

Built to Last:

The Family Law (Scotland) Act
1985 - 30 years of financial
provision on divorce



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CONTENTS

PART 1: BACKGROUND: SETTING THE SCENE

| | | |
|-----------|-----------------------------------|----|
| Chapter 1 | Introduction | 1 |
| Chapter 2 | The social context of the Act | 5 |
| Chapter 3 | The legal and policy context | 9 |
| Chapter 4 | The 1985 Act and amendments | 21 |
| Chapter 5 | The research context: methodology | 39 |

PART 2: RESEARCH FINDINGS

| | | |
|-----------|--|-----|
| Chapter 6 | Findings from the 200 cases: a statistical profile | 48 |
| Chapter 7 | Findings from the in-depth interviews | 55 |
| | Section 1: The five principles | 56 |
| | Section 2: Flexibility and creativity within the Act | 98 |
| | Section 3: Setting the relevant date | 118 |
| | Section 4: What works for litigants | 126 |
| | Section 5: Three notes | 134 |
| | Section 6: Conclusion | 143 |
| Chapter 8 | Findings from the vignette | 144 |

PART 3: CONCLUSIONS

| | | |
|------------|---|-----|
| Chapter 9 | The case for change - is there one? The voices of practitioners | 167 |
| Chapter 10 | Endnote | 183 |

| | | |
|-------------------|--|-----|
| REFERENCES | | 195 |
|-------------------|--|-----|

APPENDICES

| | | |
|------------|--|-----|
| Appendix 1 | Research instruments | 200 |
| Appendix 2 | Family Law (Scotland) Act 1985, sections 8 to 22 | 219 |
| Appendix 3 | Family Law (Scotland) Act 2006, section 28 | 235 |

Chapter 1 Introduction

The Family Law (Scotland) Act 1985 is one of the best known and most respected elements of the Scottish family law system and yet, for something so significant, it has attracted relatively little attention from researchers and commentators. In the years preceding the legislation, there was a great deal of research¹ and, around the time of its introduction it attracted some debate, particularly in comparison to the process of law reform in England.² Over the years, the statutory framework and the key cases have been explained in detail and updated as needed in Scots family law treatises and textbooks³ but, in academic journal articles it is a topic which has remained largely overlooked. Browsing through back issues of *Scots Law Times* and *The Journal of the Law Society of Scotland*, there are comments and insights predominantly from practitioners but, compared to other aspects of family law in practice, they are relatively scarce. Conference papers, web-based comments and blogs, by family law advocates and solicitors, from time to time have highlighted key cases or jurisdictional differences but beyond that there is little detailed research or analysis. And, whereas in the early days, there was a slow but steady stream of interesting cases, more recently even that seemed to be drying up.⁴

So the first and general motivation for this research was to begin to address that gap. It was a gap which had become particularly evident following the now infamous criticism of the Scottish system voiced by Lord Hope in *Miller v Miller; Macfarlane v Macfarlane*. His criticism hit a nerve. Perhaps after all the system was too harsh; perhaps there really was too little discretion; perhaps the subtleties and complexities of the statutory framework had in practice been reduced to a crude message of equal sharing. While Scots lawyers and family law academics were quick to highlight Lord Hope's apparent misunderstandings and come to the defence of the 1985 Act,⁵ the absence of data as to how the Act worked and how it was

¹ Discussed in chapter 3.

² See eg J Dewar, "Reforming Financial Provision: The Alternatives" (1984) *Journal of Social Welfare Law* 1.

³ Notably EM Clive, *The Law of Husband and Wife* (4th ed), 1997, W Green, Edinburgh; EE Sutherland, *Child and Family Law* (2nd ed), 2008, W Green/Thomson; JM Thomson, *Family Law in Scotland* (7th ed), 2014, Bloomsbury; A Griffiths, J Fotheringham and F McCarthy, *Family Law* (4th ed), 2015, W Green.

⁴ Although, interestingly, there have been several noteworthy decisions recently: eg *M v M* (OH) 2014 Fam LR 116 (departure from equal sharing); *Jack v Jack* (OH) 2015 Fam LR 95 (award of periodical allowance for three years) and *McDonald v McDonald* (IH) 2015 SLT 587 (pension valuation).

⁵ K Norrie, "Clean break under attack" (2006) 51 *Journal of the Law Society of Scotland* 16.

used in practice was particularly evident.⁶ That was the second and more specific motivation for the research. Coming out of the aftermath of *Miller* and *Macfarlane*, there was a juxtaposition of two perspectives on the longevity of the Act. Professor Eric Clive's comment that "nobody would recommend legislation in this field in the expectation that it would last for more than twenty years"⁷ set against Lord Hope's view that "[l]ike the Forth Road Bridge, it was built to last".⁸ After almost 30 years, a detailed review of the legislation was overdue: a third reason for the research.

The starting point for our research was the legislation itself. The 1985 Act was designed to address mischiefs identified in the previous legal system and to achieve explicit objectives. Particular problems, which had been identified in respect of the pre-1985 law, included a lack of clear guidance, too much judicial discretion, restrictions on the orders which courts could make and an over-reliance on continuing periodical allowance. The Scottish Law Commission considered that "[w]hat financial provision on divorce should seek to achieve is fundamental to the type of legal provision governing it"⁹ and, although they concluded that no single objective was appropriate, they did identify a range of objectives which included the desirability of achieving a clean break between the parties. The resulting detailed statutory framework in the 1985 Act, "a highly sophisticated system",¹⁰ was designed to achieve these objectives by means of a carefully constructed jigsaw of orders, principles and guidance. The legislation was well drafted but how well had it worked in practice?

Within that broad aim of looking at how the statutory principles worked in practice, we had specific points of interest. The 1985 Act is structured around a range of orders and principles but to what extent are they all used? The detailed nature of the Scottish system and its principled approach has been broadly praised but there has also been some criticism to the effect that it is overly restrictive of judicial discretion. An underlying aim of the 1985 Act was to encourage a "clean break" on divorce but it has been suggested that this may be unduly harsh on homemakers, carers and wives?¹¹ Pension sharing offers an important way

⁶ There was an important empirical study of the initial impact of the Act but it was more than 20 years old: F Wasoff, RE Dobash, DS Harcus, *The Impact of the Family Law (Scotland) Act 1985 on Solicitors' Divorce Practice*, 1990, Central Research Unit, Scottish Office.

⁷ EM Clive, "Financial Provision on Divorce" [2006] 10 ELR 413 at 418.

⁸ *Miller v Miller; McFarlane v McFarlane* [2006] 2AC 618 at [106].

⁹ Sutherland, *Child and Family Law* (2nd ed), para 16-019.

¹⁰ *Ibid*, para 16-038.

¹¹ See, eg, P Cunniff, "Notable Differences" (2011) 110 *Family Law Journal* 14.

of providing for the future needs of ex-spouses but, while it is catered for in detail in the statutory provisions of the 1985 Act, to what extent does such pension sharing happen in practice? In our research we hoped to find data which would inform debate on all of these points.

In designing any socio-legal research, there are limits: practical and ethical limits which constrain the initial design of the project and limits to the conclusions which can be drawn. We wanted to look at how the legislation works in practice and to do so we chose to focus our research on two samples: a sample of 200 published cases and a sample of around 30 interviews with lawyers and judges.

In focusing on cases which had reached a final adjudication, we were limiting our research and limiting it further still by looking only at published decisions.¹² That choice was at least partly an acknowledgement of difficulties of access: restricted access to court processes, unpublished opinions, solicitor negotiations and private dispute resolution. By definition we would be looking at cases which were unusual and unrepresentative, since the vast majority of disputes about financial provision on divorce will never reach that stage. The conclusions we can draw are therefore limited. Cases, however, are valuable. They offer an insight into the ways in which the statutory provisions are used and the ways in which arguments are constructed around them. Their structured formality demands the citation of statute which in turn offers researchers the ability to collect, relatively easily, relevant data. In a system in which many disputes are negotiated rather than litigated, those cases which do make it through to final adjudication may be by definition unusual but they are also of significant interest. They are the difficult cases, the contested cases and as such they “tend to “show ... where the system pinches””.¹³

We also limited our research by choosing to focus on the experience and the views of professionals who work with the legislation. There were ethical considerations involved in that choice: we might have chosen the more contentious route of seeking to speak to parties who had used the legislation but the key objective for us was to explore how the legislation works in practice and there we considered that it was the professional experience of lawyers

¹² Either in traditional case reports or published on the Scottish courts website.

