

When fair means unequal

How do you maximise your chances of a successful economic advantage/disadvantage, or special circumstances argument in a financial provision claim? **Tom Quail** and **Ailidh Ballantyne** draw some lessons from the case law

The starting point for the sharing of matrimonial property is an equal sharing (Family Law (Scotland) Act 1985, s 10(1)), unless there are special circumstances, as set out in s 10(6).

Section 9(1)(b) is the principle that the court shall take fair account of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either in the interests of the other or the family.

This subsection needs to be read in conjunction with s 11(2), by which regard must be had to the extent to which:

- (a) the economic advantages or disadvantages sustained by either person have been balanced by the economic advantages or disadvantages sustained by the other;
- (b) any resulting imbalance has been or will be corrected by a sharing of the value of

the matrimonial property or the partnership property or otherwise.

I propose to look at some cases in which there have been arguments made for a s 9(1)(b) claim, some of which have been successful, some of which have not, and also in relation to special circumstances.

Case law under s 9(1)(b)

Cunningham v Cunningham 2001 Fam LR 12

An argument was put forward that Mrs Cunningham had interrupted her career to care for the children for a six year period and had suffered an economic disadvantage in the interests of the family.

The judge said that the argument was not particularly strong. He went on to say that an argument which had not been put forward which was, in his view, stronger, was that if she had not taken time out from

her career, she would have been in a more advanced position. However, the evidence did not enable that claim to be quantified, and Mrs Cunningham had not demonstrated any quantifiable economic disadvantage. No award was made.

Cunniff v Cunniff 1999 SLT 992

This was a long marriage case. Matrimonial property, however, was only £41,121.

Mrs Cunniff had given up work shortly after marriage to look after the three children. Her husband had continued to work in different parts of the world and gain qualifications. The judge indicated that albeit there was no vouching of economic disadvantage, he was entitled to conclude that there was a resulting imbalance that should be corrected in terms of s 11(2)(b).

In this case, Mrs Cunniff received all the matrimonial property. The judge took the view that Mr Cunniff had knowingly and





deliberately gambled by asking the court for a half share of the house. At proof, he came across as evasive and had, in the judge's view, intentionally diminished his resources. The judge ordered him to transfer his half share, even though he faced bankruptcy.

While this is an extreme case, it reminds us that if you take an extreme (unfavourable) position, either in negotiations or litigation, you could end up with an extreme outcome.

Coyle v Coyle 2004 Fam LR 2

This pre-2006 Act case is, perhaps, the most helpful in which there was evidence before the court as to quantification of the claim.

Mr & Mrs Coyle had been married for 20 years. They had three adult children. Matrimonial property totalled £1.2 million. Mrs Coyle previously worked with British Airways earning £30,000 per annum, with fringe benefits totalling an additional £10,000. Had she continued working,

she would have been able to retire about age 55 on a gross annual pension of £28,000-£30,000. Instead she ran the house and cared for the children while her husband worked long and unsociable hours.

The judge "compensated" Mrs Coyle by granting her a property transfer order of the family home based on its value at the date of separation (£270,000). By the proof, the equity value had increased to £500,000. The increase of £230,000 compared to the total matrimonial property was 20%. The judge indicated that if an equal sharing could only have been achieved by a cash payment then Mrs Coyle would have been provided with a further substantial cash sum, as there was a clear imbalance arising from an economic disadvantage which required to be addressed.

The fact of economic disadvantage was not disputed, but different arguments on

quantifying it were put forward on both sides, by reference to the Ogden Tables (a basis for assessing personal injury claims in England) and Duxbury Tables (a basis for assessing ancillary relief claims there). Using these, the economic disadvantage was variously assessed as between £309,000 and £480,000. The judge, in considering the award to Mrs Coyle, did make reference to the Duxbury Tables.

