

**TALK TO
RFPG
ON
SHARING OF MATRIMONIAL PROPERTY
AND COHABITANT'S CLAIMS**

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ClientCentric Service

Tom Quail
Wright, Johnston & Mackenzie LLP
302 St Vincent Street
GLASGOW, G2 5RZ
tlq@wjm.co.uk
Telephone Number: 0141 223 7259
Mobile: 07966 536 364



Unequal Sharing of Matrimonial Property and Cohabitant's Claims

- I should explain that there is a detailed hand-out which is available with the talk.
- This evening I am going to look at an unequal sharing of matrimonial property in relation to couples who are married and in relation to cohabitant's claims.
- In relation to married couples I am proposing to focus on unequal sharing and financial support in terms of Section 9(1)(b)-(d) and Section 10(6) – (special circumstances claim).
- I am then proposing to look at relevant case law to both matters.
- In relation to cohabitant's claims I am proposing to look briefly at the legal position. I am then proposing to look at a few cases starting with Gow -v- Grant.
- Finally, I am proposing to draw some common threads from the legislation and case law with a view to providing guidance on what situations are more likely to be successful and, in those cases which are more difficult, how to persuade a court or an opponent to depart from an equal sharing of matrimonial property or to make an award in relation to a cohabitant claim.



(i) **THE LEGAL PROVISIONS ON UNEQUAL SHARING OF MATRIMONIAL OR PARTNERSHIP PROPERTY**

- It is important to remember that the starting point for the sharing of matrimonial property is an equal sharing (Section 10(1)), unless there are special circumstances.
- Section 9(1)(b) is the principle which the court shall apply in financial provision to take account of any economic advantage derived by either person from contributions by the other and any economic disadvantage suffered in the interests of the other person or the family.

This subsection needs to be read in conjunction with Section 11(2) which is to the effect that:-

- (a) The economic advantages or disadvantages sustained by the other person have been balanced by the economic advantages or disadvantages to the other person and
- (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.

Section 9(1)(c) is that any economic burden of caring, should be shared fairly between the parties after divorce for a child of the marriage under the age of 16 years.

That subsection requires to be read in conjunction with Section 11(3) which I comment upon later in relation to a specific case.

Section 9(1)(d) which deals with the person who has been dependent to a substantial degree on the financial support of the other person should be awarded such financial provision as is reasonable to enable him or her to adjust over a period of not more than three years from the date of the decree of divorce to the loss of that support on divorce.

That subsection requires to be read in conjunction with the provisions of Section 11(4) of the Act.

In relation to special circumstances Section 10(6) of the 1985 Act deals with special circumstances and without prejudice to the generality of the words may include:-

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



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

(ii) **CASES ON SECTION 9(1)(b) to (d)**

I propose to look at four cases, some recent, some not so recent.

Cunningham –v- Cunningham 2001 Family Law Reports – Page 12

In that case, 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 in that case said that the argument put forward was not particularly strong. However, the Judge went on to say that an argument which had not been put forward to the court which was, in his view, a stronger argument, was that if she had not taken time out from her career, she would have been in a more advanced position. The case should have been taken in terms of the financial disadvantage suffered by her as opposed to the economic advantage which her husband received. As the evidence available to the Judge did not allow quantification of the claim to be made and as Mrs Cunningham had not demonstrated any quantifiable advantage to her husband no award was made.

Coyle -v- Coyle 2014 Family Law Reports – Page 2

Whilst the case is more than 12 years old it is helpful in that there was evidence put before the court as to the quantification of Mrs Coyle's claim in terms of Section 9(1)(b).

- Mr & Mrs Coyle had been married for 20 years. They had three children, who at the time of the Proof, were grown up.
- Matrimonial property totalled £1.2m.
- Mrs Coyle previously worked with British Airways earning £30,000 per annum. This combined with significant fringe benefits including cheap and free air travel produced an additional £10,000 per annum, provided Mrs Coyle with a reasonably significant salary.
- Had she continued working she would have been able to retire at or about aged 55 on a gross pension of about £30,000 per annum. She stopped working altogether after the marriage. She ran the house, cared for the children whilst her husband worked long and unsociable hours.