¹³ A Bissett-Johnson, “Cases From the Trenches But Only Modest Legislative Responses” (2006) *International Survey of Family Law* 329 at 334.

which was more relevant. Our focus in this research was not on outcomes or satisfaction but on how the law is used in practice. Solicitors, advocates, sheriffs and judges are key players in the process of putting the statutory principles into practice and it was, therefore, their perspectives which we sought.

Our current project is only one part of a much more extensive body of socio-legal work which seeks to inform debate and policy around the legal response to the dissolution of relationships.¹⁴ Within the context of Scots law and the 1985 Act, it is one of two projects. A specific aim of the 1985 Act was to increase clarity and certainty and to limit judicial discretion and, thereby, to encourage parties to reach agreement without recourse to court. In a recently completed ESRC-funded project into the use of Minutes of Agreement or separation agreements, we explored how the statutory principles of the 1985 Act are put into practice through private ordering.¹⁵ Through these two projects, we aim to show the different but complementary ways in which the statutory framework of the 1985 Act is put into practice through the courts and through private settlement.¹⁶

Research is often undertaken because a problem has been identified and there is pressure for reform. This research does not fall into that category. We embarked on this project with the general impression that the statutory framework for financial provision on divorce probably works quite well but it was simply an impression: we had no proof. What we hoped to find through our research was detailed evidence of how it works, why it works and perhaps some insights into how it might work better.

¹⁴ For example, two other projects recently funded by the Nuffield Foundation: HD Woodward and M Sefton, *Pensions on divorce: an empirical study*, 2014, accessible at <http://orca.cf.ac.uk/id/eprint/56700>; E Hitchings, J Miles and H Woodward, *Assembling the jigsaw puzzle: understanding financial settlement on divorce – key findings*, 2014, accessible at www.bristol.ac.uk/law/research/researchpublications.

¹⁵ J Mair, F Wasoff and K Mackay, *All Settled?: A study of legally binding separation agreements and private ordering in Scotland*, Final Report, 2013: www.crf.ac.uk (ESRC grant no ES1004960/1). In this earlier project, Jane Mair and Fran Wasoff worked with Dr Kirsteen Mackay, who also contributed to the development of the funding proposal for the current project.

¹⁶ There are of course still significant gaps and in particular what we do not know is what happens to the actions which are raised and then settled before reaching final judicial decision.

Chapter 2 The social context of the Family Law (Scotland) Act 1985

INTRODUCTION

Since the 1985 Act came into force, there have been significant changes in the prevalence, nature and attitudes towards marriage, cohabitation, same sex unions, divorce, step parenthood and family life in Scotland. The key relevant trends are:

- Later and less marriage. In 2014, only a minority of the adult population (47%) was currently married, and 15% were divorced or separated.¹⁷
- More pre-marital cohabitation, now the norm and much less stigmatised.
- More single person households, now the most common household type (35% of households in 2011).¹⁸
- Higher levels of married women's and mothers' labour market participation.
- A stable incidence of lone parenthood between 2001 and 2011.¹⁹
- Not all relationship breakdown is reflected in divorce numbers due to cohabitation dissolutions.
- Later parenthood and smaller family sizes.
- More children born to parents who are not married to each other, though the great majority are born into stable relationships. Indeed, the majority of children are now born to unmarried parents: 51% in 2014, up from 15% in 1981-85.²⁰
- Higher home ownership rates for married couples since 1985, especially those with children, though the percentage has fallen slightly since 2005.²¹

¹⁷ The Scottish Government (2015) *Scotland's People Annual Report: Results from the 2014 Scottish Household Survey* Tables 2.2 and 2.3, p 31.

¹⁸ Centre for Research on Families and Relationships (2014) *Family Households: how have family households changed over 2001-2011?* Evidence Request Bank Development Project, p14: <http://www.cfr.ac.uk/assets/ERB-Changing-Family-Households-2001-2011-April2014.pdf>.

¹⁹ *Ibid.*

²⁰ National Records Scotland, *Vital Events Reference Tables 2014 (2015)*, Tables 3.1 (a) and 3.1 (b).

²¹ J Mair, F Wasoff and K Mackay, *All Settled?: A study of legally binding separation agreements and private ordering in Scotland*, Final Report, 2013, p.11: www.cfr.ac.uk.

A STATISTICAL PROFILE OF DIVORCE AND DISSOLUTION IN SCOTLAND: 1985 TO 2014

Marriages and divorces in Scotland since 1985

Both the numbers of marriages and divorces in Scotland have followed a decreasing trend since 1985. Both of these trends are associated with the greater incidence of pre-marital cohabitation. There were 29,048 marriages in 2014, compared to 35,790 in 1985, a decline of 19%. Similarly there were 12,841 divorces in 1986 and 9619 in 2013-14; a decrease of 25%, over a comparable period.²² Thus, while both numbers have declined, the divorce *rate*, i.e. the proportion of marriages that end in divorce, has not shown a comparable decline. By one measure, the ratio of the number of divorces to the number of marriages in a given year, the divorce rate in 1986 was 36%, and in 2014 it was 33%.²³

Looking at divorce and dissolution as seen by Scottish civil courts, even though family law deals with a wide range of family issues, divorce and dissolution predominate in family law actions in the courts, comprising over three quarters (76%) of all family actions.²⁴ The second most prevalent family action, 14%²⁵ involves parental responsibilities and rights, such as residence and contact.²⁶

²² National Records of Scotland (2015) Vital Events Reference Tables, Table 7.1(b), <http://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/general-publications/vital-events-reference-tables/2014/section-7-marriages-and-civil-partnerships>; Table 1, Scottish Government (2015) Divorces and Dissolutions Supplementary Tables, <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/DatasetsCJS/suptab1314>; Table Divorces Scotland 1855 – 2011, National Records of Scotland (2013) Divorce Time Series Data, <http://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/vital-events-divorces-and-dissolutions/divorces-time-series-data>.

²³ This is not an exact measure of how many marriages in a given year will ultimately end in divorce since the number of divorces in a particular year will depend on the number of marriages, not in that year but in many previous years.

²⁴ Scottish Government, *Civil Justice Statistics in 2013-2014*, July 2015, p29: <http://www.gov.scot/Resource/0048/00482433.pdf>.

²⁵ Ibid.

²⁶ Court statistics are classified by the principal crave of the action and may therefore underestimate the number of cases e.g. involving child contact if that issue is an ancillary crave in an action where divorce or another issue is the principal crave.

Simple and undefended

Both the use of the simplified procedure and the non-cohabitation means of establishing the irretrievable breakdown of the marriage are consistent with the policy direction of encouraging negotiation and settlement at separation and divorce. The use of both of these has increased over time. According to the Scottish Civil Justice Statistics for 2013-14,²⁷ most divorces dealt with by the courts are straightforward, almost administrative, matters. Almost all, 96%, were undefended. The majority of divorces and dissolutions granted used the simplified procedure (over three fifths of 9619 divorces granted in 2013-14²⁸), a procedure that is not available where there are children of the marriage aged under 16²⁹ or where the parties are making financial claims. The great majority of divorces are dealt with in the sheriff courts; less than 1 per cent are heard in the Court of Session.³⁰ In the great majority of divorces (94%)³¹ the irretrievable breakdown of the marriage was established by a period of non-cohabitation: 51% for two years and 43% for one year with consent.³²

Legal aid

Although family actions constitute only a minority of cases going through the civil courts in Scotland, and despite what solicitors told us,³³ family actions nonetheless predominate in civil legal aid expenditure; the majority of civil legal aid grants are in family cases. Such cases made up 62% of all grants for civil legal aid and 61% of total expenditure³⁴. Divorce and dissolution have become legal processes that are primarily supported by legal professionals but, in the great majority of cases, not involving substantial involvement by the courts.

²⁷ Scottish Government, *Civil Justice Statistics in 2013-2014*, July 2015: <http://www.gov.scot/Resource/0048/00482433.pdf>.

²⁸ *Ibid*, p33.

²⁹ There is no recent statistical information about the number of divorces or dissolutions in Scotland in which there are children under the age of 16.

