[64] [1997] 1 FLR 353 (at 358)

serious expectation. Especially in judging the case of ladies in their middle years, the judicial looking into a crystal ball very rarely finds enough of substance to justify a finding that adjustment can be made without undue hardship.

53. In *C v C (Financial Relief: Short Marriage)*, Ward LJ summarised the 'proper approach' having regard to s.25A MCA 1873, as follows:[65]

> *(1) The first task is to consider a clean break which pursuant to s 25A(1) requires the court to consider whether it would be appropriate to exercise its powers so that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.*
> *(2) If there is to be no clean break, and a periodical payments order is to be made, then the court must decide pursuant to s 25 what amount is to be ordered. The duration of the marriage is a factor relevant to the determination of quantum.*
> *(3) If a periodical payments order is made, whether for 5p pa or whatever, the question is whether it would be appropriate to impose a term because in the absence of such a direction the order will endure for joint lives or until the remarriage of the payee: see s 28(1)(a).*
> *(4) The statutory test is this: is it appropriate to order periodical payments only for such a term as in the opinion of the court would be sufficient to enable the payee to adjust without undue hardship to the termination of financial dependence on the paying party?*
> *(5) What is appropriate must of necessity depend on all the circumstances of the case including the welfare of any minor child and the s 25 checklist factors, one of which is the duration of the marriage. It is, however, not appropriate simply to say, "This is a short marriage, therefore a term must be imposed".*
> *(6) Financial dependence being evident from the very making of an order for periodical payments, the question is whether, in the light of all the circumstances of the case, the payee can adjust – and adjust without undue hardship – to the termination of financial*

[65] [1997] 2 FLR 26

> *dependence and if so when. The question is, can she adjust, not should she adjust. In answering that question the court will pay attention not only to the duration of the marriage but to the effect the marriage and its breakdown and the need to care for any minor children has had and will continue to have on the earning capacity of the payee and the extent to which she is no longer in the position she would have been in but for the marriage, its consequences and its breakdown. It is highly material to consider any difficulties the payee may have in entering or re-entering the labour market, resuming a fractured career and making up any lost ground.*
> *(7) The court cannot form its opinion that a term is appropriate without evidence to support its conclusion. Facts supported by evidence must, therefore, justify a reasonable expectation that the payee can and will become self-sufficient. Gazing into the crystal ball does not give rise to such a reasonable expectation. Hope, with or without pious exhortations to end dependency, is not enough.*
> *(8) It is necessary for the court to form an opinion not only that the payee will adjust, but also that the payee will have adjusted within the term that is fixed. The court may be in a position of such certainty that it can impose a deferred clean break by prohibiting an extension of the term pursuant to s 28(1A). If, however, there is doubt about when self-sufficiency will be attained, it is wrong to require the payee to apply to extend the term. If there is uncertainty about the appropriate length of the term, the proper course is to impose no term but leave the payer to seek the variation and if necessary go through the same exercise, this time pursuant to s 31(7)(a).*[66]

54. As Ward LJ emphasised, it is important to bear in mind that the question is, can the applicant or (spousal) maintenance payee adjust, not should he or she adjust. A useful, recent example is *Murphy v Murphy* in which Holman J concluded:[67]

[66] In *G v G* [2012] EWHC 167 (Fam) at [141]-[143], [2012] 2 FLR 48, Charles J opined that the approach adopted in *C v C (Financial Relief: Short Marriage)* [1997] 2 FLR 26 must be read and applied in light of the significant changes that have resulted from *White*, and later cases (particularly *Miller* and *McFarlane*)
[67] [2014] EWHC 2263 (Fam) at [36]

[36] I do not know, nor do the parties know, what the future will bring. It may be that this wife will find another partner with whom she chooses to share her life and the maintenance will all end. It may be that she will be able later, if not sooner, to obtain well remunerated employment, carrying with it a good pension, and any dependence will end. But at the moment this lady is in a precarious position. She is very largely dependent on her husband, and it is frankly impossible for me to form the opinion that section 25A(2) requires as the trigger to then making a term order.

Leading cases at first instance: *G v G* and *SS v NS*

55. In *G v G*, Charles J considered s.25A MCA 1973, including the observations of Ward LJ in *C v C (Financial Relief: Short Marriage)* in relation to the 'proper approach' to be adopted and observed as follows: [68]

143. As argued, I accept that C v C confirms that s.25A(2) is directed to the payee's hardship, that the court must take an evidence based approach to whether the payee can and will adjust and that unless the court concludes, on that evidential basis, that a term should be imposed it should not impose one on the basis that the payee can seek an extension (or on any other basis). Further, I accept and acknowledge that, as with all its other conclusions the court has to base any reductions in periodical payments on an evidential foundation.

144. But, in my judgment this need for an evidential base does not mean that the wife can assert (which at times she seemed to be arguing) that she can avoid an evidence based finding on her likely earnings by not providing an estimate of her earnings from the work she is planning to do, and/or by not co-operating in obtaining a report from an expert on her earning potential. As to the latter point, I do not accept that the absence of such a report is an indication that she is unlikely to be able to earn significant sums from part time employment. Rather, in my view, by not quantifying her earnings, and/or co-operating in their quantification, the wife acted contrary to her duty to give full and frank disclosure of her business plans (and thus her s. 25(2)(a) resources) and the overriding objective.

[68] [2012] EWHC 167 (Fam) at [143]

56. In *SS v NS (Spousal Maintenance)*, Mostyn J reviewed the earlier authorities and offered the following summary of the correct approach to the assessment of spousal maintenance in full, as follows:

> *46. Pulling the threads together it seems to me that the relevant principles in play on an application for spousal maintenance are as follows:*
>
> *(i) A spousal maintenance award is properly made where the evidence shows that choices made during the marriage have generated hard future needs on the part of the claimant. Here the duration of the marriage and the presence of children are pivotal factors.*
> *(ii) An award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies.*
> *(iii) Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.*
> *(iv) In every case the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. A degree of (not undue) hardship in making the transition to independence is acceptable.*
> *(v) If the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former.*
> *(vi) The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence.*
> *(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.*
> *(viii) Where the respondent's income comprises a base salary and a discretionary bonus the*

claimant's award may be equivalently partitioned, with needs of strict necessity being met from the base salary and additional, discretionary, items being met from the bonus on a capped percentage basis. [69]

(ix) There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should to be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why.

