Close comparison

In the conclusion to a two-part analysis Hannah Minty and Sally Nash compare the differences in practice between financial provision in England and Wales and in Scotland

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'In Scotland, inherited assets are specifically excluded from the definition of matrimonial property, and therefore are not taken into account in determining entitlement to financial provision.'

Part one of this article outlined the general principles of family law in Scotland and we considered the contrasting approaches of the Scottish courts and those in England and Wales to cases involving short marriages and civil partnerships. In this concluding part we will apply that analysis to case law involving pre-marriage assets, trusts and marital agreements and outline the jurisdictional limitations where Scottish proceedings are contemplated.

Pre-marital assets case: *K v L* [2011]

Facts

The wife was aged 52 and the husband aged 49. There were three children of the marriage, aged from nine to 16. The parties commenced cohabitation in 1986 and married in 1991, by way of a civil ceremony, the parties having previously undergone a ceremony of marriage in Israel in 1987 which was not valid. They separated in 2007.

The total assets as at the date of the proceedings were £57.4m, including shares inherited by the wife at age 15, which had a value of £700,000 at the date of the marriage. At the date of separation they were worth £28m. The matrimonial home and other assets had a value of £300,000 and had been transferred into the husband's name by the wife. During the marriage the parties had lived modestly in a semi-detached house in the London suburbs. Neither party generated an employment income and the family's net annual expenditure was approximately £79,000. The wife's shares produced average dividends from 2002-08 of £180,000 pa and in 2008/2009 the dividend was £460,000. Upon separation the wife purchased a modest property near to the matrimonial home for £345,000.

Award

The husband was awarded £5m at first instance, sufficient to purchase a property near Regent's Park for £2m and generate an income of £130,000 pa for life (index-linked). It was accepted that this sum generously met the husband's needs; however the question on appeal was whether his award should be limited to needs. It was argued for the husband that the importance of the source of the assets may diminish over time and also that his award should be £18m, following the principles in *Charman v Charman* [2007] recognising that although the wife had made a special contribution to the assets, the sharing principle still applied and this should not justify a departure of more than one third/two thirds.

The husband's appeal was dismissed and the award of £5.3m, some 9.3% of the assets, in respect of both capital and income stood.

Principles

The Court of Appeal agreed that the importance of the source of the assets may diminish over time, including where:

- the matrimonial property acquired over time is of such

value as to diminish the significance of the initial contribution of non-matrimonial property;

- the non-matrimonial property is has been mixed with matrimonial property in circumstances where it may be said to have been accepted that it should be treated as matrimonial property or making the task of identifying its current value too difficult; or
- the non-matrimonial property has been invested in the purchase of a matrimonial home which has come to be treated as a central item of matrimonial property.

However, it was held that there was nothing in the facts of the case which justified a conclusion that there was a diminution in the importance of the source of the parties' entire wealth, which was at all times ring-fenced by the share certificates in the wife's sole name and left to grow in value.

This was not a 'special contribution' case following *Charman*. A special contribution arose where one spouse's contribution to the creation of matrimonial property had been so extraordinary as to justify a departure from equality within the sharing principle. This was a case involving non-matrimonial property and while this also falls within the sharing principle, equal division does not necessarily follow.

Scottish view

In Scotland, inherited assets are specifically excluded from the definition of matrimonial property, and therefore are not taken into account in determining entitlement to financial provision. Similarly, as matrimonial property is defined as all assets acquired between the date of marriage and date of separation, excluding inherited assets and assets gifted from a third party, that means that any pre-marital assets are not matrimonial property either.

It is important to bear in mind that the protection offered to non-matrimonial assets is only guaranteed if the asset remains in the same form. Therefore, if the wife's shareholding as acquired by her in 1976 was still held in the same company when the parties separated, then it would be left out of account altogether.

However, we often see cases where decisions regarding assets are taken for perfectly sound business or tax reasons but result in non-matrimonial property being converted into matrimonial property. For example, if a hypothetical husband held 100% of the shares in A Limited prior to the marriage and during the course of the marriage A Limited becomes a wholly-owned subsidiary of B Limited, with H holding 100% of the shares in B Limited, then the husband's shares in B Limited are matrimonial property as shares have been acquired in the new company during the course of the marriage. B Limited is a new asset. There are other technical examples of this, such as the issuing of new shares. Suffice to say that given the value of the shareholding in *K v L*, the Scottish lawyers would have been carrying out a careful forensic examination of the shareholding to see whether there was any way to bring this into the pot for division.

That being said, even if any assets had changed form or been created in this case, this would be subject to a special circumstances argument that the value of the new/changed asset should be divided unequally in W's favour given the non-matrimonial source of the assets. If W's shares had changed form as a matter of a mere technicality during the course of the marriage, then there would be a good argument for most, if not all, of the value of the shares being excluded.

