

**When should the court
depart from "fair sharing"
being "equal sharing"
because of economic
advantage or disadvantage
or special circumstances?**

WELCOME TO CLARITY

Lucia Clark

6 December 2016

SPECIAL

CIRCUMSTANCES

- Section 10(1):

“In applying the principle set out in section 9 (1) (a) of this Act, the net value of the matrimonial property shall be taken to be shared fairly between the persons when it is shared equally or in such other proportions as are justified by special circumstances.”

Section 10(6): SC may include:

- (a) the terms of any agreement between the parties on the ownership or division of any of the matrimonial property;
 - (b) the source of the funds or assets used to acquire any of the matrimonial property where those funds or assets were not derived from the income or efforts of the parties during the marriage;
 - (c) any destruction, dissipation or alienation of property by either party;
-

Section 10(6): SC may include:

- (d) the nature of the matrimonial property, the use made of it (including use for business purposes or as a matrimonial home) and the extent to which it is reasonable to expect it to be realised or divided or used as security;
 - (e) the actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce
-

Existence of special circumstances does not require unequal division:

- Jacques v Jacques 1997 SC (HL) 20

“I find nothing in section 10 which requires an unequal division whenever special circumstances are found to exist. ... it is not enough simply to identify some special circumstance in order to depart from an equal division. An unequal division must be justified by those circumstances.”

But Court likely to find unequal division justified?

Summary of law:

- Harris v Harris 2013 Fam LR 122



If contribution from non-MP is large (proportionate to the overall MP), unequal division is more likely:

- Davidson v. Davidson 1994 SLT 50
 - Robertson v. Robertson (7 Dec 1999)
 - Campbell v. Campbell 2008 FamLR 115
 - M v M 2014 Fam LR 116
-

If marriage is short, unequal division is more likely:

- Davidson v. Davidson 1994 SLT 50
 - Kerrigan v. Kerrigan 1988 SCLR (Sh Ct) 603
 - White v White 1992 SCLR 769
-

Matrimonial home is (probably) not different:

Contrast Cunningham v. Cunningham 2001
Fam LR 12 with:

- Langlands v Barron (Edinburgh, 6 Sept 2006, unreported)
 - Harris v Harris 2013 Fam LR 122
 - EP, G v GG [2016] CSOH 32
-

Legal title may be a factor, but one among many:

Contrast

- EP, G v GG [2016] CSOH 32 (Lady Wolffe)

with

- BP v RMP [2016] (Sheriff Mann)
-

A gift does not equal dissipation under 10(6)(d):

- EP, G v GG

“s10(6)(d) of the Act should not be used as a means to penalise the generous”

How to award SC:

- Proportion of total pot?
 - Used in earlier reported cases (e.g. Robertson, Campbell)
 - More broad brush
 - Used where other balancing considerations in the mix (e.g. 9(1)(b))
-

How to award SC:

- Clawback of original contribution?
 - More forensic approach
 - Asset by asset basis
 - What about uplift taking into account increase in value?...
Compare with pre-nup approach?
-

Economic advantage/disadvantage

Section 9(1)(b):

- *“fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family”*
-

Section 11(2)

“the court shall have regard to the extent to which:

- *the economic advantages or disadvantages sustained by either person have been balanced by the economic advantages or disadvantages sustained by the other person;*
 - *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”*
-

Economic disadvantage often held to be balanced out by other advantages received:

- Welsh v Welsh 1994 SLT 828
- Adams v Adams (No 1) 1997 144
- Parker v Parker [2014] CSOH 159
- Jack v Jack [2015] CSOH 91

See Clive para 24.058 – still the case?

No “personal injuries” approach to 9(1)(b)....yet?

- Coyle v Coyle 2004 Fam LR 2
 - *“I do not accept that it is appropriate to approach the application of the economic disadvantage principle enshrined in s9(1)(b) as though an award were being made in a personal injuries case.”*
 - But H v H – judgment awaited...
-

Economic disadvantage easier to argue where there's considerable non-mat wealth?

- M v M 2014 Fam LR 116
- Wilson 1999 SLT 249



Is there a fairer system?...

Should account be taken of spouse's ongoing needs instead?

Or the wealthier spouse's ongoing earning potential?

Or should we just push for a more generous interpretation of the statute?