- The Judge in that case compensated Mrs Coyle by granting a property transfer order to her of the family home based upon its value at the date of separation. At the date of Proof the equity in the family home had increased from £270,000 to £500,000. The increase in the family home of £230,000 equated to an extra 20% of the overall pool of matrimonial property of £1.2m. Bearing in mind this was a pre-2006 Act case.
- The Judge indicated in this case that if an unequal sharing could only have been achieved by a capital payment then Mrs Coyle would have been provided with a further substantial capital sum as there was a clear imbalance arising from an economic disadvantage which required to be addressed.
- Mr Coyle's legal advisers did not dispute that Mrs Coyle had suffered an economic disadvantage. However, in that case there were different arguments put forward of how to quantify the economic disadvantage by both Mr & Mrs Coyle's legal advisers by reference to the Ogden Tables (which is a basis for assessing personal injury claims in England) and Duxbury Tables (which is a basis for assessing ancillary relief claims in England and Wales).
- Using the differing tables, the extent of the economic disadvantage could be assessed as between £309,000 to £480,000. The Judge did give an indication that the Duxbury Tables were perhaps more appropriate.

W -v- W 2012 Family Law Reports – Page 99

It's probably worth looking at this case in a bit of detail as it deals with payments in terms of (9)(1)(c) and (d) which is fairly unusual and a way of addressing fair financial provision when effectively there is no matrimonial property.

- Mr & Mrs W married on 15 September 2001 and separated on 7 February 2016 – a relatively short marriage – they had a child born 25 September 2002. When the decision was issued in June 2012 the child would have been almost 10.
- The wife sought periodical allowance up to the child's 16th birthday, i.e. 25th September 2018. The husband had already paid over £80,000 including payments to the mortgage on the wife's property since separation. The husband did not consider it appropriate to make any further payment.
- The couple agreed that the wife should give up employment to care for their child. She returned to part-time employment as a Care Assistant in 2009. She was studying for a nursing degree which would be completed in 2015. It was unlikely that she would be able to return to full time employment until the child was 16 due to the long shifts she required to undertake.
- The husband in the court proceedings had already been ordered to pay interim aliment to his wife of £1,000 per month. In addition he paid support for the child through the Child Support Agency. The husband was in full time employment with an income of £94,000 per annum.



- Whilst the couple had small pension provisions of around £18,000 and £19,000 each there was no other capital which formed the matrimonial property. The properties they each owned were acquired prior to marriage and were not matrimonial property.
- This case, which is not particularly long, only 7 pages, is a very good example as to how to present an argument for continuing financial support by reference to Sections (9)(1)(c) and (d).
- As indicated in considering 9(1)(c) the Court has to have regard to the factors set out in Section 11(3) which includes:-
 - (a) any decree or arrangement for aliment for the child - there was an award of interim aliment in this case. The Court felt compelled to have regard to that order;
 - (b) any loss of earning capacity caused by the need to care for the child - there was clear evidence that the woman had enjoyed a good income and pension benefits prior to marriage and a return to that type of employment was not possible as she had no relatives living nearby to support her, relied on her husband to assist with child care and occasional help from friends;
 - (c) use was also made of Section 11(3)(c) as the wife as the main carer had continued to provide the child with continuity of accommodation. Accordingly it was argued there was a need to provide suitable accommodation for the child.
- The wife gave evidence taking account of these factors, supporting her evidence with productions and, in particular, evidence that her financial position had improved following the award of interim aliment that she required (was forced) to obtain from the Court.
- The Court also considered the provisions of Section 9(1)(d) and the relevant factors at Section 11(4).
- Paragraphs (c) and (d) of sub-section (4) deal with the duration and extent of the dependency of the party seeking the order and any intention of that party to undertake a course of education or training. There was evidence led that the wife had not worked during the marriage and had only resumed part-time employment in 2009.
- The Sheriff, having considered the evidence and indicating he had been "impressed" with the Pursuer's evidence, was satisfied that the wife had lived frugally since she and her husband separated in 2009. He considered her financial position improved in 2011 when she received an award of interim aliment of £1,000 per month. (Why would it not?)
- The Sheriff awarded periodical allowance and for this to be paid at a £1,000 per month for 18 months and then to be paid at £500 per month until September 2018 when the child was 16 (which was a period from the date of the decision of 6 years and 3 months) in terms of Section 9(1)(c).