(x) On an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence.

(xi) If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party.

57. When read in conjunction with the overarching guidance provided in the leading cases in the House of Lords *(Miller; McFarlane)* and in the Court of Appeal *(Flavell* and *C v C*), the Family Justice Council endorses and commends adopting this type of rigorous and disciplined approach, consistent with the **overall objective** identified above in paragraph 15 and the 'gentle transition' towards independence.

58. But we emphasise that each case must be considered on its merits, upon proper exercise of the court's individual discretion, at each stage at which the continuation of periodical payments falls to be considered, and in light of the implied premise of the original order.[70] And as noted above, in some cases a combination of age, the length of the marriage and duration out of the work place may render an ambition of independence impossible.[71] To this should be added those cases – including in some short marriage cases – in which there are children of the family, save only (perhaps) if any assessment or order for child periodical payments is sufficient to meet needs and avoid undue hardship.

[69] The approach to bonuses identified by Mostyn J at (viii) is collected from the decision of Eleanor King J in the case of *H v W (Cap on Wife's Share of Bonus Payments)* [2013] EWHC 4015 (Fam), [2015] 1 FLR 75.

[70] See paragraph 63 (below)

[71] (Law Com No 343) *Matrimonial Property, Needs and Agreements* at [3.49] – the majority view expressed by the Judges of the Family Division.

Undue hardship

- **A clean break should not be achieved at the expense of a fair result**
- **There is a distinction between "undue hardship" and "hardship" and a payee might be expected to suffer a degree of hardship - not all reductions in the standard of living amount to undue hardship**
- **In assessing undue hardship the court is likely to draw a distinction between, for example, short childless marriages and marriages which are either long or involve children or both**

Undue hardship

59. Notwithstanding the 'clear steer' and 'powerful encouragement' towards a clean break in s.25A MCA 1973, as Baroness Hale made plain:

> *a clean break is not to be achieved at the expense of a fair result.*[72]

60. In *SS v NS (Spousal Maintenance)*, Mostyn J observed as follows:[73]

> *28… A term should be considered by the court unless the payee would be unable to adjust without undue hardship to the ending of the payments. This suggests that Parliament anticipated that a degree of not undue hardship in making the adjustment is acceptable.*
>
> *29…Unless undue hardship would likely be experienced the court ought to be thinking of providing an end date to a periodical payments order.*

61. Given that the statute recognises that some hardship is permissible, what amounts to 'undue hardship' is a matter for the court to assess. In this regard, the observations of Charles J in *H v H* are helpful:[74]

> *(e) the provision awarded should enable a gentle transition for the party who made the domestic contribution from the standard of living enjoyed during the marriage to the standard that she could expect as a self-sufficient woman (see Baroness Hale at paragraph 158, in*

[72] Ibid at [134]
[73] [2014] EWHC 4183 (Fam) at [28].
[74] [2007] EWHC 459 (Fam), [2007] 2 FLR 548 at [96(ii)(e)].

the context of the Miller case) and in my view the length of the marriage and the role of an ex-wife as the primary caretaker of the children of the marriage would be factors to be taken into account in determining the amount of the provision to meet that transition.

62. In a case involving a short (childless) marriage and/or one with a younger spouse, the court's assessment of what does or does not amount to 'undue hardship' might be different, for example:

(i) in *M v L*, Coleridge J said:[75]

42. Nowadays a young spouse at the end of a short marriage, and in the situation in which this wife found herself in 1973 (even with young children), would normally be expected to take proper steps to make him or herself financially independent to a significant extent within a reasonable time so that by the time the children were adult the requirement for support would have at least diminished if not wholly disappeared…

(ii) in *SS v NS (Spousal Maintenance)*, Mostyn J observed:[76]

30…It is hard to see how a relationship has generated needs in the case of a short childless marriage, although that is not impossible.

By contrast, as indicated, in *Murphy v Murphy*, Holman J observed as follows:[77]

[35] What, frankly, the arguments by the husband overlook is that the having of children changes everything. Of course this wife could never have expected a "meal ticket for life" on the basis of six years of marriage and two years of cohabitation if there had been no children….But the fact of having children, and their obvious dependence in this particular case on their mother for their care, changes everything, as I have said. The economic impact on this wife is likely to endure not only until they

[75] [2003] EWHC 328 (Fam), [2003] 2 FLR 425 at [42]
[76] [2014] EWHC 4183 (Fam) at [30]
[77] [2014] EWHC 2263 at [35]

leave school but, indeed, for the rest of her life.