³⁰ Scottish Government, *Civil Justice Statistics in 2013-2014*, p24.

³¹ *Ibid*, p34.

³² *Ibid*.

³³ See below, *A note on legal aid*.

³⁴ Scottish Legal Aid Board Annual Report 2013-14 (2015) p 4, www.slab.org.uk. This report does not provide a breakdown of what are the key issues in these family cases.

CONCLUSION

Over the 30 year period during which the Family Law (Scotland) Act 1985 has been the principal statute governing financial provision on divorce, many social and demographic changes have taken place in Scotland, as in other similar jurisdictions. Nonetheless the legislation has remained relevant to the changing circumstances of Scottish families. The legal process of divorce and dissolution has moved in the desired policy direction of encouraging negotiation, reducing conflict and court involvement. This is evidenced by the growing and very high proportion of divorces that demonstrate the irretrievable breakdown of the marriage by “no fault” separation, by the use of the simplified procedure, and by the very small number of disputed cases. While divorce and dissolution still make substantial use of legal professionals, that support is provided, by and large, outwith the courts.

Chapter 3 The legal and policy context

INTRODUCTION: SETTING THE CONTEXT

The provisions of the 1985 Act were clearly drafted from the outset; so much so that, with some amendments,³⁵ they still operate well today: “*The basic structure of the Act does ... stand the test of time. It continues to be capable of delivering a fair and practicable result, in accordance with common sense*”.³⁶ While other legislation, such as the financial provision awarded to cohabitants found in the 2006 Act, has proved difficult for practitioners to interpret,³⁷ the 1985 Act continues to be well regarded. To understand why this Act has stood the test of time, one needs to consider the process of its drafting. This process began with research covering a review of the law as it then existed, the particular defects of that law, and a survey of solutions adopted in other countries; all of which was set out by the Scottish Law Commission (SLC 1976) in Memorandum 22 of 1976,³⁸ a consultative document. Further research on family property was then commissioned in 1979 (Manners and Rauta)³⁹ and, although the resultant report was not, at that point, published the subsequent 1981 Report of the SLC drew on its conclusions. The 1981 Report also drew on another, at the time, unpublished study,⁴⁰ by Doig (1982) entitled *The Nature and Scale of Aliment and Financial Provision on Divorce in Scotland*.⁴¹ A further consultation followed in 1983 on matrimonial property. Based on the research of Manners and Rauta (1981),⁴² finally Memorandum No. 57 (SLC 1983)⁴³ posed a set of propositions for consultation.

³⁵In particular amendments in 1990, 1999 and 2006 respectively to original s8(1)(a) re transfer of property; s8(1)(b) re pension sharing; s10(3) re relevant date.

³⁶JM Scott, *Financial provision on Divorce: Beyond Equal Sharing*, Lecture delivered at the CLT Scotland Family Law Conference, 2013, www.westwateradvocates.com/janys-m-scott-qc-speaks-at-clts-family-law-conference/ p11.

³⁷See F Wasoff, J Miles and E Mordaunt, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006*, 2010, www.crfr.ac.uk/assets/Cohabitation-final-report.pdf.

³⁸Scottish Law Commission, *Family Law: Aliment and Financial Provision* in 5 vols, Memorandum 22, 1976, Edinburgh.

³⁹See AJ Manners and I Rauta, *Family Property in Scotland: An enquiry carried out on behalf of the Scottish Law Commission*, Social Survey Division of the Office and Population Censuses and Surveys in 1979, London: HMSO.

⁴⁰This study was actually published in 1982.

⁴¹B, Doig, *The Nature and Scale of Aliment and Financial Provision on Divorce*, 1982, Scottish Office Central Research Unit, Edinburgh.

⁴²AJ Manners and I Rauta, 1981, *Family Property in Scotland: An enquiry carried out on behalf of the Scottish Law Commission*, Social Survey Division of the Office and Population Censuses and Surveys in 1979, London: HMSO.

⁴³Scottish Law Commission, *Matrimonial Property*, Consultative Memorandum No. 57, 1983, Edinburgh.

These documents are set out in *Figure 3.1*, which shows a timeline of developments in relation to financial provision on divorce in Scotland, along with corresponding developments in England that also informed thinking in Scotland. Both the 1976 and the 1985 Acts were later amended to accommodate changes in the law relating to civil partnerships in 2004 and the mechanics of divorce along with pension sharing provisions in 2006.⁴⁴

Figure 3.1: A timeline of key Scottish documents (and in blue corresponding English documents) related to financial provision on divorce

| | |
|------|---|
| 1976 | SLC Memorandum 22 <i>Family Law: Aliment and Financial Provision</i> in 5 vols |
| 1976 | Divorce (Scotland) Act 1976 |
| 1979 | research commissioned by the SLC conducted by the Social Survey Division of the Office of Population Censuses and Surveys see below Manners and Rauta |
| 1980 | Law Commission (No. 103 Cmnd. 8041) <i>The Financial Consequences on Divorce: The Basic Policy</i> |
| 1981 | Manners and Rauta <i>Family Property in Scotland</i> report on their 1979 research |
| 1981 | Law Commission (No. 112) <i>Family Law: Financial Consequences on Divorce</i> |
| 1981 | SLC (No. 67) <i>Family Law: Report on Aliment and Financial Provision</i> |
| 1982 | Doig, B <i>The Nature and Scale of Aliment and Financial Provision on Divorce</i> Central Research Unit of the Scottish Office |
| 1983 | SLC Consultative Memorandum 57 <i>Matrimonial Property</i> consultation for reform based on the research of Manners and Rauta |
| 1985 | Family Law (Scotland) Act 1985 |
| 2004 | Civil Partnership Act 2004 |
| 2006 | Family Law (Scotland) Act 2006 |

⁴⁴ See below at 'LATER DEVELOPMENTS'.

With so much research and a consultation exercise to draw on, the SLC's 1981 Report (SLC 1981)⁴⁵ was comprehensive and also contained the full draft Bill of the 1985 Family Law (Scotland) Act, which passed into law without alteration.

The 1970s saw wide-ranging reforms enacted in England and Wales in relation to support and financial provision on divorce and nullity of marriage, which included matrimonial property. However, in Scotland, at that time, no such comprehensive approach was adopted; instead a mix of out-dated legislation, no longer reflecting the society it was meant to serve, along with piecemeal statutory additions, were in operation (SLC 1981). Although there had been a consultation document published (SLC 1976) the actual production of a report had been postponed as other issues had taken priority. However, five years later the SLC published *Family Law: Report on Aliment and Financial Provision*,⁴⁶ in which Part 3 covered the law on financial provision and redistribution of property on divorce. Two major defects were noted by this Report in the law as it then stood; that there were: “*no ascertainable objectives*”⁴⁷ and there was an inadequate range of powers.⁴⁸

THE ORIGINAL INTENTION OF THE SECTION 9 PRINCIPLES

In order to remedy the major defects of Scots law as it stood in the 1980s, the Report⁴⁹ set out a list of orders for financial provision; but it went much further than this by underpinning them with a set of principles. Such principled legislation, linked so closely to models of marriage within society, is remarkable because it remains meaningful today despite radical societal changes in the last 30 years in relation to marriage, divorce and cohabitation.⁵⁰

The Report,⁵¹ on which the 1985 Act is based, aimed to clarify and offer: “*specific guidance to the courts, the legal profession and the public on the purpose or purposes of financial*

⁴⁵ SLC (No. 67) *Family Law: Report on Aliment and Financial Provision*, 1981.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, p2.

⁴⁸ EM Clive, *The Law of Husband and Wife in Scotland* (4th ed), 1997, para 24.004 sets out three main defects of the Divorce (Scotland) Act 1976, namely (i) a lack of universal principles led judges to vary in the awards made; (ii) financial awards limited to either a capital sum or periodical allowance; (iii) no power to award a periodical allowance for a fixed period.

⁴⁹ SLC (No. 67) *Family Law: Report on Aliment and Financial Provision*, 1981.

⁵⁰ Anne Hall Dick notes the extent of the “*new territory*” into which the 1985 principles have extended, namely to civil partnerships and by the 2006 Act to cohabitants in “Using the 1985 Act s9 principles in negotiation and their implications for negotiations involving cohabitants” 2007 SLT 186.