- This is a very good example where the legal position is set out clearly. In addition there are averments, evidence has been led, and productions are lodged to support the averments and evidence.
- As a consequence, periodical allowance was paid for significantly longer than the three year period using Section 9(1)(c).

M -v- M 2014 Court of Session Outer House 136

The reason I mention this case is that all the various sub-sections from 9(1)(b) through to (9)(1)(e) (serious financial hardship) were considered and arguments were advanced on all factors.

- The case is extremely helpful in that not only are the arguments for the Pursuer set out seeking an unequal sharing of matrimonial property and continuing financial support but also in the judgement the opposing arguments for the Defender effectively responding to the arguments and submissions are also set out by reference to the various sub-sections.
- Accordingly there is a lot of law in this case which you can either use to either put forward an argument or counter an argument which, as we all know, can actually be more difficult that putting forward the initial argument.
- The facts of the case briefly are that the couple married on 14 February 1992 and separated in September 2012. They had three children, including twins. The couple agreed the wife would transfer her interest in a farming partnership to her husband and he would pay the children's school fees.
- The wife sought payment of a capital sum and periodical allowance.
- There were argument in relation to special circumstances (I don't propose to dwell on these).
- The wife sought a capital sum of £680,000.
- Even when it came to the wife's Section 9(1)(b) argument there are separate arguments set out for
 - (i) the contributions made by the wife and
 - (ii) her economic disadvantage.
- The wife in this case, when they initially met, was working in Australia. Following marriage in 1992, she came to Scotland to set up home with her husband.

- Whilst the wife's arguments were the usual arguments of efforts to improve the family home and difficulty in undertaking employment whilst looking after the family home and the family. The wife also had a genuine first world problem in that she had to accommodate shooting parties every second weekend during the shooting season in the substantial family home.
- The wife's arguments for economic disadvantage are also set out, significant sacrifices in the interest of her husband and family, the loss of income she suffered as a consequence of doing so, the absence of pension provision, her age at over 50 of obtaining suitable employment and her lost ability to earn a significant salary. Whereas her husband's financial position had improved, hers had deteriorated. This should be corrected by payment of a capital sum.
- In addition, the wife also set out arguments for unequal sharing as a consequence of the burden of caring for the children (9)(1)(c). The argument was couched on the basis of a capital requirement to purchase a suitable home for her children in terms of Section 11(3)(c). The wife produced sales schedules of properties in price ranges between £450,000 to £575,000 and indicated that £500,000 was required to fund a property.
- In referring to her Section (9)(1)(d) argument as well as a capital sum she indicated she was financially dependent on her husband. She had been receiving £2,000 per month of which £850 per month was spent on rent. She argued that she should continue to receive £2,000 per month until the capital payment was made and thereafter continuing financial support as periodical allowance at a reduced rate for a further period of three years to allow her to adjust to the loss of support.
- The Judge was significantly swayed by the 9(1)(c) argument in that the burden of caring for the children would fall on the wife. The Judge accepted that she required a capital sum to allow her to acquire a house which was suitable for the children and herself. He did not dispute that such a house should extend to four bedrooms. However the Judge did consider that the wife had suffered some economic disadvantage by being unable to pursue an independent career, her commitment to the children, organising the family home, funding family expenditure from her own funds and that those contributions had operated to her husband's advantage.
- Taking these into consideration and also the resources of her husband the Judge took the view that a fair award would be £250,000.
- The Judge took the view that the once the capital sum was paid this would relieve the burden of paying rent and accordingly periodical allowance of £2,000 per month would be paid until the capital sum was received and then periodical allowance of £1,000 for a further period of two years.
- Whereas it was previously thought that continuing financial support was unlikely to be given when a capital sum was to be paid and even then only for a limited period of



time, here is a very good example of arguments being put forward for both unequal sharing of matrimonial property and continuing financial support for a fairly significant period of time, both of which were largely successful.

