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The Question:

Special circumstances

If a business is commenced pre-marriage but during cohabitation, when will "special circumstances" arguments be successful in securing a share for the non-owning party?

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Does anyone think this is an odd question?

- Why?
- Well – one reason is there is a very brief answer
  - NO!
- But in earnest: it is odd because it confuses a number of factors in the proper analysis of a matrimonial case
- It starts, as a headline, with "special circumstances"
- But it talks of (a) "pre-marriage but during cohabitation" (b) and "securing a share"

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Back to Basics

What I will cover

A. Case Analysis
B. The 1985 Act vs 2006 Act
C. 1985 Act – steps or stages in the analysis
   i. Stage 1
   ii. Stage 2
   iii. Stage 3

You can have more or less steps or stages, I am not creating an algorithm here – the point is that there are steps you have to take and not just go straight to special circumstances

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A. Case Analysis

- One of the issues with this question – case analysis is all wrong
- Never under-estimate the importance of a good analysis of any client's case
- If a client consults you about divorce you take details of the matrimonial assets and liabilities
- This is the first step, the **stage 1** task: identify if an asset is matrimonial property
- **Stage 2** is where you get a value of the asset, proportioned over the period of marriage if necessary
- **Stage 3:** the principles of s. 9, including special circumstances: economic disadvantage, source of funds and so on
- Do not forget **this order** of analysis

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B. 1985 Act vs 2006 Act

- This might be quite basic and potentially insulting to your intelligence but…
- The 2006 Act deals with cohabitation – s. 28 and s.29
- There is a question of **status** as between cohabitants falling under the definition in s. 25 and married couples
- No interplay between the Acts
- This question talks of the breakdown of a **marriage**
- **Therefore 1985 Act**
- **So – we'll look at the stages of analysis**

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C. 1985 Act

i. Stage 1

- **What is the extent of the matrimonial property?**
- If one spouse had an existing business pre marriage and it is not “transformed” during the course of the marriage then it is not part of the matrimonial pot.

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Matrimonial Property

- Family Law (Scotland) Act 1985: s. 10(4):

(4) Subject to subsections (5) and (5A) below, in this section and in section 11 of this Act *"the matrimonial property"* means all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)—

(a) before the marriage for use by them as a family home or as furniture or plenishings for such home; or

(b) during the marriage but before the relevant date.

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"Transformation"

- It is recognised that property owned by one spouse pre-marriage can be transformed into matrimonial property.
- However, courts are careful about the extent to which a transformation can be effective
- *Whittome v Whittome (No 1)* 1994 SLT 114
- *Watt v Watt* 2009 FamLR 62

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General judicial trend?

- I am not going to list all the cases
- Alison Edmondson has a talk later where she will focus on s. 9(1)(b) special circumstances
- But from my perspective can I endorse Alison's article on *Jack v Jack: multi-generational business and financial provision on divorce* – Edin. LR 2017, 21(2), 286-293

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- "[T]here is evidence of a judicial preference to exclude from the matrimonial property valuable business interests built up outside the marriage but which risk falling into the pool by reason of technicality rather than principle." (p. 290)

- **BUT REMEMBER - At the moment we are only on stage 1 – is this a matrimonial asset at all**

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Stages 2 and 3

- ***ii.*** ***Only*** if a business is in the matrimonial pot or pool do we get on to **stage 2**
  - Valuation of asset – maybe apportion it
  - This is where, for businesses, we may need experts
- **iii. Stage 3**. - s 9(1)(a)

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iii. Stage 3

9.— Principles to be applied.

(1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that—(a) the net value of the matrimonial property should be shared fairly between the parties to the marriage or as the case may be the net value of the partnership property should be so shared between the partners in the civil partnership

- It is only at this stage that we get to special circumstances
- And also – NB share of the pot or pool, not necessarily a “share of the asset itself”
- Basic I know, but in answering the question posed I have had to go to the basics. No harm in doing so every now and then I believe.

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Conclusion: Why do I labour the basics?

- There are some trips out there for us all
- But also, I have had experience of some solicitors not covering the basics with clients
- This will not apply to any of you, if you are here for one thing you take an interest
- Just as an example: this question talks of a “share” of the asset
  - If say a pension, it need not be a share it could be offset
  - Same with business interests (if they are matrimonial property)

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