⁵¹ SLC (No. 67) *Family Law: Report on Aliment and Financial Provision*, 1981.

provision on divorce, and on the principles to be applied and the factors to be taken into consideration in connection therewith".⁵² Indeed, the Report emphasised throughout the need for financial provision on divorce to be based on a defined set of principles, which are available and accessible to all:

*It does not seem satisfactory that questions of social policy, which have very important financial consequences for individuals, should turn on informal understandings and somewhat arbitrary rules of thumb based on no ascertainable principle and known only to a small circle of court practitioners. It seems to us that any solicitor in any part of Scotland, even if not a divorce specialist, should be able to turn to a statute on financial provision on divorce and find some clear statement of the underlying principles on the basis of which he could advise his client and seek to negotiate a settlement. That is not possible under the present law.*⁵³

Such accessibility was essential as there was, at that time, a planned move away from divorce cases being heard exclusively in the Court of Session to most cases being heard in the sheriff court.⁵⁴

Although Scots law did not then use any explicit principles on which to base the award of financial provision, Memorandum 22⁵⁵ took a step in that direction by considering the purpose of such provision. To that end the Memorandum set out five possible "purposes".⁵⁶ Meanwhile the situation in England and Wales was considered in the Law Commission's Discussion Paper,⁵⁷ which reflected on what were called possible "models".⁵⁸ These, in part, overlapped the "purposes" in the Memorandum. The Report⁵⁹ drew everything together, looking at the purposes found in the Memorandum and the models in the Discussion Paper. The Report concluded that each of the English models was found wanting as a sole model⁶⁰ and that a combination of principles was required if the provisions were to: "*correspond to*

⁵² Ibid, p82.

⁵³ Ibid, p81.

⁵⁴ Change was effected by the Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983, s1.

⁵⁵ SLC Memorandum 22, *Family Law: Aliment and Financial Provision*.

⁵⁶ Ibid, para 3.2.

⁵⁷ Law Commission (No. 103 Cmnd. 8041) *The Financial Consequences on Divorce: The Basic Policy 1980*.

⁵⁸ Ibid, paras 59-86.

⁵⁹ SLC (No. 67) *Family Law: Report on Aliment and Financial Provision*, 1981.

⁶⁰ Ibid, paras 3.47 *et seq.*

reality”.⁶¹ The Report then went further and set out its own objectives, developed in part from the Memorandum, the Discussion Paper and from comments submitted to the SLC.⁶²

Whether called purposes, models or principles the documents each aim to define and clarify why and in what circumstances any financial provision on divorce should be applied. Over the years these documents span, the principles (as they are known in the 1985 Act) become more clearly defined, more focused and comprehensive. *Figure 3.2* shows the purposes, models and objectives of financial provision on divorce and where, if at all, they developed into a principle of the 1985 Act.

Figure 3.2: Purposes, models and objectives of financial provision on divorce considered in the drafting of the 1985 Act

| 1976 Scot Law Com Memo 22 Purposes | 1980 Law Com Discussion Paper Models | 1981 Scot Law Com Report 67 Objectives | 1985 Family Law (S) Act Principles |
|---|---|--|---|
| | paras 77-79 division of property | 3.51 division of property | 9(1)(a) |
| 3.2(e) technique for remedying certain injustices | | 3.46 equitable adjustment (advantages/disadvantages) | 9(1)(b) |

⁶¹ Ibid, para 3.60.

⁶² Ibid, paras 3.41-3.46.

| | | | |
|---|--|--|------------------------|
| | paras 84-85 restoration | 3.53 restitution | |
| 3.2(c) transitional measure | | 3.44 transitional measure | 9(1)(d) |
| | paras 73-76 rehabilitation | 3.50 rehabilitation | |
| | paras 70-72 relief of need | 3.49 relief of need | 9(1)(e) |
| 3.2(a) penalty for fault | | 3.42 penalty for fault | |
| 3.2(b) continuation of obligation of support existing during marriage | | 3.43 continuing support | |
| 3.2(d) relieving the public purse | | 3.45 relief of public purse | |
| | paras 59-65 retention of s 25 of Matrimonial Causes Act 1973 | 3.47 preservation of economic position of both parties | |
| | paras 66-69 repeal of s 25 | 3.48 justice at court's discretion | |
| | | 3.57 equitable adjustment without qualification | |
| | paras 80-83 a mathematical approach | 3.52 apportionment of means according to formula | 9(1)(a) to some extent |
| | paras 86 combination of models | 3.54 combination of models | 9(1) |
| | | 3.55 provision for children | 9(1)(c) |
| | | 3.56 reward for past contributions | |

GROUNDS OF DIVORCE

Currently there is one principal ground for divorce, namely that the marriage has broken down irretrievably.⁶³ Irretrievable breakdown can only be established in one of a number of ways. In its original form, the Divorce (Scotland) Act 1976 provided five ways of establishing irretrievable breakdown: adultery, unreasonable or intolerable behaviour, desertion, two years' non-cohabitation with consent or five years without. The first three of these were based on an element of fault while the final two were clearly non-fault. The law was amended in 2006, with the abolition of desertion as a means of establishing irretrievable breakdown and the reduction in the periods of non-cohabitation to one year with consent and two years without. In these changes there has been a move to make divorce quicker, simpler and predominantly no-fault.

For some, divorce was also made much simpler and cheaper by using a simplified application.⁶⁴ The conditions for a simplified divorce/ dissolution are:

- the ground for divorce/ dissolution being relied upon is one of the separation grounds
- the action is not being defended by the other party to the marriage/ civil partnership
- there are no children under 16
- neither party is applying for an order for financial provision on divorce/ dissolution
- there is no indication that either of the parties is unable to manage his/her affairs because of mental illness, personality disorder or learning disability
- there are no other court proceedings under way that might result in the end of the marriage/ civil partnership.

The concept of no fault divorce has proved to be essential to those using separation grounds, especially when using the simplified procedures. Under the 1985 Act either party can apply for an order; however, under the Divorce (Scotland) Act 1976, as amended by the Family Law (Scotland) Act 2006, it is not possible for both parties to submit a joint petition for divorce even though both fault and no-fault actions are accommodated in the Act. The Report (SLC 1981)⁶⁵ considered the policy of no-fault divorce in the context of financial awards: *“There was no support whatsoever on consultation for the view that the general*

⁶³ Strictly speaking there is another ground, i.e. the grant of an interim gender recognition certificate.

⁶⁴ Simplified divorce procedures were introduced by statutory instrument, Act of Sederunt (Rules of Court Amendment No. 6) (Simplified Divorce Procedure) 1982, SI 1982/1679.

⁶⁵ SLC (No. 67) *Family Law: Report on Aliment and Financial Provision*, 1981.

purpose of financial provision on divorce should be to penalise fault'.⁶⁶ However, the Report does recommend that there are occasions when conduct should be taken into account:

*In applying the principles laid down in Recommendation 31, the conduct of the parties, except where it has affected the economic basis of the claim for financial provision, should be taken into account only in relation to the principles of fair provision for adjustment to independence and relief of grave financial hardship, and then only if it would be manifestly inequitable to leave that conduct out of account.*⁶⁷

Out of court divorce arrangements have also developed with greater use being made of separation agreements.⁶⁸

THE CRITICISMS

Since this research sets out to explore the operation of the statutory framework for financial provision in practice, both the positive criticisms (of which there are many) and the negative criticisms (of which there are few) are covered in detail in Chapters 7 and 9. Suffice to say here, that the most well known criticisms were made by Lord Hope,⁶⁹ almost a decade ago and still give rise to comment today, as was seen in some interviews. His main criticisms were that the framework for financial provision is tightly structured, attaching greater importance to certainty than flexibility. Such an emphasis led Lord Hope to feel that the framework overly restricted judicial discretion. Seeing the 1985 Act as rejecting: “*the unfettered discretion model that up to then had been part of Scots Law*”,⁷⁰ he describes the Act as being:

... designed to reduce the scope of the court’s discretion to the minimum that was consistent with enabling the court to deal with each case on its own facts. ... There is

⁶⁶ Ibid, para 3.42.

⁶⁷ Ibid, para 3.44.