Fixed or extendable terms: s.28(1A) MCA 1973

- **Where a term order is made the court must decide whether it is to be extendable**
- **Where a party seeks to extend the term the court must carry out a fresh analysis of need, but the reason for the imposition of the initial term is likely to be a relevant and possibly decisive factor**

Fixed or extendable term: s.28(1A) MCA 1973

63. If the court concludes that a "term order" is appropriate, it must also consider whether any such term should or should not be extendable. Section 28(1A) of MCA 1973 provides as follows:

> (1A) Where a periodical payments or secured periodical payments order in favour of a party to a marriage is made on or after the grant of a decree of divorce or nullity of marriage, the court may direct that that party shall not be entitled to apply under section 31 below for the extension of the term specified in the order

64. In *Fleming v Fleming*, Thorpe LJ stated that:[78]

> *12…the exercise of [the] power to extend obligations requires some exceptional justification*

on the basis that the payer had a reasonable expectation that his or her liability to make payment would come to an end. In *Miller v Miller; McFarlane v McFarlane* Lord Nicholls of Birkenhead and Baroness Hale of Richmond each accepted this set an applicant (i.e. to extend the term) a "high threshold".[79]

65. However, some first instance judges have taken the view that the reasoning underpinning the original order is key to a decision regarding variation. For example, in *SS v NS (Spousal Maintenance)* Mostyn J adopted the view that:[80]

> *44…An application by a payer to discharge and an application by a payee to extend should be*

[78] [2003] EWCA Civ 1841, [2004] 1 FLR 667 at [12]
[79] [2006] UKHL 24, [2006] 2 AC 618 at [97] and [155]
[80] [2014] EWHC 4183 (Fam) at [44]

decided by reference to the same principles. Charles J points out that "the reasoning behind the earlier order that a party seeks to vary is a relevant circumstance of the case, and therefore on an application to vary it can be assessed whether the purpose of the earlier order has been fulfilled and, if it has, this would be a relevant (and perhaps a decisive) factor in favour of refusing an extension or variation." [81] *Therefore, on an extension application an examination would have to be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve. Similarly, on a discharge application an examination would have to be made of the assumption that it was just too difficult to predict eventual independence. This is to state the obvious…*

Step down maintenance orders

- **When making a periodical payments order the court may impose future step ups or step downs of the amount to be paid to anticipate future changes in circumstances, for example an anticipated gain of employment**

Step down maintenance orders

66. Related to the issue of fixed term orders is whether the quantum of payments should reduce over the lifetime of the order, as the payee becomes more self-sufficient and/or to achieve a gentle transition down from the marital standard of living where that is not thought to constitute a proper level of provision for the payee in the longer term.

67. In *Murphy v Murphy*, Holman J observed as follows:[82]

22. The Matrimonial Causes Act 1973 does not itself make express statutory provision as to so-called "step down", although, of course, the flexibility and width of the language of section 23(1)(a) is such that a court can, as it routinely does, make orders for periodical payments which may go up or down at various defined points to reflect anticipated future circumstances and, in particular, anticipated gain of employment. It is, of course, the statutory duty of the court under section 25(2)(a) of that Act to have express regard not only to actual income but also

[81] See *G v G* [2009] EWHC 891 (Fam), [2009] 2 FLR 1322 at [104]
[82] [2014] EWHC 2263 at [22]

"earning capacity", and "including in the case of earning capacity any increase in that capacity which it would in the opinion in the court be reasonable to expect a party to the marriage to take steps to acquire." So undoubtedly in a situation in which the court is of the opinion that it would be reasonable to expect a party to the marriage to take steps to acquire an increase in his or her earning capacity, then that circumstance and opinion operates to influence future levels of maintenance and, most probably, some identified step down. But the court still has to form that necessary opinion.

Similarly, in *Aburn v Aburn* the Court of Appeal emphasised that in a 'needs' case, any future increase (i.e. step up) in the level of periodical payments must be justified on an informed basis, having regard both to the payer's ability to pay and to the payee's future needs at the time of any proposed variation.[83]

Factors to be taken into account

68. When considering whether to make a 'joint lives' or 'term order' for (spousal) periodical payments, with or without a 'section 28(1A) bar', we recommend that courts have regard (inter alia) to the following matters:

- age
- health and mobility
- relevant qualifications
- previous work experience
- length of time since last employment
- the opportunity to brush up, acquire skills or retrain
- cost and availability of retraining
- availability of work
- child care commitments and the daily routine
- age, health and any particular needs of a child/children or other dependants
- childcare options and cost
- realistic level of net remuneration
- availability of work related state benefits
- net financial gain after paying childcare and work related expenses
- the extent to which there has been pension sharing to take account of future needs

and finally

  - compatibility of working with caring for any children

[83] [2016] EWCA Civ 72 at [26] to [33]

- attributing an earning capacity in view of the length of the marriage and the ex-spouse's net remuneration and ability to pay.

69. Courts may find it useful to look at the guidance given in paragraph 3 on pages 40-41 of *Sorting out Finances on Divorce 2015*.

Annex 1: table of MCA 1973/CPA 2004 provisions

Provision	**MCA 1973 Part II**	**CPA 2004 Schedule 5**
maintenance pending suit / outcome	s.22	para 38
payment in respect of legal services	s.22ZA-22ZB	para 38A-38B
spousal periodical payments	s.23(1)(a)	para 2(1)(a)
secured spousal periodical payments	s.23(1)(b)	para 2(1)(b)
lump sum or sums	s.23(1)(c)	para 2(1)(c)
child periodical payments	s.23(1)(d)	para 2(1)(d)
secured child periodical payments	s.23(1)(e)	para 2(1)(e)
lump sum or sums for a child	s.23(1)(f)	para 2(1)(f)
transfer of property	s.24(1)(a)	para 7(1)(a)
settlement of property	s.24(1)(b)	para 7(1)(b)
variation of settlement	s.24(1)(c)	para 7(1)(c)
extinguishing or reducing interest in settlement	s.24(1)(d)	para 7(1)(d)
order for sale (etc.) of property	s.24A	para 11
pension sharing orders	ss.24B-24G	Part 4 paras 15-19F
matters to which the court is to have regard	s.25	Part 5 paras 20-22
'clean break' / terminating financial obligations	s.25A	para 23
failure to maintain	s.27	para 39
duration of spousal/civil partner orders	s.28	para 47
prohibition ('bar') on extension of term	s.28(1A)	para 47(5)
duration of child orders	s.29	para 49
Variation	s.31	paras 51
variation by capitalisation	s.31(7A)	para 53

Annex 2: annotated worked Examples

The annotated worked Examples below are taken from ***Sorting out Finances on Divorce*** which is intended to guide and assist litigants in person to understand the approach likely to be adopted by the court when addressing financial remedies. Courts dealing with litigants in person are encouraged to invite attention to ***Sorting out Finances on Divorce*** and to the worked Examples.

