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Across the border

In the first of a two-part analysis Hannah Minty and Sally Nash look at the differences in practice between financial provision in England and Wales and in Scotland

In recent months there has been much debate in the political arena and the media over the question of Scottish independence and what that might mean for the future of the UK. Independence has, of course, long been the norm for the Scottish legal system. A brief examination of the matrimonial regimes north and south of the border highlights how the operation of these two legal systems can produce markedly different outcomes.

In her article published in FLJ 110 Philippa Cunniff outlined the principal differences in the approach of the courts in Scotland and those in England and Wales to financial provision upon divorce. Following on from that article, we have looked at the issues in practice and considered how some recent cases in this jurisdiction might have been decided had the Scottish courts had jurisdiction.

Principles applied

In determining the appropriate financial provision upon divorce, the Scottish courts will apply the principles set out in the Family Law (Scotland) Act 1985 (FL(S)A 1985). In summary, the key points are:

- Matrimonial property should be shared fairly. As a general rule, fair sharing means equal sharing unless there are special circumstances to justify a departure from that:
    - matrimonial property means all property belonging to the couple at the 'relevant date' (being the date they ceased to cohabit or the date the proceedings commenced, whichever is earlier) which was acquired by them during the marriage other than by way of inheritance or gift from a third party;
    - generally, anything acquired before the marriage or after the 'relevant date' is excluded; and
    - the value of matrimonial property is assessed retrospectively, having regard to the value at the 'relevant date'.
- Fair account should be taken of any economic advantage derived by one party from contributions (whether financial or otherwise) by the other, and any economic disadvantage suffered by one party in the interests of the other party or the family.
- Any economic burden of caring for the children of the marriage should be shared fairly between the parties after divorce.
- A person who has been dependent to a substantial degree on the financial support of the other should be awarded such financial provision as is reasonable to allow adjustment to loss of that support, over a period of not more than 3 years from the date of divorce.

- A person who is likely to suffer severe financial hardship as a result of the divorce should be awarded such provision as is appropriate to relieve them of that hardship over a reasonable period.

The Scottish courts have broadly the same powers as their English counterparts however a fundamental distinction between the two jurisdictions is that the Scottish courts do not regard themselves as having an overriding jurisdiction in dealing with financial provision upon divorce and any agreement reached between the parties. An agreement reached between divorcing spouses can be registered and enforced without the Scottish court being called upon to approve such an agreement or determine whether its provisions represent a fair division of the assets. Although as yet untested definitively, it is widely accepted that pre-nuptial and post-nuptial agreements will generally be treated by the Scottish courts as valid, enforceable contracts unless demonstrably unfair and unreasonable at the time they were entered into.

On paper, many of these concepts seem familiar to the English family lawyer and it is difficult to envisage quite how the principles under the FL(S)A 1985 may lead to an outcome which is significantly different to the s25 Matrimonial Causes Act 1973 (MCA 1973) exercise and considerations of needs, compensation and sharing. We have considered how in theory these principles might apply to some recent judgments which many family lawyers in England and Wales will already be familiar with.

Civil partnership - *Gallagher v Lawrence* [2012]

Facts

In brief, Mr Lawrence was age 47 and worked as an equity analyst earning £200,000 p.a. Mr Gallagher was age 54, an actor earning £100,000 pa in a West End show at the time of proceedings but whose income was less secure. There were no children of the partnership.

Cohabitation had commenced in February 1997 with the parties entering into a civil partnership in December 2007, separating in September 2008.

The assets at date of proceedings were £4,175,000 including a flat acquired by Mr Lawrence in 1995 and worth £650,000 at the time that cohabitation commenced, and £2.4 million at the time of proceedings together with a jointly owned cottage acquired in 2002 for £618,000 and worth £822,000 at the time of proceedings and subject to a deed of trust providing for 62% to Mr Lawrence and 38% to Mr Gallagher. Mr Lawrence subsequently spent £307,000 on 'perfecting' the property. There were also pensions in Mr Lawrence's name with a CETV of £580,000.

Award

The Court of Appeal held that Mr Gallagher should retain the cottage and Mr Lawrence should retain the flat. In addition, Mr Gallagher received a lump sum of £350,000 plus a pension share of £200,000, representing a total award of approximately 32% of the assets.

Principles

It was agreed for the purpose of the proceedings that this was a partnership of 11 years and seven months, taking into account the period of cohabitation as well as the civil partnership itself. The Court of Appeal held that the sharing principle did apply to the flat, as it has been used by the couple as one of their homes during the partnership, but that the award to Mr Gallagher should be reduced to reflect the fact that it was a pre-acquired asset and the increase in value was solely due to the rise in property prices in that location.

Citing *Miller v Miller; McFarlane v McFarlane* [2006], Mr Lawrence had argued that each of the couple had continued to work throughout the partnership, as they had done before it, and as such this was a 'dual career relationship' and their capital and income should be treated as being separate. The court did not consider this to be a dual career case as the couple clearly intermingled and combined their assets and income.