(iii) CASE LAW UNDER SPECIAL CIRCUMSTANCES

I propose to look at three cases.

Campbell –v- Campbell 2008 Court of Session Outer House 11

In this case Mr Campbell produced a Schedule of his Assets at the date of marriage identifying that he had a net asset value of £1.8m. (That however was adjusted down to £1.45m because he had double counted an asset).

- During the marriage, Mr Campbell sold his pharmacy business for £3m net of tax.
- At the date of separation, matrimonial property totalled £3.6m.
- The court found that, having regard to the source of funds of matrimonial property having been in large measure, assets which Mr Campbell had at the date of marriage, then special circumstances existed justifying a departure from equal sharing.
- The court awarded Mrs Campbell £900,000. On one level this was 25% of matrimonial property. On another level it was an equal sharing of matrimonial property which had come into existence between the date of marriage and the date of separation.
- Albeit Mr & Mrs Campbell had been married for sixteen years, Mr Campbell had been able to produce a Schedule of Assets of what he owned at the date of marriage. Had he not done so, then it would have been much more difficult for his argument of special circumstances to succeed.

Harris –v- Harris 2013 Family Law Reports 122

The reason I mention this is that Sheriff Morrison set out in the case factors to be considered in relation to special circumstances. Sheriff Morrison is also a temporary Judge in the Court of Session so his opinions and decisions do carry some weight.

- The facts of the case were that Mr & Mrs Harris married on 6 February 1988. They had three children. They separated on 5 January 2009 after being married for almost twenty one years.
- Matrimonial property at the date of separation was £478,000. The husband's mother gave a loan to the couple of £10,000 towards the purchase of the family home. During the course of the marriage the wife inherited funds from her parents put £78,000 into a joint savings account linked to a offset mortgage in March 2007 and a



further £30,000 into the same offset account in May 2008. The couple separated shortly thereafter in January 2009.

- The Judge found special circumstances applied. He ordered the husband to pay the wife a capital sum of £65,673 which took account of the inherited funds the wife had received and put into the joint account.
- The husband's source of funds/special circumstances argument in respect of the gift of £10,000 was to be balanced against the economic disadvantage the wife had suffered.
- The Sheriff indicated that he had nothing to guide him in assessing the monetary value of the disadvantage of the wife allow him 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 did so by not re-crediting Mr Harris with the £10,000 loan from his mother.
- Sheriff Morrison having considered all of the authorities which were cited, noted some points about source of funds arguments under Sections 10(6)(b) which are as follows:-
 - The broad policy underlying Section 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 large or substantial extent derived from the funds of one party before marriage or assets 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 parties 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 is made may be relevant and the length of the marriage may be a relevant factor. The longer the marriage and the earlier the inherited or gifted funds were contributed then that may not favour the application of the source of the funds.
 - The extent to which the parties regarded the inherited money used to purchase matrimonial property as being 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.
- In this case the family home was the only significant asset. Mrs Harris' inherited funds, although used for the benefit for the family, were paid into the family's offset mortgage accounting only in the last two years of the marriage. They were not used to purchase the family home.



- Mrs Harris's agents also ran an alternative argument that if the special circumstances argument was not to be accepted then an argument for unequal sharing on the grounds of economic advantage and disadvantage by virtue of Section 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. Whilst accepting that the argument was 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 her husband. It was however an alternative and not an additional argument.