⁶⁸ J Mair, F Wasoff and K Mackay (2013) *All Settled?: A study of legally binding separation agreements and private ordering in Scotland*, Final Report, p.11: www.crf.ac.uk.

⁶⁹ See *Miller v Miller; McFarlane v McFarlane* 2006 UKHL 24 per Lord Hope at paras 101-121 where, although an English case, he compares the systems in operation in the two jurisdictions.

⁷⁰ Ibid, at para 111.

almost no room here for what Lord Cooke of Thorndon referred to in White v White⁷¹ as the development of general judicial practice.⁷²

Other commentators,⁷³ however, see the Act as occupying the middle ground where both certainty and flexibility are balanced, enabling clients to be advised but leaving room for the courts to deal with individual circumstances fairly. Curtailing the level of judicial interpretation that operated pre-1985 has meant that lawyers across Scotland understand and employ the provisions in a more standard fashion; while the positive aspect of placing the emphasis on certainty has meant that clients are offered clear advice from the outset. This has led to outcomes that are more predictable with the overwhelming majority of cases being settled through negotiation rather than court action, thus reducing costs.⁷⁴ Thus, the clarity of the 1985 Act has encouraged out of court settlements, often in the form of minutes of agreement (MoA). Therefore, in most cases, there are no accompanying financial orders, because the majority of people agree between themselves their own financial arrangements by means of such a MoA. However, a MoA is a contract with the force of law behind it and both parties need to realise that it is binding in nature.⁷⁵ While it is not easy to set aside or even vary an agreement, it is not impossible because any test of reasonableness is one of judicial discretion.⁷⁶

Furthermore, Lord Hope described the appearance of the framework, as a *fait accompli*. It was a complete and finished system with no recommendation for review, constructed to last: “*It was intended to establish the law not just for a generation. Like the Forth Bridge, it was built to last for a very long time*” (para 106). Indeed, it has succeeded in that, as one of our interviewees commented:

⁷¹ *White v White* [2001] 1 AC 596, 615.

⁷² *Ibid.*

⁷³ A Dick, “Using the 1985 Act s.9 principles in negotiation and their implications for negotiations involving cohabitants” 2007 SLT 186, for example, sees the 1985 Act providing “*guidelines rather than imposing a straight jacket*”; see also K Norrie, “Clean break under attack” (2006) 51 *Journal of the Law Society of Scotland* 16.

⁷⁴ See Chapter 7 where these points are considered in detail.

⁷⁵ In *Gillon v Gillon (No 3)* 1995 SLT 678 the pursuer wife fell foul of this when she sought to set aside an agreement under s16 of the 1985 Act, arguing that the MoA was unreasonable as it was signed at a time when she was not aware of the full value of her husband’s pension entitlement; while in *Anderson v Anderson* 1991 SLT (Sh Ct) 11 a husband twice agreed to hand over everything to his wife at the point of separation. Later regretting his action he tried to claim a capital sum. The sheriff regarded this as a binding obligation which could not be set aside just because he had thought better of it later.

⁷⁶ See *Hughes v Hughes* 2011 GWD 31-664 and *MacDonald v MacDonald* 2009 Fam LR 131.

The 1980s wasn't exactly the Stone Age, but it is 30 years ago and attitudes have changed, but you don't hear any judges ... complaining that it is rooted back in a time of different social attitudes. It has been broad enough and flexible enough to keep pace with whatever changing attitudes there have been. [Judge 31]

Finally, Lord Hope's recommendation that section 9(1)(d) should be amended to allow for periodical allowance for longer than three years was seen as an attack on the concept of clean break,⁷⁷ the very concept that Scots law favours.⁷⁸ In an early study of the impact of the 1985 Act solicitors were found: "*to give the idea of a clean financial break more prominence than is warranted by the terms of the Act*", (Wasoff *et al* 1990) understanding the notion of clean break almost as though it were one of the section 9 principles. Indeed, it is still the case that some practitioners refer to clean break as a principle.⁷⁹

Section 13 of the 1985 Act regulates the Orders for Periodical Allowance, which can only be justified by three of the principles (i.e. (c), (d) or (e)) and even then can only be used when other awards, such as a capital sum or transfer of property, are either inappropriate or insufficient to satisfy the requirements of section 8(2). The effect of section 13(2), therefore, is to reduce the use of periodical allowance in favour of either capital sum or property transfer. During the first years of the 1985 Act there were more cases than now involving awards of a periodical allowance, many sought to vary an allowance made pre-1985 Act. As time passed cases involving periodical allowances become very specific in nature, such as in *Galloway v Galloway*,⁸⁰ where, in order to achieve fairness where the disparity between the resources of the parties was large, periodical allowance of £1,000/ month for six years was awarded.⁸¹

There was never an intention that the clean break concept should stand alone. Indeed, the SLC Report of 1981 made this very clear: "*We therefore reject the view that the sole objective of financial provision on divorce should be to enable the parties to effect, or to*

⁷⁷ See K Norrie, "Clean break under attack" (2006) 51 *Journal of the Law Society of Scotland* 16.

⁷⁸ Strengthened by the limited use of periodical allowance in terms of the 1985 Act, s13(2); also Chapter 7 at 'A NOTE ON THE CONCEPT OF CLEAN BREAK'.

⁷⁹ See Chapter 7 at 'A NOTE ON THE CONCEPT OF CLEAN BREAK'.

⁸⁰ *Galloway v Galloway* 2003 Fam LR 10.

⁸¹ In terms of s9(1)(e).

effect more easily, the transition from marriage to divorce, or from dependence on to independence of the other spouse” (para 3.44, emphasis added). There was, however, through the relationship between the orders and the principles, and in particular the restricted availability of periodical allowance,⁸² an inbuilt preference for the nature and extent of the settlement to be confirmed at the point of divorce. Where there are children under the age of 16, despite the clean break approach, the default position is that support by parents for children continues regardless of divorce.

There is no provision in Scots law, as would be found in England, of continuing maintenance after divorce/ dissolution.⁸³ Lord Hope (*op cit*) considered there should be a reform of this aspect of the provisions as it can discriminate against those (usually women) who have given up a well-paid career to look after the children. He indicated that in, Scots law, such a woman could be awarded an order for periodical allowance but that the limitations attached to such an order would not compensate fairly for her future loss of earnings and reduced living standards. Lord Hope suggested one way of addressing this injustice would be to allow an order for periodical allowance to be justified by section 9(1)(b). That, of course, would greatly weaken the clean-break principle.⁸⁴

Clive, the principal architect of the 1985 Act, countered Lord Hope’s arguments on two fronts:⁸⁵ first, by drawing a distinction between a compensatory award and a maintenance award. The former looks to past events, such as correcting the imbalance of the weaker partner in the advantage/ disadvantage balancing exercise, while the latter looks to possible future events and the perceived needs of the weaker partner. Thus, while there is no principle in Scots law of maintenance, section 9(1)(b) of the 1985 Act can and should be applied, as it was specifically designed to meet such needs. Secondly, Clive demonstrated that Lord Hope took no regard of awards that were not time limited to three years.⁸⁶ The limitation applies only when addressing the need for a short-term adjustment (section 9(1)(d)). Where there is

⁸² 1985 Act, s13(2).

⁸³ See Matrimonial Causes Act 1973 and Matrimonial and Family Proceedings Act 1984.

⁸⁴ See eg K Norrie, “Clean break under attack” (2006) 51 *Journal of the Law Society of Scotland* 16.

⁸⁵ EM Clive, “Financial Provision on Divorce” (2006) 10 *Edinburgh Law Review* 413.

⁸⁶ Lord Hope’s apparent misunderstanding of awards that were not limited to three years also seems to have been a common misunderstanding of solicitors: see F Wasoff, RE Dobash and DS Harcus (1990) *The Impact of the Family Law (Scotland) Act 1985 on Solicitors’ Divorce Practice*, Edinburgh: Central Research Unit, Scottish Office.

a long-term need, such as the child care principle or the relief of severe hardship, then sections 9(1)(c) and 9(1)(e) should be used. Neither of these sections is time limited to three years, nor are they limited as to how the money should be paid.⁸⁷ Such awards can come from capital or from earnings spread over forthcoming years.