The annotated version below includes reference to reported cases relied on in formulating the possible outcomes set out.

This is an example of a *Mesher* order

Jade and Steve are in their early thirties and are getting divorced after being married for five years and having separated six months ago when Steve moved out. They have two children Mark (5) and Scarlett (3). Jade has not been working since Scarlett was born so that she can look after the children. Scarlett currently goes to nursery five mornings a week. Steve is working full time and earns £35,000 gross; he brings home £2,230 each month. Before the children came along, Jade was earning £22,000 working full time. She can earn £10,000 on part time basis, working 2½ days each week on Monday and Tuesday and on Thursday morning. Both her and Steve's mothers have agreed to look after Mark and Scarlett when Jade is at work. They have agreed that the children will continue to live with Jade and will still see Steve every weekend. The family home is worth £180,000 but is subject to an interest only mortgage of £120,000 which costs £400 per month. Steve's rent (for a two bedroom flat) costs £600 per month. When they separated Jade went to the CMS for child support and they have assessed that Steve should pay £398 per month.

https://www.gov.uk/calculate-your-child-maintenance

They have a joint debt on credit cards of £3,500. They both have cash ISA accounts: Steve's has £4,000 and Jade's has £2,800. Steve has a small pension connected with his work worth £5,000, but Jade has no pension savings.

Possible outcome

The children need to have a home. If the family home was sold, the mortgage discharged and the sale costs paid, there will be about £54,600 left. This is unlikely to be enough to enable either Jade or Steve each to buy a new home each, even with a mortgage. So, as the needs of the children must come first, this means that Jade and the children should probably continue to live in the family home. Steve will need to rent. After paying his rent and child support Steve is left with £1,238. Jade will not have to

pay tax on her earnings of £10,000 per annum and can qualify for Working Tax Credit (as she will be working more than 16 hours each week) and Child Tax Credit.

http://taxcredits.hmrc.gov.uk/Qualify/DIQHousehold.aspx

These benefits will provide Jade with about £367 each month and she will have her Child Benefit of £147.50 per month.

https://www.gov.uk/child-benefit-tax-calculator

So her monthly income will be about £1,350 plus the child support, so in total £1,748. It is fair that Jade's income is more than Steve's as she has the children with her most of the time, but the mortgage and other household bills have to be paid. It might be fair to suggest that Jade pays £300 and Steve pays £100.Then Steve will have available for himself £1,138 each month; Jade will have £1,448 for herself and the children.

Jade's claims for support for herself should not now be dismissed; because the children are so young and the future uncertain she should have a nominal order to last until Scarlett goes to secondary school.

It would make sense to pay off the credit card debt by using the ISAs. If they paid the debt 50/50, Steve would have £2,250 left over and Jade would keep £1,050. No pension sharing order would be required.

The home can be kept in Steve and Jade's joint names. It can then be sold when the children have both left school or are over the age of 18. It could be sold earlier if Jade remarries or perhaps was to live with somebody else as a couple. On a future sale the mortgage will be paid off and what is left can perhaps be divided as to 60% to Jade and 40% to Steve, a division in Jade's favour to reflect not only the continuing contribution she will make to the welfare of the family by caring for the children but also the impact that that will have on her earning capacity. Jade may then have to rent, as Steve has been doing.

This is an example of a reducing maintenance order illustrating the move to independence in a case based on need

Karen (49) and Sam (54) are getting divorced after being married 25 years. They have two children, Nikki (23) and Michael (20). Both now work full time, Karen having taken a career break from the NHS for 8 years from when Nikki was born until Michael went to primary school. Sam earns £40,000 per annum (£2,613 net per month) as a programme manager for their local NHS Primary Care Trust; Karen works as a medical secretary for her local GP practice, earning £17,500 a year (£1,238 net per month). Nikki lives away from home and is independent but Michael, who is in his last year at university, still lives at home. The family home is worth £240,000 and the mortgage will finally be paid off early next year. They have a joint loan of £8,000 that was taken out to help fund an extension to the house two years ago. Sam has a cash ISA account and some savings together worth £18,350 and Karen has £30,000 left over from an inheritance (of £40,000) she received when he mother died several years ago. They are both members of NHS Pensions although as Karen had her career break, Sam's is more valuable; they have therefore agreed to share the fund value of their pensions equally. It will cost each of them £145,000 to buy a more modest home.

Possible outcome

At the end of this long marriage the family home will need to be sold as each will need somewhere to live. On a sale, once the final mortgage payment has been made, the sale costs paid and the loan repaid, there will be about £224,800 left over. It would be fair for Karen and Sam to share this asset and Sam's ISA and savings equally, so there is £243,150 or £121,575 each. Sam and Karen will have to down size. One option would be for Karen to get £121,575 and keep her inheritance. Whilst this is not an inevitable outcome, it would enable her to re-house without a mortgage, which she will need to do because she cannot afford to pay a mortgage from her income. They have agreed to divide the fund value of their pensions equally.

On this basis, Sam will need a mortgage of £35,000. On a repayment basis at 4% over 15 years this will cost £268 per month. His take home pay is £2,613 each month so after his mortgage he will have £2,345.

Given the difference in their incomes it would be fair for Sam to pay some financial support to Karen until he retires. On this basis, and because Karen has kept her inheritance and has no mortgage, it is only fair on Sam that his support should be for a

limited period but long enough for Karen to adjust and make the transition to independence without undue hardship. Karen's take home pay is £1,238 each month.