EP or G –v- GG 2016 Court of Session Outer House 52

Parties had been married for only seven years. Net matrimonial property amounted to £1.5m. Both parties sought an unequal division of matrimonial property in their favour.

- The wife relied on Section 10(6)(c), i.e. dissipation and argued that she should be awarded a greater unequal share of matrimonial property on the basis that her husband had dissipated matrimonial funds during the marriage. The husband had made gifts to his two daughters in April 2007, only 18 months after the marriage of about £200,000 each. These funds were acquired by the husband by him exercising share options for shares with his employer and selling the acquired shares at a higher market price, making a profit of about £415,000.
- Lady Woolffe considered the definition of dissipation. She held that the ordinary meaning of dissipation was to "squander" or "waste". She held that dissipation did not include inter-generational gifts or payments for the purposes of tax planning. There was no evidence that these gifts had any adverse impact on the living standards of the couple which was also important. Accordingly the wife's argument was rejected.
- The husband relied on Section 10(6)(b) and argued that he should receive a greater share of matrimonial property at a result of the source of funds used to purchase the family home and two Bonds, both in joint names.
- The husband had a pension at the date of separation of £2,255,923 - once apportioned only £213,000 was matrimonial property which equated to 9.4% of the total pension fund. During the marriage the husband had received a lump sum payment of £650,000. Applying the same percentage to the lump sum payment mean only £61,360 of this lump sum could be said to be attributable to the period of the marriage. It was the remainder of the lump sum payment and the assets acquired with those funds that the Defender sought to argue should be excluded from the matrimonial pot.
- Lady Woolffe, in considering the source of funds towards the family home and the purchase of two Bonds with Santander and Nationwide by the husband, accepted that his source of funds arguments should be applied and were successful.



- The effect of this is that the wife received a capital sum of £189,000 representing about 30% of matrimonial property.
- The case effectively reinforces what Sheriff Morrison said in the Harris case.

(iv) **COHABITANT'S CLAIMS**

The Law – Section 28 of Family Law (Scotland) Act 2006

Subsection 2

The Court, having regard to matters in subsection (3) can:-

- (a) make an order requiring the other co-habitant to pay a capital sum of an amount specified to the applicant and
- (b) make an order in respect of any economic burden of caring of a child of whom the co-habitants are parents.

Subsection 3

The matters which the Court are required to consider are:-

- (a) whether (and if so, to what extent) the Defender has derived economic advantage from contributions made by the applicant and
- (b) whether (and if so, to what extent) the applicant suffered economic disadvantage in the interests of the Defender or any relevant child.

Subsection 4

In considering whether to make an order, the Court requires to have regard to:-

- Subsection 5 – the extent to which any economic advantage derived by the Defender from contributions made by the applicant is offset by any economic disadvantage suffered by the Defender in the interests of the applicant or any relevant child and
- Subsection 6 – the extent to which any economic disadvantage suffered by the applicant in the interests of the Defender or any relevant child is offset by any economic advantage the applicant has derived from contributions made by the Defender.

Subsection 8

In making an Order in terms of Subsection (2) any amount shall be payable on such date as maybe specified or in instalments.

Subsection 9

In terms of subsection 9 contributions are defined as including indirect and non-financial contributions (and in particular any such contribution made by looking after any relevant child or any house in which they cohabited) and economic advantage includes gains in capital, income and earning capacity with economic disadvantage being construed accordingly.