Case law under special circumstances

Jacques v Jacques 1997 SC (HL) 20

The major item of matrimonial

property in this case was a house purchased by the parties in joint names for £30,000, bought with the sale proceeds of a house which they had occupied before their marriage, title to which had been in the husband's sole name. The matrimonial home was in joint names. That house required repairs, which were financed from the prior sale proceeds and a bank loan. At date of proof, its value had increased to £55,000; the loan outstanding was £5,000.

The husband put forward as arguments of special circumstances, the extent of his contribution to the purchase and renovation of the home (s 10(6)(b)), and the use made of the home, and to be made in future by him, as a bed and breakfast business (s 10(6)(d)).

The House of Lords indicated that the argument for unequal sharing was an afterthought which had not been focused and did not feature in the lower courts, and decided that there should be no departure from equal sharing. This case is authority that even if special circumstances exist, it is not a given that they result in unequal sharing. However, this was a low value case, the special circumstances argument was an afterthought, and the funds had been put into a family home.

Campbell v Campbell [2008] CSOH 11

Albeit Mr & Mrs Campbell had been married for 16 years, Mr Campbell was able to produce a schedule of assets of what he owned at the date of marriage. As adjusted, this showed net assets of £1.45 million. During the marriage he sold his pharmacy business for £3 million net of tax. At the date of separation, matrimonial property totalled £3.6 million.

The court found that the matrimonial property having been in very large measure assets which Mr Campbell had at the date of marriage, special circumstances existed. Mrs Campbell was awarded £900,000. On one level this was 25% of the matrimonial property. On another level it was equal sharing of matrimonial property which had come into existence between the date of marriage and date of separation.

Had Mr Campbell not been able to produce his schedule, it would have been more difficult for his argument of special circumstances to succeed.

B v B 2012 Fam LR 65

The couple married in 2000 and separated in 2010. As in *Campbell*, the husband was able to vouch his assets at the date of marriage, as £195,000. It was also established that the wife had no assets at the date of marriage. Matrimonial property at the date of separation was £520,000.

As at that date, the husband's pension had a value of £73,000. However, based on an actuarial report accepted by the court, only about £8,500, or slightly more than 10%, was contributed during the marriage.

The court also referred to the approach in *Jacques and Cunningham* that the special circumstances argument should not apply with the same force to funds applied to the family home as to other assets. While not approving that approach, the judge did not disagree with it. However, it was accepted that special circumstances applied and the wife received £185,000, or 35% of the matrimonial property.

Harris v Harris 2013 Fam LR 122

This is the most recent case. Mr & Mrs Harris married on 6 February 1988. They had three children. They separated after almost 21 years on 5 January 2009.

Matrimonial property at the date of separation was £478,000. The husband's mother had loaned £10,000 towards the purchase of the family home. During the marriage, the wife inherited £125,000 from her parents and put £78,000 into a joint savings account offsetting the mortgage in March 2007, and £30,000 in May 2008.

The judge found there were special circumstances and ordered the husband to pay a capital sum of £65,673, which would take account of the inherited funds put into the joint account. The source of funds argument in respect of the husband's gift of £10,000 would be balanced against the economic disadvantage the wife suffered.

The case deals with a special circumstances and an economic disadvantage argument. Sheriff Morrison, having considered the authorities, noted the following points about source of funds arguments under s 10(6)(b):

- The broad policy underlying s 9(1)(a) is that

equal sharing applies to the fruits of the efforts of the parties during the marriage.

- The justification for unequal division will be very strong where matrimonial property is to a substantial extent derived from the funds of one party before marriage, or assets are acquired by inheritance or gift or remain outside the common wealth of the family. It may be relevant that one party retains title to matrimonial property acquired from that party's inherited funds.

- A relevant factor will be that matrimonial property was derived from a business carried on by one of the parties.

- The point at which the contribution of funds was made may be relevant, as may the length of the marriage. The longer the marriage and the earlier the inherited or gifted funds were contributed, that may not favour the application of the source of funds.

