

**COMPENSATION FOR ECONOMIC DISPARITY ON RELATIONSHIP
ENDING**

When a relationship ends, should the partner who is able to earn more, pay compensation to the other partner?

The possibility of compensation for economic disparity following separation was introduced in the amended relationship property legislation in 2002. Four years have passed and there have been a number of Court decisions on this issue. The decisions have not always been consistent and it can be difficult to advise with precision on what, if any, award is likely to be made.

First, the grounds for making a case for economic disparity must be made out. Those grounds can be difficult to establish.

The grounds provide that the living standards **and** income of one partner must be **significantly** higher than that of the other. Court decisions about what is significant vary considerably. In *P v P*, a Family Court decision, an income of four to five times higher was regarded as significantly higher. However, the High Court decision of *Cunningham v Cunningham* found an income twice as high was also significantly higher.

Then, the living standards and income **must** be due to the effects of the division of functions during the relationship. Typically this will be when one party has forgone their career opportunities to care for children or to further the other's career; in other words, "but for" undertaking these roles, would there be economic disparity at separation?

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The recent Family Court decision of X v X found that because the wife chose not to return to the work force when she could have, her role had become a matter of choice rather than necessity. Therefore the wife could not establish that the economic disparity was caused by her household responsibilities but rather her choice not to return to work. This case has gone on appeal and the result is awaited with anticipation.

Once these hurdles are crossed, the Court must consider whether it is just to make an Order for compensation.

A recent Family Court decision, Smith v Smith has canvassed various decisions made in the High Court and Court of Appeal and has drawn together the salient principles:

- The jurisdictional requirements i.e. grounds, must be satisfied.
- The discretion to award compensation should not be used to undermine the underlying presumption of equal sharing.
- The need for compensation for differences created by relationships is recognised.
- A "but for" causal nexus is required between division of functions and economic disparity.
- An award of compensation is aimed to reduce future economic disparity.
- In considering future economic disparity, it is earning potential, not actual earnings which are taken into account.
- Economic disparity awards will depend on the facts of each case.
- If an award is made it is limited to the amount of the relationship property pool.

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There is some disagreement in the decisions as to whether the value of the lost or enhanced earning opportunity should be halved when fixing an award. Judge Murfitt in Smith v Smith favours the view that the award should not be shared by the party who has benefited from the advantage and that compensation is for the victim of the disadvantage.

The recent Court of Appeal decision M v B emphasises that the outcome in cases involving division of relationship property must conform to the principles of the Act and be just i.e. it must not displace the established principle of equal division of property. What is just for one party must not be at the expense of what is unjust for the other.

In spite of the lack of consistency in Court decisions to date, compensation for economic disparity is available in some situations where that disadvantage will not be overcome by an equal division of relationship property.

Economic disparity can also be addressed in part by other available means in certain situations e.g. lump sum child support, spousal maintenance.