Sam could pay maintenance to Karen for 5 years on a sliding scale; say £400 per month in the first year (Sam would have £1,945 / Karen would have £1,638); £320 each month in the second year (Sam £2,025 / Karen £1,558); £240 each month in the third year (Sam £2,105 / Karen £1,478); £160 per month in the fourth year (Sam £2,185 / Karen £1,398)and £80 a month in the fifth year (Sam £2,265 / Karen £1,318). Then maintenance could stop. Sam would be 60 and Karen 55 and they would be independent of each other before each retires.

This is an example of a maintenance order ending on retirement / a deferred clean break

Mary is 63 and Adrian is 59.They are getting divorced after being married for thirty three years. They have three children but all live away from home and are independent. Mary gave up work when she was pregnant with their first child and has not worked out of the home for 27 years. The family home, a three bedroom property which they have lived in for 19 years, was bought for £125,000 with a 25 year repayment mortgage of £100,000 and is now worth £260,000; there is now only £24,000 outstanding on the mortgage. Adrian and Mary both have cash ISA accounts worth £7,000 each. Adrian is self-employed and owns a shop in their town's high street (which is leased and has six years left on the lease)). Last year his income was £47,500, which is less than he has earned in the past. Business has suffered since a shopping mall was opened out of town five years ago. He has a substantial pension savings worth £300,000 in a scheme into which he has been paying throughout the marriage. Mary has no pension savings, but receives her state pension.

https://www.gov.uk/calculate-state-pension

Mary plans to move away from the town and live near their youngest child, who has just had a baby boy and who has asked Mary to help look after him. Adrian plans to move into a flat in the town, near his shop. Each believes they will need not more than £110,000 to buy somewhere new to live.

Possible outcome

Mary and Adrian have been married for a long time. The family home will need to be sold because it is their main cash asset and each will need the money to buy a new property, in Mary's case, near her daughter and in Adrian's case, near the shop. After paying off the mortgage and paying the sale costs, there will be £228,200. This can be

shared equally. Add the ISA they each have and each will have £121,000. This will meet their housing need.

Mary is a pensioner. She is active but has promised to look after their grandson. Her only income is her state pension of £490 per month, which she has received for the last two years. She will need to receive financial support from Adrian. Adrian has another six years work in front of him until he reaches 65 and retires. His income after tax and National Insurance is £2,992 per month. He will pay Mary maintenance. Were he to pay Mary £1,250 per month she will have this amount and her pension, in total £1,740 each month; Adrian will be left with £1,742 per month. The maintenance should continue until he retires. But what happens then?

Adrian's pension scheme will need to be shared now. It is as much of an asset as the family home. A pension sharing order can be made. If the pension is shared equally now, the maintenance he will be paying to Mary can stop when Adrian retires at 65. There will then be a clean break.

This is an example of an immediate clean break

Sally and Raj are in their early thirties and have been married for six years. They have no children and have been living in a flat that they bought together for £100,000 a year before they got married with an interest only mortgage of £80,000. The deposit of £20,000 came from Sally's savings of £5,000 and a £15,000 loan from Raj's father. They have decided to divorce. Their flat is now worth £125,000. They each work full time; Sally works as theatre nurse and earns £27,900 a year; Raj now works in IT for a small start up company (and was given a 15% shareholding in the company) and is paid a salary of £22,000 but can receive a discretionary bonus, which last year was £8,000. Sally has a credit card debt of £3,000, resulting from a holiday that she and Raj took last summer to try and "mend" their marriage. Raj has been repaying his father the money he and Sally borrowed to use towards the deposit and still owes him £5,500. Sally has savings of £900 and Raj has £3,750 left over from last year's bonus. Sally has her NHS pension. Raj has no pension provision but does own 15% in the company, although its value is unknown and has not been valued.

Possible outcome

Sally and Raj will need to sell their flat. Once the mortgage has been discharged and the costs of the sale have been paid, there will be about £41,250 left. Sally's credit card debt should be paid off since it was taken out for her and Raj to have their holiday. Raj's

father should also be repaid as the loan was made for both of them and has been repaid regularly throughout the marriage. That will leave them with £32,750 which they can share equally. This can be used for a deposit if either wants to buy or put in the bank should either decide to rent. Neither Sally nor Raj will need to pay maintenance to the other. Sally's monthly take home pay is more than Raj's, but he can get a bonus, as he did last year. Sally will keep her own pension and Raj will keep his shareholding. This will be a clean break. Each goes their own way.

This is an example of a joint lives order

Anne and Rob are in their mid-forties and have been married for 18 years. They have one child, Garry, who is 16 and has just done his GCSEs, who will live with Anne but see Rob from time to time, as Garry wishes. They live in a house bought ten years ago for £200,000 with a £150,000 repayment mortgage over 25 years. Their home is currently worth £300,000 with a mortgage debt of £100,000. They have both worked throughout their marriage. Rob currently earns £55,000 (and brings home £3,253 each month). Anne worked until the birth of Garry, took time out until he went to school and has worked three days a week since then. She earns £20,000 (£1,383 take home each month). Rob and Anne have agreed that Anne can and will return to full time work when Garry goes to university from when Garry will support himself from a student loan. Her income will then increase to £34,000 (£2,208 net each month). They each have cash ISAs, Rob's is worth £15,000 and Anne's £8,000, and a joint savings account with £10,000. Neither has a private pension. A new home for each of them will require each to have £150,000.

Possible outcome

It will be necessary to sell the home and release funds to enable each to purchase somewhere to live. The equity in their home will be about £191,000. If this was shared between Anne and Rob each would have £95,500. It would be fair to share equally the ISAs and the savings, in total £43,000, so that each then has £117,000. Both will need a small mortgage to buy and move into a new home, say of £40,000, On a repayment basis at 4% of 20 years this would cost each of them £242 per month.

Rob will pay to support Garry. Anne and Rob have agreed that Rob should pay £515 a month which is in line with the amount the CSA would assess as being payable.

https://www.gov.uk/child-benefit-tax-calculator

So Rob's available net income after the mortgage and for Garry will be £2,496.