- The extent to which the parties regarded the inherited money used to purchase matrimonial property as part of the general family funds may be relevant.

- There is no requirement that the sum paid in is the sum to be paid out on equal sharing.

The matrimonial home in this case was the only significant asset. The inherited funds, although used for the benefit of the family, were not used to purchase the family home, and were paid into the account only in the last two years of the marriage. Accordingly, Mrs Harris was re-credited with the funds.

Mrs Harris's agents argued alternatively that an argument for unequal sharing by virtue of s 9(1)(b) should apply. Mr Harris had benefited to the extent of £62,500 from Mrs Harris's inherited funds. Mrs Harris had been disadvantaged to that extent. While accepting that the argument is less clear cut, more problematic and more difficult to quantify, there was no reason why Mrs Harris could not argue that her inheritance resulted in an economic advantage to Mr Harris. It was, however, an alternative argument, not an additional argument.

The sheriff accepted that, in addition to being entitled to a re-credit of the inherited wealth, Mrs Harris had suffered an economic disadvantage by being homemaker and primary carer and that that would not be balanced by an equal sharing. However, he had nothing to guide him in assessing the monetary value of the disadvantage to reach a view about an appropriate compensating payment. All he could do was "make a stab in the dark about an appropriate compensatory figure". He compensated Mrs





Harris by not re-crediting Mr Harris with the £10,000 loan from his mother.

Constructing an argument

While it is helpful to emphasise the law and to look at the interpretation of the statutes through case law, these have to be brought together in presenting an argument to another party and/or to the court.

The following points can be gleaned:

- It is important to put forward averments for unequal sharing in your pleadings or set out your position in correspondence. If you do not, you will not succeed and equal sharing will apply.
- You should provide evidence to support your averments. In a s 9(1)(b) case, quantify your claim as in *Coyle*, or obtain a report from an employment consultant or use a multiplier of net wage loss and also loss of pension provision. *Campbell, Davidson, B* and *Harris* emphasise the importance of vouching your averments and providing evidence of pre-marriage assets, particularly the actuarial report in *B*.
- Do not rely on the judge, on either argument, as in *Cunniff* or *Harris*, to do the work for you.
- Make your claim reasonable. Do not inflate it. *Campbell* is a good example of the

importance of doing your arithmetic in a special circumstances claim.

- What is clear from the cases is that the special circumstances argument is more likely to result in a departure from the equal sharing principle than a claim under s 9(1)(b). That may well be because s 9(1)(b) is more difficult to quantify, or because of the absence of guidance given to sheriffs and judges. Part of our task is to put forward arguments.
- Special circumstances are less likely to succeed in relation to the sharing of the family home, as evidenced by *Jacques, Cunningham* and *B*.
- The length of the marriage in a s 9(1)(b) or special circumstances claim, if there are children, particularly of school age, can be of significance: *Cunniff* and *Harris* are authority.
- The length of the marriage and the date of a contribution, or gifted or inherited funds, are relevant.

A well-constructed argument is more likely to succeed with a court and to persuade an opponent

- Make an assessment not only of your client, but the client you are not representing. Mr Cunniff and Mr Coyle did not come across well in court.
- The judge has significant discretion in making awards of financial provision which is very difficult, if not impossible, to appeal. If your argument is successful the benefit to your client can be significant. In the *Coyle* s 9(1)(b) case, Mrs Coyle received an additional £230,000. In the *Campbell* special circumstances case, by putting forward the argument instead of equal sharing of £1.8 million, Mrs Campbell received £900,000. If you do not make the argument, you are likely in the future to be asked some serious questions.

We are dealing with a fair sharing of matrimonial property. If an equal sharing seems unfair, put forward an argument as to why it should be shared unequally in your favour. A well-constructed argument is more likely to succeed with a court and more likely to persuade an opponent to reach an agreement. Use the discretion to your advantage.

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