Gow -v- Grant (2012) UKSE Page 29

The facts of the case briefly are:-

- Mrs Gow (then aged 64) and Mr Grant (then aged 58) met at a Singles Club in 2001. In December 2002 they started living together at Mr Grant's home in Penicuik. Mrs Gow sold her house for £50,000. From the free proceeds she repaid the mortgage, various debts, loaned £4,000 to her son and invested £10,000 in Bonds. They ceased living together in January 2008. There were no children of the relationship.
- During the periods of cohabitation, Mrs Gow contributed about £8,000 from the proceeds of her house to the couple's relationship and general living funds. In addition she sold the £10,000 worth of Bonds and spent the proceeds. The couple purchased two timeshares in joint names with Mrs Gow contributing £1,500 more than Mr Grant towards the purchase. At the date of Proof the value of the house that she had sold for £50,000 was worth £88,000.
- The Sheriff was satisfied that Mrs Gow had suffered an economic disadvantage in the interest of Mr Grant. She accepted Mrs Gow's evidence that the only reason she sold her house was a result of Mr Grant's encouragement and in the interest of furthering their relationship. She also accepted that had she not embarked on a new relationship with Mr Grant she would have continued to have maintained her property and would have continued to work to enable her to do so. As a consequence she had lost her principal capital asset. She now required to live in rental accommodation and was unlikely to be able to afford to purchase another property. Albeit she enjoyed the benefit of a substantial amount of the sale proceeds the balance of £8,000 had been contributed to the parties' relationship. As the value of her flat was £88,000 in July 2009 she had suffered an economic disadvantage in the interests of Mr Grant to the extent of £38,000 which was the difference between the sale proceeds and the flat's current value. In addition she had contributed £1,500 more to the joint purchase of the timeshares which also represented an economic disadvantage.
- The Sheriff examined whether the economic disadvantage suffered by Mrs Gow in the interest of Mr Grant was offset by an economic advantage derived by her from contributions made by Mr Grant. It was not disputed he had made various contributions financial and non-financial to the relationship, however, in the Sheriff's opinion such contributions as were made were not sufficient to offset the economic disadvantage suffered by Mrs Gow in the interest of Mr Grant. The Sheriff's conclusion having regard to matters which she was directed to have regard by statute was that there was a net economic disadvantage suffered by Mrs Gow and she should be compensated in the sum of £39,500.
- The case was appealed to the Inner House which overturned the Sheriff's decision. The Inner House's decision was appealed to the Supreme Court which overturned the Inner House's decision.

➤ The Supreme Court said:-

- The overriding principle of the legislation was one of fairness rather than precise economic calculation – remember that.
- The Supreme Court said the original Sheriff was entitled to hold that the loss of the benefit of the increase in the value of the house was an economic disadvantage and that it was suffered by Mrs Gow in the interests of the relationship.
- At the end of the relationship, Mrs Gow did not have a home. Mr Grant had a home which had increased in value. Accordingly the Sheriff's conclusion that Mrs Gow should be compensated for that disadvantage could not be criticised.
- The initial award of £39,500 was reinstated.

Jacqueline Whigham –v- Steven Owen 2013 Court of Session Outer House Page 29

Miss Whigham and Mr Owen lived together from July 1984 until January 2011. There were three children of the relationship who in 2013 were aged 26, 24 and 18. Miss Whigham was originally a Commis Chef living with her mum. At that point she had no savings or property of any value. At the end of the relationship she had assets of slightly over £10,000 and lived in a rented property in Penicuik. She provided accommodation for their 18 year old son who suffered from depression and was unable to work. Miss Whigham had attempted to work as a cleaner and child-minder but owing to her own depression she was unable to keep that going. She was in receipt of state benefits. She had limited means and limited opportunity to improve her means.

- In contrast, whilst at the beginning of the parties' relationship, Mr Owen had assets of £2,000, at the end of the relationship he had assets of £737,000. The house in which they lived (prior to separating) was in his name and had a value of £387,000. His income was in excess of £50,000 per annum.
- The Judge indicated that whilst Mr Owen's wealth was created through his own business activities in which his brother played a major part, Miss Whigham, however, had made a considerable contribution towards the business. She also put great effort into looking after the family. The contributions were made willingly.
- Mr Owen's position was that Miss Whigham had not established that any contributions she had made resulted in an economic advantage to him nor any net economic disadvantage suffered by her in the interests of the couple or their children. Effectively what he was saying was that Miss Whigham was no worse off at the end of the relationship than she was at the beginning. She had not lost any property or career.
- The Judge disagreed. He said that Miss Whigham's contributions were very substantial and that those contributions related to both the running of the house and her contributions to Mr Owen's business. Bearing in mind in terms of Gow –v- Grant



this indicated that you do not have to establish that the Defender derived economic benefit from contributions.