One technical point to make is that although in Scotland where non-matrimonial property is utilised to purchase assets during the course of the marriage the new asset becomes matrimonial property, the issue of bonus shares has previously been looked at by the Scottish court and the conclusion reached was that bonus shares which are issued simply as a result of the fact that a party held shares in a company would not themselves become matrimonial property.

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Need again would not have been a factor. The court's principal focus would have been on ensuring that the truly non-matrimonial nature of the wife's assets could be established, in which case the husband would have been left with sharing equally in the assets which were matrimonial, perhaps principally the house. Interestingly, in circumstances where the husband had been fundamentally reliant on the wife's dividends as an income source during the course of the marriage, the court might have been prepared to order a short period of ongoing support, no more than three years, after the point of divorce to allow the husband time to adjust to loss of support.

Pre-nuptial/post-nuptial agreement case: *Kremen v Agrest* [2012]

Facts

Both parties were of Russian nationality. The wife was aged 44 and the husband, a financier, aged 51. There were three children of the marriage aged 20, 14 and seven. The parties married in 1991 in Moscow and moved to England in 1999. In 2001 the parties entered into a post-nuptial agreement in Israel

with no disclosure or independent legal advice that provided:

- the husband would pay for the children's education until 25 years of age;
- the wife would retain all real estate outside England in her name;
- the wife would transfer all real estate in England to the husband; and
- $1m would be paid to the wife and any sums in excess of $1m would go to the husband.

This agreement gave the wife approx $1.5m (of a multimillion-pound fortune) on a clean break basis.

The parties separated in 2007. The husband asserted that the parties were never validly married, on the basis that he was already married at the date of their purported marriage. In 2010 the husband obtained an annulment of the marriage to the wife from a Russian court.

The wife brought an application under Part III of the Matrimonial and Family Proceedings Act 1984 for financial provision following an overseas divorce. The assets in the UK as at the date of the proceedings were £400,000 equity in property in Weybridge (purchased in 1999 in the wife's sole name and transferred by the wife into the husband's name under pressure by him in 2007) and approximately £650,000 in secured funds in the Court Funds Office. There were issues in relation to non-disclosure on the part of the husband and evidence of total wealth between £20m and £30m.

Award

The post-nuptial agreement was disregarded entirely by the court, which made an award of £12.5m to the wife based upon her needs. This comprised £2m for a house, and an award sufficient to generate an annual income of £200,000, maintenance for the two younger children at £20,000 pa and school fees of £356,000.

Principles

The wife argued that the husband was a non-discloser and was worth in the region of £100m. The husband argued that he had no assets and was working for a Russian business earning £150 per month. The court found that the husband was a non-discloser and estimated his assets at £20m-£30m.

The court held that the wife had not freely entered into the post-nuptial agreement with a full appreciation of its implications and under pressure from the husband, with an absence of legal advice or disclosure. Further, that it would be unfair to hold the wife to the post-nuptial agreement, which deprived her of her share of the assets which she had otherwise contributed to and the agreement did not in any event provide for her reasonable needs or those of the children. It was recognised that the wife would face formidable difficulties in enforcing any sum in excess of £1m but that this should not affect the court's assessment of what is a fair award.

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Scottish view

In Scotland the starting principle is that a contract entered into between two parties to a marriage regarding financial provision on divorce will be valid and enforceable. Such an agreement can, under s16 of the Family Law (Scotland) Act 1985, be set aside only if it was not fair and reasonable at the time it was entered into.

An important distinction between the way in which fairness and reasonableness is examined by a Scottish court compared to, for example, the approach of the Supreme Court in *Radmacher v Granatino* [2010], is that the concept of fairness does not relate to the outcome which the agreement would deliver. In considering whether an agreement was fair and reasonable at the time it was entered into, the Scottish court is focused on issues such as whether the parties were given an opportunity to seek independent legal advice, and in essence whether they had had an opportunity to investigate what they were letting themselves into.

The principles regarding the setting aside of an agreement are set out in *Gillon v Gillon (no 3)* [1995] and are that:

- both fairness and reasonableness are to be considered;
- all of the circumstances that are prevailing are to be examined, including the nature and quality of any legal advice;
- unfair advantage taken by one party of the other may have 'a cogent bearing';
- the court should 'not be unduly ready to overturn agreements validly entered into'; and
- the fact of even very unequal division is not in itself evidence of unfairness and unreasonableness.

However, one other issue which can be drawn from that case is that withholding all the relevant information is a relevant factor.