Clive considered that Lord Hope's comments could act as a wake-up call and: "*an encouragement to legal advisers and courts*" to make full use of all the provisions in the Act, especially those under section 9(1)(b) where compensation could be substantial: "*It would have been more useful still, however, if Lord Hope had drawn attention to these powers and the desirability of using them rather than giving the impression that they do not exist*".⁸⁸

CONCLUSION

This chapter has traced the development of the framework for financial provision on divorce found in the 1985 Act. Moving from out-dated legislation with piecemeal statutory additions to a tightly constructed framework set within five principles, the legislation has attracted criticism, which has been counteracted by a range of commentators, both practising and academic lawyers along with Clive himself, the main architect of the Act. As will be seen in Chapter 7, the framework is not without its areas of concern for practitioners, but as will also be seen in Chapter 9 there is no appetite for any wholesale change to the framework. Indeed, the framework for financial provision set within the principles is seen as unique to Scots law and legislation of which to be proud.

⁸⁷ Although being subject to s13(2), there is always a preference for an order other than PA.

⁸⁸ EM Clive, "Financial Provision on Divorce" (2006) 10 *Edinburgh Law Review* 413, at 419.

Chapter 4 The 1985 Act and amendments

INTRODUCTION

The research and policy background to the statutory framework for financial provision on divorce, as set out in the Family Law (Scotland) Act 1985, has already been explored in some detail⁸⁹ and the purpose of this chapter is to consider the provisions themselves and to highlight how they have been amended since the Act came into force on 1 September 1986.⁹⁰ It will concentrate on outlining the key provisions and amendments and it does not aim to be exhaustive.⁹¹ The full text of the statutory provisions is included in Appendix 2.

There is no doubt that the 1985 Act and in particular the sections dealing with financial provision on divorce were, in their original form at least, very well drafted. Anyone looking at the provisions could not fail to notice the order and neatness of the individual sections and the coherence of the overall structure. Little was left to chance: terms were defined, where there was flexibility, there were factors to be taken into account and, where there was discretion, there was further guidance on its exercise. The framework for financial provision in the 1985 Act was complex but it was well constructed.

While the fundamental elements of the legislation have remained relatively unchanged, there have been several amendments, relating to both scope and substance. Amendments concerning scope are simple: with the introduction of the new legal relationship of civil partnership in 2004, the provisions for financial provision which originally applied only on divorce were extended to apply equally on dissolution of a civil partnership and the language of the 1985 Act was changed accordingly.⁹² There was also some amendment in terms of scope in respect of children and the concept of “child of the family” to reflect provisions of the Human Fertilisation and Embryology Act 2008 in respect of parentage of children born as a result of assisted reproduction.⁹³ Other amendments affect the substance of the legislation

⁸⁹ In chapter 3.

⁹⁰ Family Law (Scotland) Act 1985 (Commencement No 1 Order) 1986/1237.

⁹¹ For further detailed discussion of the provisions, see A Griffiths, J Fotheringham and F McCarthy, *Family Law* (4th ed), 2015, 13-06 – 13-87.

⁹² Amendments introduced by the Civil Partnership Act 2004, Sched 28, with effect from 5 December 2005. For simplicity, the discussion in this chapter will tend to refer only to divorce but the legislation now refers equally to divorce or dissolution.

⁹³ See eg 1985 Act, s9(1)(c), as amended by HFEA 2008, Sched 8(2), para 46.

and here they have not been so simple. Rather than substituting new provisions for old, amendments have taken the form of additions to the existing rules meaning that the current provisions are without doubt longer, more complex and it might be said less elegant than the original. By far the bulk of these amendments relate to pensions and the various and complicated means by which they may be shared.⁹⁴

Financial provision on divorce is mainly dealt with in sections 8 to 16 of the 1985 Act, with some additional provision in sections 17 (financial provision on declarator of nullity), 18 (orders relating to avoidance transactions), 20 (provision of details of resources) and 22 (expenses of action). The focus of this chapter, and indeed of the research, is sections 8 to 16 and in particular sections 8 to 14. These sections can be classified under three headings: the orders, the principles and the additional factors or guidance. Section 8 lists the orders, section 9 the principles and the remaining sections provide further detailed guidance on both.

A NOTE ON FINANCIAL PROVISION AND DIVORCE

At this point it is worth noting that, in Scots law, divorce and financial provision are dealt with concurrently:

*It is important to appreciate that the 1985 Act deals with financial provision between divorcing spouses, rather than ex-spouses. ... Divorce represents the severing of a financial relationship between partners, even though continuing financial dealings as parents may remain. Thus divorce is the final opportunity for a spouse to compel a legally binding financial transfer of resources on their own behalf from the other spouse.*⁹⁵

In Scots law an action for divorce/ dissolution goes hand-in-hand with any claim for financial provision with the result that, in almost all types of cases,⁹⁶ the right to make a financial claim ends at the time of divorce. The right to apply for financial provision rests with the parties to the divorce action. When cases cross borders both parties and agents can make

⁹⁴ These amendments are the result in particular of the Welfare Reform and Pensions Act 1999 and the Pensions Act 2008.

⁹⁵ F Myers and F Wasoff, *Meeting in the Middle: a study of solicitors' and mediators' divorce practice*, 2000, Scottish Executive Central research Unit, Edinburgh, para 1.2.2.

⁹⁶ The exception is in overseas divorces.

mistakes as in *Sullivan v Sullivan*⁹⁷ where a mix of the husband's inaction and the ignorance of an English solicitor finally led to an appeal seeking a reduction of the decree.⁹⁸

THE ORDERS

Section 8 deals with the orders: the tools which the court may use to implement the scheme of financial provision on divorce. Any such order is referred to as an "order for financial provision".⁹⁹ As originally enacted, section 8 was short; comprising only three subsections. While the basic function of the section remains the same, it has been amended on several occasions, principally to introduce a number of additional orders relating to different methods of pension sharing and it now runs to 11 subsections. New sections 8A and B and 12A and B, which further regulate pension orders, have also been introduced. What may have been gained in terms of specification of a wider range of pension sharing orders, has arguably resulted in a loss of simplicity and conciseness. It is perhaps an example of what one of our interviewees described as "*trying to micromanage*" [Judge 31]. All of the orders listed in section 8(2) are in various ways further defined or their use clarified in subsequent provisions.¹⁰⁰

Either party "*in an action for divorce ... may apply to the court for one or more*"¹⁰¹ of the listed orders. As originally enacted, there were four types of order: capital sum payment,¹⁰² transfer of property,¹⁰³ periodical allowance¹⁰⁴ and "*an incidental order within the meaning of section 14(2)*".¹⁰⁵ The list of available orders has been extended and now includes several orders specifically relating to pension sharing. Section 8(1) in its current form provides that either party may apply "*for one or more of the following orders:*

(a) an order for the payment of a capital sum ... to him by the other party to the action;

⁹⁷ *Sullivan v Sullivan* 2003 Fam LR 53.

⁹⁸ See R Kelsey, "Scottish family law as relevant to the English lawyer", 2013 *Private Client Business*, 126-131 for fuller description of the differences between English and Scottish divorce procedures and financial provisions.

⁹⁹ 1985 Act, s8(3).

¹⁰⁰ See in particular, 1985 Act, ss8A, 8B, 12, 12A, 12B, 13 and 15.

¹⁰¹ *Ibid*, s8(1).

¹⁰² *Ibid*, s8(1)(a).

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*, s8(1)(b).

¹⁰⁵ *Ibid*, s8(1)(c).

- (aa) an order for the transfer of property to him by the other party to the action;*
- (b) an order for the making of a periodical allowance to him by the other party to the action;*
- (baa) a pension sharing order;*
- (bab) a pension compensation sharing order;*
- (ba) an order under section 12A(2) or (3) of this Act;*
- (bb) an order under section 12B(2);*
- (c) an incidental order within the meaning of section 14(2) of this Act.*

Capital sum and property transfer orders

While capital sum and property transfer orders are fixed in nature and not subject to subsequent review, there is scope for them to be used flexibly. This is set out in section 12: a provision which remains almost unchanged since its original version, having been amended only to take account of civil partnership. Section 12(1) provides that an order for payment of a capital sum or transfer of property may be made either on granting of the decree of divorce or within such period as the court may specify on granting the decree. The court may provide that the order “*shall come into effect at a specified future date*”¹⁰⁶ and, in respect of a capital sum payment, that “*it shall be payable by instalments*”.¹⁰⁷ Although the amount of the capital sum or the nature of the property is fixed at the point of order, there is scope for the court to “*vary the date or method of payment of the capital sum or the date of transfer of property*” on application by either party where there is a material change of circumstances.¹⁰⁸

There is further provision for capital sum payments to be made directly out of pension benefits¹⁰⁹ or from any Pension Protection Fund (PPF) compensation.¹¹⁰ These provisions are discussed further below, together with the other “Pension orders”.