Rather than a global quantification, which produced a lump sum by mathematics, it would have been safer to have assessed the fair lump sum from the starting point that Mr Gallagher would have the cottage and his pension share as the foundations of the award. Whether approached on a needs basis or a fair sharing basis, a lump sum of £350,000 was appropriate.

Scottish view

The assets to be taken into account in determining financial position, and the principles applied in Scotland, would likely have led to a very different outcome for Mr Gallagher. Mr Lawrence acquired his flat in 1995, prior to the civil partnership. Although assets acquired before marriage/partnership are not matrimonial property, the one exception is where the asset concerned is a property acquired for use as a family home. However, as Mr Lawrence appears to have purchased the property prior to the parties contemplating cohabitation, and as Mr Lawrence's ownership of the flat had not changed during the partnership, the flat would have been excluded from the matrimonial property by a Scottish court and not taken into account in calculating entitlement to financial provision.

Mr Lawrence's pension had a value at the time of the proceedings of £580,000. In Scotland, the CETV of the pension as at September 2008 would have been obtained and then apportioned to the period of the partnership. This would have reduced the value of the pension being taken into account in Scotland – potentially significantly if Mr Lawrence had been contributing to the pension for a considerable time.

The jointly owned property was owned 62/38 in Mr Lawrence's favour. While there is no equivalent to a deed of trust in Scottish property law, a comparison might be that the parties had formally taken title to the property in unequal shares, or entered into an agreement providing that notwithstanding the property was owned jointly, for the purposes of transacting with the property Mr Lawrence owned 62% and Mr Gallagher 38%. There is certainly a possibility that the Scottish court would have taken the view that the parties had already separately determined how this asset was to be dealt with between them and therefore that this asset should be left out of account in calculating the overall matrimonial pot and instead divided according to title/prior agreement.

The jointly owned cottage had increased in value between the date of purchase and the date of separation by £204,000. Mr Lawrence's share had increased by £126,480 and the Mr Gallagher's share by £77,520. As Mr Lawrence had spent £307,000 on 'perfecting' the jointly owned property, he would have an argument for the unequal division of the civil partnership property in his favour to reflect that Mr Gallagher has been economically advantaged as a result of his share in the property increasing in value due to Mr Lawrence's financial contributions, and Mr Lawrence being economically disadvantaged because the sums expended by him increased the value of Mr Gallagher's share.

In Scotland, need is not a factor for the court. Mr Gallagher's need for a house of reasonable standard and amenity and capital to provide income would not have been taken into account in Scotland where looks to divide the matrimonial property, not to meet each parties' needs.

The length of the partnership would also have had an impact in this case. The short length of time that the partnership subsisted meant that very little by way of partnership property had been accumulated during that time.

Without knowing the full extent of the matrimonial property (including the apportioned value of Mr Lawrence's pension that would have been taken into account) it is difficult to say with certainty how Mr Gallagher would have fared in Scotland. However, given that the assets available for division would likely have fallen from £4,175,000 to £1,775,000 as a result of Mr Lawrence's property alone being out of account, then it would appear that the outlook for Mr Gallagher would have been much bleaker north of the border.

Short marriage spousal maintenance - G v G

Facts

The wife was age 33 and had given up work upon the birth of the child but had previously qualified as a barrister working at Goldman Sachs and subsequently at the criminal bar. She was in the process of setting up a partnership business offering support to people going through divorce that she hoped to work in on a part-time basis. The husband was age 38 and city head-hunter earning £330,000 - £458,000 net pa during the last 4 years. There was one child of the marriage, age four, subject to a shared residence order but spending more time with the wife. Cohabitation commenced in April 2004 and the parties married in June 2005, separating in the summer of 2010. The assets as at the date of proceedings totalled £2.6 m of which £2.4 m comprised the matrimonial home.

The wife was also a beneficiary under 11 family trusts that existed before the marriage and from which she had received capital, loans and income. These trusts owned her parents' family holding company, which had a balance sheet of £32 m.

Award

A central point in the case was for how long, after a short marriage between two highly qualified persons, should a high earning spouse remain responsible for supporting the other spouse who has a good earning capacity but does not wish to pursue it to the full so that she can be at home to act as the primary carer of the child of the marriage, and effectively decide what work she will do.

The court awarded periodical payments to the wife to start at £95,500 per annum for two years, reducing to £75,500 per annum for the next two years, reducing to £55,500 per annum for the two years thereafter, and then reducing to £35,000 for life, to allow the wife to adjust without undue hardship, and taking into account her external resources.

The husband was also ordered to pay periodical payments of £18,000 per annum for the child's benefit and school fees until the end of tertiary education, but from the end of secondary education or the child's 18th birthday (whichever later) the payments were to be made directly to the child.

The court accepted that the wife had housing needs of £1.675 m but ordered that liquid capital should be split equally (£1.3 m each) and the wife should make up the remainder through borrowing.

Principles

The court held that a fair result was not one that seeks to achieve dependence for life (or until re-marriage) for the wife to fund a lifestyle equivalent to that enjoyed during the marriage (or parity if that level is not affordable for two households). The correct approach recognises that the aim is independence and self-sufficiency based on all the financial resources that are available to the parties. Generally, the marital partnership does not survive as a basis for the sharing of future resources.