The fact that the wife did not receive disclosure of the husband's assets would not necessarily be a bar to the enforceability of the agreement. If the wife was aware that the husband likely had assets over and above those which were the subject of the agreement, and she chose not to insist on further information, then the court may take the view that 'on her own head be it'.

However, the other facts in this case would tend to lead to a conclusion that a Scottish court

might have been prepared to set the agreement aside. If indeed the husband had asked for the agreement to be drawn up and his legal advisors had not advised the wife that she should seek independent legal advice, then that could have a bearing as to the extent to which parties could be held to an agreement in Scotland. If the agents acting for the husband had written to the wife to stress that she should take independent legal advice, and she chose to ignore that, then there is a strong possibility that she would have been held to the terms of the agreement.

Trust case: *Whaley v Whaley* [2011]

Facts

The wife was aged 47 and the husband aged 60. There were four children of the marriage, aged from 12 to 20. The parties commenced cohabitation in 1985 and married in 1987. They separated in 2008. The family divided their time between England, where the children were schooled, and Spain, where the husband retained a residence for tax purposes.

The assets as at the date of proceedings comprised non-trust assets of £4m, of which £1m was in the wife's name, and two Jersey trusts with assets of £7m which were inherited by the husband, who was a beneficiary under one trust but, for tax reasons, not under the second trust.

Award

On the wife's case the assets were £11.8m. On the husband's case the assets were £3.17m, the difference being the treatment of the trust assets. The court valued the assets available to the parties at £10.4m, including the resources of the two trusts.

The husband was ordered to pay a lump sum of £3m to the wife plus maintenance of £40,000pa until payment of the lump sum in ten months' time. This award gave the wife 36% of the assets, with the departure from equality taking account of the husband's pre-marital wealth and wealth supplied by his parents via the trust funds.

Principles

The court determined that the resources of both trusts should be treated as resources available to H, having regard to s25(2)(a) of the Matrimonial Causes Act 1973 which refers to the property and other financial resources which each of the parties to the marriage is likely to have in the foreseeable future. The trustees were likely to advance funds from the trust immediately or in the foreseeable future if the husband requested it and he could be added as a beneficiary of the second trust at any time for this purpose.

The husband argued that a lump sum order of £3m, as ordered by the judge at first instance, could not be satisfied without him having recourse to the trust assets and this would place improper pressure upon the trustees. The court held that the judge at first instance had asked herself the proper question and arrived at the unassailable answer that the trustees were likely to make available such resources as the husband requested; consequently he had no grounds to complain of improper pressure upon the trustees.

Scottish view

The position in Scotland would have been clear cut. Firstly, the husband's interest in the Jersey trusts was inherited. In addition, the assets of the trust were ring-fenced within the trust 'wrapper'. As discussed above, inherited assets are not matrimonial property and therefore not to be taken into account in determining entitlement to financial provision on divorce.

As we are dealing with the division of the matrimonial property in Scotland, we are not looking to achieve a fair result looking at the parties' resources. Therefore, the fact that the Jersey trusts were resources of the husband would not have been relevant in terms of each parties' entitlement to share in the matrimonial property, although they might be relevant in terms of the husband's ability to pay the wife any award that was made in her favour.

Trust assets in Scotland are protected by the 'wrapper' of the trust and therefore will not be seen as an asset of the party holding the trust interests. That being said, if the beneficiary was the only beneficiary and had full autonomy in terms of how the trust assets were distributed or used, then that might be seen differently. If a spouse receives income from a trust as a beneficiary and applies the income to acquire assets during the course of the marriage, the assets will be matrimonial property but subject to a source of funds argument.

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A word of warning

This round-up of comparisons has highlighted some stark differences in the application of the matrimonial regimes within the two jurisdictions and the temptation may be to start trawling through one or two ongoing case files for a Scottish connection, in scenarios where a more favourable outcome might be secured north of the border. However before you rush to issue that initial writ in the Scottish courts, it is worth remembering that the first in time principles *per* Brussels II *bis* do not apply to cases within the UK. The relevant provisions are contained in Schedule 1 of the Domicile and Matrimonial Proceedings Act 1973. In the event of concurrent proceedings, the appropriate jurisdiction will be determined by reference to the location of the parties' last joint family residence. Whether a disappointment or a relief, the reality is that there is very limited scope for cross-border forum shopping. ■

Charman v Charman
[2007] EWCA Civ 503
Gillon v Gillon (No 3)
[1995] SLT 678
K v L
[2011] EWCA Civ 550
Kremen v Agrest
[2012] EWHC 45 (Fam)
Radmacher v Granatino
[2010] UKSC 42
Whaley v Whaley
[2011] EWCA Civ 617