A property transfer order directs one party to transfer property to the other. Any necessary consent of a third party must be obtained before the court can grant such an order.¹¹¹

¹⁰⁶ Ibid, s12(2).

¹⁰⁷ Ibid, s12(3).

¹⁰⁸ Ibid, s12(4).

¹⁰⁹ Ibid, s12A.

¹¹⁰ Ibid, s12B.

¹¹¹ Ibid, s15(1).

Periodical allowance

Although an order for periodical allowance may be sought under section 8(1)(c), it is subject to considerable further regulation as set out in section 13. Periodical allowance is more flexible than a property transfer or capital sum but that flexibility is in turn subject to more detailed and extensive statutory control. The flexibility is evident in section 13(1) to the extent that an order for periodical allowance may be made not only at the time of the divorce,¹¹² or within such period thereafter as the court may specify,¹¹³ but also after the decree of divorce or dissolution where:

- (i) no such order has been made previously;*
- (ii) application for the order has been made after the date of decree; and*
- (iii) since the date of decree there has been a change of circumstances.¹¹⁴*

There is further flexibility in section 8(3) which provides that any order for periodical allowance “*may be for a definite or an indefinite period or until the happening of a specified event*”. Unlike the other orders, which are fixed at the time of making, periodical allowance is open to review and variation in the following terms:

Where an order for a periodical allowance has been made under section 8(2) of this Act, and since the date of the order there has been a material change of circumstances, the court shall, on an application by or on behalf of either party to the marriage or his executor, or as the case may be either partner or his executor, have power by subsequent order—

- (a) to vary or recall the order for a periodical allowance;*
- (b) to backdate such variation or recall to the date of the application therefor or, on cause shown, to an earlier date;*
- (c) to convert the order into an order for payment of a capital sum or for a transfer of property.¹¹⁵*

¹¹² Ibid, s13(2)(a).

¹¹³ Ibid, s13(2)(b).

¹¹⁴ Ibid, s13(2)(c).

¹¹⁵ Ibid, s13(3).

It is specifically provided that such a material change of circumstances will include the making of a maintenance calculation in respect of a relevant child.¹¹⁶

While, in all of these ways, periodical allowance is relatively flexible, there is significant control over its use, as set out in section 13(2). It is provided that the court shall not make an order for periodical allowance unless the order is justified by a principle in section 9(1)(c), (d) or (e).¹¹⁷ Even then, periodical allowance is the last resort as the court must be satisfied, in terms of section 13(2)(b) that:

an order for payment of a capital sum or for transfer of property, or a pension sharing order or pension compensation sharing order, under that section would be inappropriate or insufficient.

It is important to note that an order for periodical allowance cannot be made where the only relevant principle is the first principle of fair sharing of matrimonial property in section 9(1)(a). Nor may it be used where the court thinks an order is justified under the balancing principle in section 9(1)(d).

Pension orders

Since the 1985 Act came into force there have been a number of amendments, most of which relate to pension awards.¹¹⁸ While it has always been clear that pensions could form part of matrimonial property, what has changed is the range and detail of the various types of order which can be used to implement the sharing of occupational pensions and pension compensation payments. These orders, which have been seen as potentially generous,¹¹⁹ involve earmarking and lump sum or pension sharing orders. The value of any pension, which forms part of matrimonial property, can of course be taken into account as part of the overall fund of matrimonial property and, if there is sufficient capital, the value can be shared while leaving the pension fund itself untouched. This process of offsetting is likely to be used in many cases.

¹¹⁶ Ibid, s13(4A).

¹¹⁷ Ibid, s13(2)(a).

¹¹⁸ See Chapter 7 at 'A NOTE ON PENSIONS' and Chapter 9 at 'Pension amendments'.

¹¹⁹ L Clarke, A Guide to Matrimonial Law in Scotland for Family Lawyers in England and Wales: www.morton-fraser.com/publications/articles/1436-a-guide-to-matrimonial-law-in-scotland-for-family-lawyers-in-england-wales.

There are, however, several types of order which can be made specifically in respect of a pension. A “pension sharing order” in terms of section 8(1)(baa) has the effect of splitting the value of pension between the parties, with each then receiving pension benefits from his or her own part. Parties themselves may initiate this arrangement by entering into a formal pension sharing agreement.¹²⁰ A “pension compensation sharing order” may be made in terms of section 8(1)(bab) by which a share or proportion of any compensation payable by the Pension Protection Fund (PPF) will be paid to the other party. This type of sharing can also be initiated by the parties themselves, rather than by court order, by means of a formal qualifying agreement.¹²¹ In making either of these orders, the court may make provision for the apportionment of associated charges.¹²²

The court may also make what is often referred to as an “earmarking” order. Where a capital sum order is made in terms of section 8(2), the court may order all or part of that sum to be paid direct from a pension lump sum payable on death or retirement.¹²³ A similar earmarking order may be made in respect of PPF compensation.¹²⁴

It remains possible for a court to earmark either a proportion or a fixed lump sum to come from the pension for the future benefit of the party who is the non-member of the pension scheme (s 12A). This would be paid when the pension matures. As can be seen in Chapter 8, earmarking is now almost never used. Further detailed provision is made in section 8(4) – (10) to regulate the interaction of these various types of pension orders and qualifying agreements and to ensure that the court cannot order both pension sharing and earmarking in respect of the same pension.

From the outset the fair/ equal sharing of pensions proved to be a difficulty for solicitors. Wasoff *et al*¹²⁵ found that pensions were used as a negotiating tool to be balanced against the value of the matrimonial home. Indeed, even after so many pension amendments they are rarely used; more common is for the pension award simply to be capitalised. Thus the

¹²⁰ Welfare Reform and Pensions Act 1999, s28(1)(f); Family Law (Scotland) Act 1985, s8(5).

¹²¹ Pensions Act 2008, s110(1); Family Law (Scotland) Act 1985, s8(10).

¹²² Family Law (Scotland) Act 1985, ss8A and 8B.

¹²³ *Ibid*, s12A.

¹²⁴ *Ibid*, s12B.

¹²⁵ F Wasoff, RE Dobash and DS Harcus, *The Impact of the Family Law (Scotland) Act 1985 on Solicitors' Divorce Practice*, 1990, Central Research Unit, Scottish Office, Edinburgh.

pension is, in effect, left intact. If the stronger party has inadequate liquid assets to make a full payment of such a capital sum, there are several ways that it can be paid over time. In *Gulline v Gulline*,¹²⁶ for example, a section 14 incidental order was made to compensate the wife for having to wait eight years to receive a capital sum reflecting her half of husband's pension. The incidental order was used to attach interest from the date of divorce until the retirement date or whenever the sum was paid to her.

Incidental orders

In addition to the specific orders listed in section 8, the court may also make, “*before, on or after the granting or refusal of decree of divorce or of dissolution of a civil partnership*”,¹²⁷ one of a range of so called “incidental orders” as provided for in section 14. An incidental order is one of the following:

- (a) an order for the sale of property;*
- (b) an order for the valuation of property;*
- (c) an order determining any dispute between the parties to the marriage, or as the case may be the partners, as to their respective property rights by means of a declarator thereof or otherwise;*
- (d) an order regulating the occupation of
 - (i) the matrimonial home, or*
 - (ii) the family home of the partnership,*or the use of furniture and plenishings therein or excluding either person from such occupation;*
- (e) an order regulating liability, as between the persons, for outgoings in respect of
 - (i) the matrimonial home, or*
 - (ii) the family home of the partnership,*or furniture or plenishings therein;*
- (f) an order that security shall be given for any financial provision;*
- (g) an order that payments shall be made or property transferred to any curator bonis or trustee or other person for the benefit of the person by whom or on whose behalf application has been made under section 8(1) of this Act for an incidental order;*

¹²⁶ 1992 SCLR 650.