However the court acknowledged that the lifestyle enjoyed during the marriage set a benchmark that was relevant to the assessment of the level of the parties' independent lifestyles. The length of the marriage was relevant to determining the period for which that level of lifestyle was to be enjoyed by the wife. In a short marriage, the award should be directed to providing a transition over an appropriate period for the wife to either a lower long-term standard of living than that enjoyed during the marriage or one that was not contributed to by the husband.

The choices made during the marriage in relation to the care of the child were an important factor in determining how that care should be funded. Here, the court found the choice was that the wife would return to the law or a full time career when her role as a carer allowed but she had a relationship generated need and disadvantage because she had stopped work as a barrister and this impacted upon her earning capacity. The husband should be primarily responsible for relationship-generated needs, contributions and disadvantages, because they were created by or during, and flowed from, the marital relationship.

The correct approach to the wife's trust assets was to focus on what the trustees would, in acting properly, be likely to do in the future in all the relevant circumstances of the case, not on what they would be likely to do if there was a disaster. It would be in line with the history and purposes of the family trusts and the family ethos to assist in funding the purchase of a home for the wife and the child and to assist her and the child to maintain a reasonably comfortable standard of living not significantly different from that enjoyed during the marriage, encouraging her to maximise her own earnings whilst also caring for her son on a day to day basis.

The court concluded that in the longer term it was likely that the wife would receive either significant income or capital from the trusts. After an appropriate period of adjustment, her resources, including her trust interests, should be primarily responsible for the funding of her independent and self-sufficient lifestyle.

Scottish view

This case raised a number of interesting issues from a Scottish perspective but for the purposes of this article the main focus is the issue of maintenance for the wife and child. The Scottish courts largely adhere rigidly to the principle that it is only the Child Support Agency (CSA) that has jurisdiction to deal with claims for maintenance in respect of a child, unless the maximum level of net income assessable by the CSA is exceeded and an application can then be made to the court for a "top up" It is common for separating to couples to record their agreement regarding child maintenance in a binding minutes of agreement dealing with the other financial matters arising from their separation, but a court order for child maintenance is rare, unless the case is outwith the jurisdiction of the CSA.

As the husband would seem to have been over the threshold of the maximum net assessable income then once the wife had secured her CSA assessment she could apply to the court for a "top up" of the maintenance. This would be assessed based on the needs of her son, the resources of the husband, the resources of the wife and all general circumstances of the case.

There is no provision in the FL(S)A 1985 for a parent to seek ongoing support from the other parent for a child who is in tertiary education. If a child is between the ages of 18 and 25 and in fulltime further education in Scotland, then both parents have a continuing obligation to support that child. However, the obligation is between parent and child directly, not between parent and parent. It would appear that the court in *G v G* adopted a similar approach, with the periodical payments being made to the child direct from the end of secondary education or the child's 18th birthday (whichever later).

The wife's position would in all likelihood have been significantly different in Scotland. Spouses have an obligation to aliment (financially support) one another up until the point of divorce. Thereafter, in Scotland it is possible to seek ongoing support (periodical allowance) for a maximum period of up to three years to allow adjustment to loss of support. However, this is entirely discretionary and spousal support for three years is not automatic.

The underlying principle of the FL(S)A 1985 is a clean break, and in a Scottish context that means the intention is that the fair, usually equal, division of the matrimonial property gives each party sufficient capital and neither is thereafter reliant on the other for financial support. A lump sum in lieu of ongoing support is a rare thing to see in a Scottish judgment.

As far as the wife is concerned, given that she was in the process of setting up a business, a Scottish court would likely have considered it justified that she received some ongoing support for a brief time to allow her some breathing space to set up her business. However, the Scottish court may well have taken the view that the wife's decision to pursue an alternative career was her own and the level of the award would have been far more likely to reflect her earning capacity from the business. It is doubtful that she would have received anything like the level of award in Scotland that was achieved in England, and in Scotland there would not have been any “joint lives” element. Financial support for longer than three years in Scotland is specifically for cases where there would be severe financial hardship otherwise. As a result, it is rarely seen other than in cases where there are long term debilitating illnesses.

The fact that the wife gave up a career as a barrister to look after the child of the marriage would be a factor which she could argue should justify an unequal division of the capital assets in her favor. She could argue that she had been economically disadvantaged by giving up her career to take care of the child, while due to her support the husband’s career had continued to go from strength to strength. However, the fact that she had given up her career for a relatively short time would mean this argument would be less palatable from the perspective of the Scottish court. Even if an argument for unequal division is accepted by the Scottish court, the divergence is unlikely to take unequal division much further than a 55/45 or 60/40 split.

Conclusions

We have seen that the application of Scottish principles would lead to some radically different outcomes to those commonly encountered in this jurisdiction. Part two of this analysis will consider case law involving pre-marriage assets, trusts and marital agreements together with an outline of jurisdictional limitations.

Cases

Lawrence v Gallagher [2012] EWCA Civ 394

Miller v Miller; McFarlane v McFarlane (2006) UKHL 24

G v G [2012] EWHC 167 (Fam)

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