- The Judge said that Miss Whigham's contribution to the running of the household were clearly very significant and in his opinion that must be reflected in a substantial award. In relation to the contributions to the business it is not sufficient to look at the net contribution to Mr Owen's capital at the end of the period of co-habitation. A broad approach requires to be taken. The business provided the family with a good livelihood.
- The Judge said it was not necessary to calculate a payment on a precise mathematical basis as in the vast majority of cases such a calculation would be impossible. He indicated that had they married the capital payment would have been about £368,000. However, that is not a guide for the amount which should be payable. Nevertheless, the Judge indicated that this was a case which was at the forefront of the minds of the legislators.
- The couple had lived together for more than 26 years. Miss Whigham had made very substantial contributions both financial and non-financial. Mr Owen unquestionably benefitted from these. She was unable to develop a career of her own with the result that in middle age she was without formal qualification and virtually without assets. This was a particularly deserving case and there was an award made of £250,000.
- The decision in this case was from Lord Drummond Young who delivered the Inner House's decision in Gow –v- Grant, overturning Sheriff Mackie's decision which was subsequently overturned by the Supreme Court.

Saunders –v- Martin 2014 Family Law Reports 86

At the start of the couple's relationship, the Pursuer was the tenant of his property and the Defender owned her property. She sold it and used the proceeds to purchase the Pursuer's Property at a discount under the Right to Buy legislation. Title had to be taken in his name as he was the tenant. The property was later sold and the parties then bought a new property in the name of the Defender, financed partly the by the free proceeds of the previous property of £66,420. The Sheriff Principal found there was a disadvantage to the Pursuer of £66,420 that was now locked in the Defender's property. The Sheriff Principal also found on the other hand that the Defender has contributed £75,000 to living costs for the joint benefit of the parties. Half of that had been to the Defender's own benefit and accordingly the overall disadvantage to the Defender was £37,500. This reduced the net advantage to the Defender of £28,920. However there were other factors that were important for the Sheriff Principal and the final award made was £10,000. The other factors being:-

- The co-operation of both parties had been needed to secure the elevated profit of £28,000 in the first property and accordingly that elevated profit should be shared equally and



- Rent free accommodation was enjoyed by the Pursuer which was an advantage to him.

W –v- M SLT 2016 (Sheriff Court) 14

This was a short co-habitation of nine months. W had made various payments to M, namely, £35,000 towards renovation works on M's property that had increased in value, £714 course fee, £1,500 given pre-cohabitation and £2,000 per month for bills and living costs, i.e. £18,000.

- The Sheriff found that W was entitled to the return of one-half of this latter sum (£9,000) given that some of the expenditure had been to her benefit in that she was not paying rent and she would have required to pay for food, heating, council tax and rent or mortgage in any event. She was also entitled to £35,000, £714 and the £1,500 being a total of £46,214.
- M appealed to the Sheriff Principal. This was refused. The Sheriff Principal stated that although the issue of pre-cohabitation payments was dealt with specifically by the 2006 Act or by the Supreme Court, the relevance of these to the assessment of economic advantage and disadvantage was a matter within the Court's discretion.

Alexander Melvin –v- Fiona Christie 2016 CSIH 43

The couple lived together from about 1991/92 until November 2007. They had two children. They lived in a series of houses. The first was purchased in joint names and each contributed £10,000 towards the price. Subsequent houses were all purchased in the Defender's sole name with the assistance of mortgages taken out in her name. The last house at Lochinch Drive, Aberdeen, was bought as a family home in November 2005 for £192,951 and its purchase was wholly funded by a Northern Rock loan secured by mortgage.