Anne has her net monthly income of £1,383, will receive the child support of £515 and has also Child Benefit (£88pm) and can receive Child Tax Credit (£71 pm), in total £2,057 per month. However after her mortgage will have £1,815.

http://taxcredits.hmrc.gov.uk/Qualify/DIQHousehold.aspx

It would be fair for Rob to pay towards Anne's needs for the next two years and before her return to full time work. Were he to pay £400 per month he would be left with £2,096 and Anne would have for herself and Garry £2,215.

When Garry goes to university and Anne returns to work full time, her take home pay will increase to £2,208 but will no longer receive Child Benefit or Child Tax Credit. After her mortgage she will have £1,966 each month. In contrast Rob, no longer paying for Garry, will have £3,011 per month after his mortgage payment.

After a marriage as long as theirs it would not be unfair for Rob to continue assist Anne financially and, were this to remain at £400 per month, Anne would have £2,366 each month. These payments would continue until Anne remarried or until there was a change of circumstances, such as retirement, which would merit a review. The court is likely to view this as a fair outcome since Anne's future needs have been generated largely as a result of the choices which she and Rob made together during their marriage which resulted in the interruption of her full-time career whilst she cared for Garry. If, at some future point, the situation were to change so that the difference in their respective incomes was not so great (i.e. Rob's disposable income after Garry goes to university will be one third greater than Anne's), a court might take the view that the time had come to bring to an end Rob's payments to Anne (or at least to reduce them significantly).

	Authority	Description
***Mesher* Orders**	*Martin v Martin* [1977] 3 All ER 762 *Hanlon v Hanlon* [1978] 1 WLR 592	CA voiced disapproval of the universal use of Mesher orders. It was pointed out that this type of order simply stores up trouble for the future.
	Clutton v Clutton [1991] 1 All ER 340	CA decreed that where there is doubt as to W's ability to rehouse herself, on the statutory charge taking effect, then a Mesher order should not be made. However such an order did provide the best solution where the family assets are amply sufficient to provide both parties with a roof over their heads if the family home were sold, but nevertheless the interests of the children require that they remain in the matrimonial home.
	B v B (Mesher Order) [2002] EWHC 3106 (Fam)	HC declined to make a Mesher order in H's favour on the basis, inter alia, that such an order would leave W in fear of observation by H to see whether he could realise his charge. This reasoning was found to be unsustainable on appeal, however, a Mesher order remained inappropriate because W's realistic prospects of being able to generate capital of her own between now and the date when one of the Mesher triggers would operate was small, whereas there was every reason to believe that H would generate such capital. This inequality of outcome was brought about by the fact that W would have to devote years to bringing up the child. That was a very substantial future contribution to the marriage which would not fairly be recognised and reflected in the award if it were subject to a Mesher order.
	V v V (Prenuptial Agreement) [2011] EWHC 3230 (Fam)	An appeal before Charles J: should a Mesher order have been made? H was 10 years older than W and worked as an investment banker while W was a full-time mother to their two children,

		now aged 9 and 6. The marriage came to an end after 3 years at which time W and children remained in the matrimonial home in London and H, who had been made redundant, found employment and moved to Milan, earning a significantly lower salary. In the financial proceedings W was awarded a lump sum of £800,000 and global periodical payments of £30,000. H was left with £489,000 of non-pension capital as well as his income and prospects. Overall he received 42% of the assets including his pension. The suggestion of a Mesher order was rejected on the basis that H had a greater earning capacity than W and was likely to get a better paid job. H appealed, claiming that the judge had erred in not making a Mesher order. The appeal was allowed and a Mesher order was granted of 35.83% over W's property in favour of H inclusive of 2.5% in respect of H's costs on appeal –
	Mansfield v Mansfield [2011] EWCA Civ 1056	H received £0.5m compensation from a personal injury claim prior to meeting W. He invested the money in a bungalow which subsequently became the matrimonial home and an investment flat which he let out for rent. The bungalow was adapted to meet his special needs, partially funded by £30,000 from the sale of W's pre-marital flat. H and W were married, including a period of cohabitation, for 6 years and had 4-year-old twins. Upon separation W was awarded £285,000 to provide a home for herself and the children. If the award could not otherwise be met, H was ordered to place the bungalow on the market for sale. H appealed, seeking a lower award for W and the possibility of a Mesher order. The appeal was allowed and the order was converted to a Mesher order with a 1/3 reversionary interest to H to be redeemed upon the children's maturity.

Reducing maintenance order	*Murphy v Murphy* [2014] EWHC 2263 (Fam)	Holman J refused to order a "step down" in spousal maintenance where a wife's future earnings were unknown. W aged 42 was primary carer of young twins (aged c. 2 years old). The parties cohabited since 2005, married in 2007 and separated in 2013. In the circumstances it was not appropriate to place a limit on the duration of periodical payments. W was in a precarious financial provision without support from H and with the responsibility of raising their two children. She had very little capital and an uncertain earning capacity.
	SS v NS (Spousal Maintenance) [2014] EWHC 4183 (Fam)	The parties' open positions were as follows: • H: £24k p.a. for 12 mths, reducing to £18k p.a. for 5 yrs, then £12k p.a. for 6 yrs; then termination with s.28(1A) bar; plus 20% net cash bonus for 3 yrs capped at £18k p.a. • W: £60k p.a. for 27 years, extendable; plus 30% net bonus (after school/univ fees) capped at £70k p.a., without time limit Mostyn stated that *"Neither of these proposals is reasonable"*. H was ordered to pay from his base salary £30k in spousal maintenance (+ £22.5k in child maintenance and £65k school fees). The order left H with £52.5k of his base salary. There was an 11-year extendable term until the youngest child attained 18 years of age.
	Wright v Wright (2008, unreported)	Highly publicised permission to appeal case in 2015. The 2008 Final Hearing was before DJ Cushing. In essence the Judge found that: • No PP's step-down *"because I would need to have confidence in the precise earning capacity she has before I could justify stepping down... A step down is not to be used as a stick…"* • But *"there is a firm expectation that she will use her best endeavours to develop her earning capacity in 2-3 years' time to the*