- Albeit title to the mortgages were in the Defender's name, she could not have afforded the mortgage payments without input of some kind from Mr Melvin. Miss Christie was only earning £16,000/£17,000 per year. She could not fund the mortgage herself. Someone else must have been making a contribution or providing an input. On the evidence the only other available source of finance was Mr Melvin who was working. The Sheriff found that the parties made equal contributions to their general expenditure and found that Mr Melvin must have contributed in some way to the mortgage for the house and observed that Mr Melvin must have been involved in financing the house. The house increased in value over the years and even after a re-mortgaging exercise there was equity in it. Title remained in the name of Miss Christie and Mr Melvin had no interest as an owner.
- The Sheriff found that at the end of the relationship there was a significant economic advantage held by Miss Christie in the form of the equity. The couple had been



making broadly equal contributions to general expenditure. On a broad axe basis, an award amounting to one half of the equity in the house at the date of the Proof of £29,515 was made.

SUMMARY

I have gone through a number of cases, however, it is important to draw conclusions from both the legislation and the case law.

In relation to married couples, the range of options available is significant. There are arguments for unequal sharing in terms of Section 9(1)(b) through to (e), there are unequal sharing arguments in terms of Section 10(6) Special Circumstances, there are various orders available in the form of capital sum, property transfer, pension share, earmarking order, interim aliment, and periodical allowance and all orders have to be reasonable and take account of resources in terms of Section 8.

Co-habitant's claims are much more restricted. There is a capital sum payable now or at some point in the future or instalments for financial disadvantage and the economic burden of caring for a child of whom the co-habitants are the parents.

- It is clear in married couple cases that special circumstances arguments are more likely to result in a departure from equal sharing than claims under Section 9(1)(b). Why is that? My view, and it is simply my view, is that it is much more difficult to quantify. There is an absence of guidance given to Sheriffs and Judges. We have to put forward arguments.
- It is essential in dealing with 9(1)(b) and (c) claims to put forward arguments for unequal sharing in correspondence or your pleadings. It is a given if you do not put forward an argument you will not succeed and if your argument is weak it is less likely to succeed.
- In section 9(1)(b) and (c) cases, support your averments – quantify your claim as in Coyle, obtain a report from an employment consultant as to economic disadvantage or use a multiplier of wage loss, using net wage loss and loss of pension provision. The case of M –v- M set out averments in relation to unequal sharing in terms of 9(1)(b) and (c). 9(1)(c) was used to significant success in obtaining a capital sum of £250,000 for a home. The same provision was used successfully in W –v- W to secure periodical allowance for more than three years – how many thought that was possible?
- As Lord Hope of Craighead said in Miller -v- Miller and McFarlane -v- McFarlane 2006 UKHC 24 Paragraph 120 “the career break which results from concentrating on motherhood and family in the middle years of their lives comes at a price which in most cases is irrecoverable”. In Whigham -v- Owen (I appreciate it is co-habitation)



Lord Drummond Young indicated that Miss Whigham's contributions must be reflected in a substantial award.

- What can we say about cohabitations cases? They seem to be following a similar pattern or trend to married couples cases. Apart from Whigham -v- Owen, the five cases we have spoken about are essentially cases where financial advantage and disadvantage can be demonstrated.

Whigham -v- Owen, which is essentially a 9(1)(b) case for a stay at home co-habitant is much more difficult to quantify. However M -v- M and W -v- W, albeit married couple cases, set out averments in relation to Section 9(1)(b) which can be used and are relevant in cohabited claims.

- There is an element of fairness to co-habitation legislation. If something appears to be unfair it probably is. However you need to explain it. In Whigham the woman at the end of the relationship did not own any property whereas Mr Owen did. That was perceived to be unfair.
- Finally, it is important to make an assessment of not only your client but the client you are not representing. Mr Coyle and Mr Owen did not come across well in Court.

A well constructed argument is more likely to succeed in persuading an opponent and more likely to succeed in a Court. Use the discretion given to Sheriffs and Judges to your advantage.

Hopefully, this talk will assist in your daily practice.