		extent that is compatible with [the children's] care"
Maintenance order ending on retirement/deferred clean break	*H v H* [2014] EWHC 760 (Fam)	This case looked at when a former spouse can stop paying maintenance, and whether there should be a final lump sum payment to (in part) capitalise the maintenance. H had been paying a significant yearly amount to his first wife. He had remarried and had two young children with his second wife, who had tragically been diagnosed with terminal cancer. It was H's firm intention to retire from his well-paid job when his wife passed away, to look after his two young children. He therefore applied to end the maintenance payments to his first wife. W had been able to save money from the maintenance already received, and the court looked at the income generating potential of those savings. Looking at W's income needs for the rest of her life, and what she could provide herself, the judge ordered that the maintenance would end when H retired, and he should pay a lump sum of nearly 3 years' maintenance at that point to discharge the obligation for good.
	L v L (Financial Remedies: Deferred Clean Break) [2011] EWHC 2207 (Fam)	Eleanor King J considered that this case "cried out" for a term order. It was a 10-year marriage with aged children 12 and 9. W owned a £2m farm and worked in fashion. She had minimal income. H earned £82k pa net. The Judge made a joint lives global maintenance order at £47.5kpa. On appeal, this was reduced to a term of 2.5 years with a s.28(1A) bar, and to £30k pa (+£10k in child maintenance).
	SA v PA (Pre-marital agreement: Compensation) [2014] EWHC 392 (Fam)	This case is an example of the court looking to achieve a clean break over a much shorter period in a high income case through a combination of factors such as awarding the recipient spouse a higher level of maintenance than their assessed income needs in the expectation that the surplus will be saved and used as

		a partial income generating fund once the term has ended. It included not only commencement of pension drawdown in the years ahead but also further investment income becoming available to the recipient spouse through equity release by downsizing her home once the children reached a certain age or the parties reach retirement age. On the latter, the court appears to accept retirement as being significantly lower than statutory pension age for those working in professional firms.
Immediate clean break	*Matthews v Matthews* [2013] EWCA Civ 1874	W's application for permission to appeal was refused by the Court of Appeal. This was a short marriage in which there were two children (aged 6 and 3) who predominantly lived with W. H earned c. £27k pa. W earned c. £42kpa but had been made redundant. Mostyn J estimated her earning capacity at £40k pa. A clean break was upheld; no nominal order was made on the basis that W's earning capacity was higher than H's.
	A v L (Departure from equality: needs) [2011] EWHC 3150 (Fam)	Moor J considered on appeal an extendable term order that had been made in favour of W who was also receiving the lion's share of the proceeds from the sale of the family home. Moor J was of the view that the district judge should have given clear reasons for the departure from equality because he had not articulated how the capital division would meet the needs of both H and W. Furthermore, there was no explanation of the interplay between the division of the capital and the periodical payments order. Moor J therefore ordered an immediate sale of the house with the clean break taking place upon sale of the property as opposed to five years into the future.
	D v D [2010] EWHC	Charles J considered that a clean break

	138 (Fam)	should not to be achieved at the price of fairness and must represent a result that in all the circumstances was fair. The "*crucial questions*" came down to whether the advantages of a clean break to the parties would lead to a result in which W would be limited to an award below, or at the bottom of, the fair range, or H would be required to take a very high risk to raise and distribute sufficient funds through the company to meet the award and for the company to still survive. Consequently, he concluded this would be the case if a clean break was to be made and so would not be a "fair clean break" in all the circumstances. Accordingly, W was awarded a lump sum (including the former matrimonial home) and periodical payments.
Joint lives order	*C v C (financial relief: short marriage)* [1997] 2 FLR 26	The marriage lasted nine-and-a-half months and led to the birth of a child. H was ordered to pay periodical payments for joint lives at a high level. Ward LJ stated it was inappropriate to say that, because this was a short marriage, therefore a term must be imposed upon the maintenance. Ward LJ was clear that the court cannot form its opinion that a term is appropriate without supporting evidence. The evidence must justify a reasonable expectation that W can and will become self-sufficient. There was so much uncertainty in W's position that it would not have been appropriate to impose a term. It was always possible for the appellant to seek a variation in the future.
	SS v NS (Spousal Maintenance) [2014] EWHC 4183 (Fam)	Mostyn J held that: • *"A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. A degree of (not undue) hardship in making the adjustment is*

		acceptable" • *"if the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former"*
	Murphy v Murphy [2014] EWHC 2263	See above regarding 'step down' refusal. Holman J stated that: • *"the having of children changes everything… The economic impact on this wife is likely to endure not only until they leave school but...for the rest of her life…I do not know, nor do the parties know, what the future will bring…it is frankly impossible for me to form the opinion that s.25A(2) requires as the trigger to then making a term order"* In the circumstances it was not appropriate to place a limit on the duration of periodical payments. W was in a precarious financial provision without support from Hand with the responsibility of raising their two children. She had very little capital and an uncertain earning capacity. The consent order would remain in its current form but with a clear recital expressing W's clear desire and intention to obtain the best paid work that she reasonably could.

Annex 3: Pensions

One aspect of "need" which will arise in most divorces is the need for income in retirement. The need will be more acute for parties approaching or past retirement age, but even for younger parties this need will be seen by the courts as being "in the foreseeable future" for the purposes of MCA 1973, section 25(2)(b) and the court is also required by section 25(2)(h) to consider the widow's pension rights which will be lost on divorce.

The orthodox view, encouraged by *Martin-Dye v Martin-Dye* [2006] 2 FLR 901, has been that meeting the need for income in retirement should primarily be achieved by way of a pension sharing order. The orthodox logic has been that pensions (being a sui generis species of future income stream) should be dealt with separately and discretely from other capital assets.

In bigger money cases, where needs are comfortably met, the courts are now likely to be less interested in drawing a distinction between pension and non-pension assets than hitherto. This is partly because other assets will also be deployed for income production so the distinction is less obvious, but more because the "pension freedoms" introduced by Taxation of Pensions Act 2014, as a result of which those aged 55 or above have the option of cashing in some categories of pension scheme, have blurred the dividing line between cash and pensions and in such cases the trend is now to treat pensions as disposable cash assets, thus disregarding their income producing qualities: see *SJ v RA* [2014] EWHC 4054 (Fam) and *JL v SL* [2015] EWHC 555.

In small to medium money cases, however, where needs are very much in issue, a more careful examination of the income producing qualities of a pension may well be required in the context of assessing how a particular order can meet need. The need to avoid the possibly punitive tax consequences of cashing in a pension may be more important in these cases and the mathematical consequences of making a pension sharing order (for example because of an external transfer from a defined benefit scheme to a defined contribution scheme or the loss of a guaranteed annuity rate) can be unexpected and often justify expert actuarial assistance: see *B v B* [2012] 2 FLR 22. In cases where state pension income is an important component of meeting need, the complicated changes introduced in April 2016[84] provide additional justification for expert pension evidence.

In cases where (for whatever reason) a court wishes to set off the value of a pension against other assets the methodology to be utilised is uncertain[85]. Where needs are the dominating factor, ensuring that the outcome of any offsetting capital provision is understood, in terms of what the parties will each receive in income terms, will be critical and the court may often be assisted by expert pension evidence.

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[84] In particular the phasing out of the additional state pension with the related transitional arrangements, the introduction of a single tier state pension and the abolition of substitution of National Insurance contribution records on divorce.

[85] The authors of "Apples or pears? Pension offsetting on divorce", Family Law, December 2015 at p.1485 were unable to suggest a reliable working formula to cover all cases and in *JS v. RS* [2015] EWHC 2921 (Fam) the process was described as "necessarily arbitrary". In *WS v WS* [2015] EWHC 3941 (Fam), where the issue had to be addressed on its particular facts, the court utilised Duxbury tables in its calculations, but this may not be the right answer in all cases.

The guidance set out in *Sorting out Finances on Divorce* and in *A survival guide to sorting out your finances when you get divorced* includes excellent information on the options and issues, which may be particularly helpful to direct to litigants in person appearing before the court, but also to judges in considering the case studies and the key issues.[86]

[86] *Sorting out Finances on Divorce* at pages 42-47; *A survival guide to sorting out your finances when you get divorced* at pages 41-49

Annex 4: practical examples of different types of need

The table below provides some examples of awards for particular 'needs' ranging from the commonplace to the more unusual.

Main home	'Homes are of fundamental importance and there is nothing more awful than homelessness' per Thorpe LJ in Cordle v Cordle [2001] EWCA Civ 1791, [2002] 1 FLR 207 at [33] M v B [1998] 1 FCR 213 (at 220) B v B (Mesher Order) [2003] 2 FLR 285 Elliott v Elliott (2000) EWCA Civ 407, [2001] 1FCR 477
Removal expenses, improvement and decoration works	B v B (Financial provision) [1989] 1 FLR 119 Conran v Conran [1997] 2 FLR 615
Furniture for a home	P v P (Financial Provision [1989] 2 FLR 241 F v F (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45
Discharge of debts: **bank overdraft**	'Nevertheless it is easy to accept in general terms that it is for the benefit of a child that a home-maker for her (or him) should not remain encumbered by debt, although of course it has always to be fair to expect the other parent to shoulder it' per Wilson LJ in Radmacher (formerly Granatino) v Granatino (pre-nuptial contract) [2009] EWCA Civ 649, [2009] 1 FLR 1566, CA. Luckwell v Limata [2014] EWHC 502 (Fam); [2014] 2 FLR 168 B v B (Financial provision) [1989] 1 FLR 119 North v North [2008] 1 FLR 158, CA the husband was <u>not</u> liable for needs created by the wife's financial mismanagement and irresponsibility
Promoting the opportunity to work by provision for course fees or retraining	'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' per Thorpe LJ in Cordle v Cordle [2001] EWCA Civ 1791, [2002] 1 FLR 207at [33]
Periodical payments paid at a rate in excess of meeting needs in order for capital to be accumulated to provide a clean break	Parlour v Parlour [2004] 3 All ER 921, CA McFarlane v McFarlane [2009] EWHC 891 (Fam); [2009] 2 FLR 1322 per Charles J
Car purchase	B v B (Financial provision) 1989 1 FLR 119

	Radmacher (formerly Granatino) v Granatino (pre-nuptial contract) [2009] EWCA Civ 649; [2009] 1 FLR 1566, CA
Second and third homes	Conran v Conran [1997] 2 FLR 615 F v F (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45
Funding a hobby	S v S [2008] 1 FLR 113 award to fund the keeping of horses upheld by Sir Mark Potter P.
Contingency fund for unforeseen expenses	P v P [2004] EWHC 1364 (Fam), [2005] 1 FLR 576, per Munby J at 590 [47] McCartney v Mills McCartney [2008] EWHC 401 (Fam), [2008] 1 FLR 1508
A war chest: **to fund future proceedings to recover abducted children** **to defend satellite litigation in a foreign jurisdiction** **Legal costs of relocation proceedings**	Al Khatib v Masry [2002] 1 FLR 1053 J v C (disclosure: offshore corporations) [2004] 1 FLR 1042 Minwalla v Minwalla [2005] 1 FLR 771 Radmacher (formerly Granatino) v Granatino (pre-nuptial contract) [2009] 1 FLR 1566, per Wilson LJ.