¹²⁷ 1985 Act, s14(1).

(h) an order setting aside or varying any term in an antenuptial or postnuptial marriage settlement or in any corresponding settlement in respect of the civil partnership;

(j) an order as to the date from which any interest on any amount awarded shall run;

(ja) in relation to a deed relating to moveable property, an order dispensing with the execution of the deed by the grantor and directing the sheriff clerk to execute the deed;

(k) any ancillary order which is expedient to give effect to the principles set out in section 9 of this Act or to any order made under section 8(2) of this Act.

PRINCIPLED AND REASONABLE

Any of the orders outlined above may be made under section 8(2), only where it is “*justified by the principles set out in section 9 of this Act; and reasonable having regard to the resources of the parties*”. This subsection is key to understanding how the Act works and is typical of its carefully constructed framework. Section 8(2)(b) makes it clear that the court does not have a free choice when it comes to granting orders: each order must be clearly linked to a particular principle. While orders will be driven by the principles, ultimately they are also subject to a test of reasonableness in the context of the resources of the parties. The court may conclude that a particular order is justified in theory under the principles but in practice what is possible is constrained by the nature and extent of the resources of the parties. Reference to the “resources argument” was made in many of our interviews, and in particular in the context of the vignette.¹²⁸ Resources arguments refer to this provision in section 8(2)(b) and it is here that the impact of the restricted availability of periodical allowance may sometimes be highlighted.

THE PRINCIPLES AND THE GUIDANCE

Central to the statutory framework for financial provision are the “principles”. There are five principles, set out in section 9, and they have remained substantially unchanged. The only amendments have been to take account of the introduction of civil partnership in 2004 and to

¹²⁸ See chapter 8.

reflect the definition of parentage in terms of the Human Fertilisation and Embryology Act 2008. The principles themselves, in substance, remain in their original form.

The pattern of the legislation is similar in respect of both the orders and the principles. The orders are listed in section 8 and then there is further guidance relating to each of them in later sections. There is a similar approach with the principles: the principles themselves are set out in section 9 and then in sections 10 and 11 there is further guidance as to how they should be applied. Section 9(1)(a), the principle of fair sharing of matrimonial property, should be read in conjunction with section 10 which defines each of the elements of the principle. The other four principles, s9(1)(b) – (e) are to be applied in light of the further factors set out in section 11.

The first principle (s9(1)(a)): Fair sharing of matrimonial property

Section 9(1)(a) provides that:

the net value of the matrimonial property should be shared fairly between the parties to the marriage or as the case may be the net value of the partnership property should be so shared between the partners in the civil partnership

This first principle is fundamental to the statutory framework and its significance is reflected in the detailed guidance as to its application, set out in section 10. Every aspect of the principle is defined and explained.

Fair sharing and equal sharing

Principle 9(1)(a) is sometimes referred to in short-hand as the principle of equal sharing but as is clear from the provision itself what is required is “fair” sharing. Section 10(1) provides that the net value of the matrimonial property will be treated as having been fairly shared where it has been shared equally “*or in such other proportions as are justified by special circumstances*”. Special circumstances are further defined in section 10(6) to 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 family 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;

(e) the actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce or the dissolution of the civil partnership .

Matrimonial property

A key aspect of the first principle is that it applies only to the fund of property identified as being matrimonial property. This is clearly defined in section 10(4) as:

all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)—

(a) before the marriage for use by them as a family home or as furniture or furnishings for such home; or

(b) during the marriage but before the relevant date.¹²⁹

It is the “net” value of the matrimonial property which is to be shared and this requires deduction of any outstanding debts incurred by either or both of the parties during the marriage or debts incurred before the marriage but in the latter case only in so far as they relate to the matrimonial property.¹³⁰

It is specifically provided that matrimonial property shall include rights and interests of either party in a life policy or similar arrangement,¹³¹ a pension¹³² or PPF compensation.¹³³ The amount which will be included as matrimonial property is that which is referable to the period set out in section 10(4), that is from the date of marriage until the relevant date.

¹²⁹ In the case of dissolution of civil partnership, the equivalent definition of partnership property is set out in s10(4A).

¹³⁰ 1985 Act, s10(2).

¹³¹ Ibid, s10(5)(a).

¹³² Ibid, s10(5)(b).

¹³³ Ibid, s10(5A).

Further detailed provision as to inclusion and valuation of various types of pension is made in section 10((8), (8A), (8B), (8C) and (9). While the basic principle that pensions might be included as matrimonial property was included in the original 1985 Act, these additional detailed provisions are examples of subsequent amendments.

Relevant or appropriate valuation date

The value of the matrimonial property is assessed at “*the relevant date*”¹³⁴ or, where a property transfer order, at the “*appropriate valuation date*”.¹³⁵ Other than the amendments introduced in connection with pension sharing, this is the main way in which the substance of the provisions has been changed. In its original form, valuation was made in all cases at “the relevant date” but following the decision in *Wallis v Wallis*¹³⁶ the possibility of valuation at the appropriate valuation date was introduced to address the problem which might arise from a rise in property values between valuation and the date of divorce: the so-called “Wallis problem”.¹³⁷ The relevant date, according to section 10(3), is the earlier of the date on which the parties ceased to cohabit or the date of service of the summons in the action for divorce or dissolution. The possibility of short periods of non-cohabitation is taken into account in section 10((7) which provides that no account shall be taken of cessation of cohabitation where cohabitation is later resumed except where the parties ceased to cohabit “*for a continuous period of 90 days or more before resuming cohabitation for a period or periods of less than 90 days in all*”.

Where the court is making a property transfer order, the date at which the property should be valued is not the relevant date but the “appropriate valuation date”. According to section 10(3A) that is either the date which the parties agree or, where there is no agreement, “*the date of the making of the order*”. Or, in exceptional circumstances, the court may apply a different date “*as near as may be to the date*”¹³⁸ of the making of the order.

The second principle (s9(1)(b)): The balancing principle

¹³⁴ Ibid, s10(3).

¹³⁵ Ibid, s10(3A).

¹³⁶ 1993 SC (HL) 49.

¹³⁷ 1985 Act, s10(3A) offers more flexibility, addressing the unfairness of a valuation of marital property being taken at the time of separation when the value then rises before the divorce is granted see (*Wallis v Wallis* 1992 SC 455). Although Clive considered the injustice to have been caused by a “*misreading of the Act*”: EM Clive, “Financial Provision on Divorce” (2006) 10 *Edinburgh Law Review* 413 at 418, fn 49.

¹³⁸ 1985 Act, s10(3A)(b).

The second principle is set out in section 9(1)(b) and provides that:

fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family.

The concept of “economic advantage” is defined in section 9(2) to mean an advantage “gained whether before or during the marriage [or civil partnership] and includes gains in capital, in income and in earning capacity”. Economic disadvantage is to be interpreted accordingly. It is important to note that, unlike the concept of matrimonial property applicable under section 9(1)(a), which focuses largely on the period of the marriage, section 9(1)(b) looks back further to include relevant advantages and disadvantages before the marriage. It does not, however, explicitly refer to the period after the marriage and it is here that one of the limitations of the principle may lie.

In applying section 9(1)(b), the court is directed to take into account 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”.¹³⁹ The court should further have regard to the extent to which any advantage or disadvantage “has been or will be corrected by a sharing of the matrimonial property ... or otherwise.”¹⁴⁰

While section 9(1)(b) is in broad and neutral terms, one of its aims was to address the situation of the potential disadvantage which might arise in the context of a homemaker/breadwinner marriage model. Section 9(2) therefore specifies that “contributions” include “indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family.”

The third principle (s9(1)(c)): Fair sharing of the burden of childcare

The third principle is set out in section 9(1)(c) and provides that:

¹³⁹ Ibid, s11(2)(a).

¹⁴⁰ Ibid, s11(2)(b).

any economic burden of caring, should be shared fairly between the persons—

- (i) after divorce, for a child of the marriage under the age of 16 years;*
- (ii) after dissolution of the civil partnership, for a child under that age who has been accepted by both partners as a child of the family*

In applying section 9(1)(c), the court is directed by section 11(3) to have regard to a range of factors:

- (a) any decree or arrangement for aliment for the child;*
- (b) any expenditure or loss of earning capacity caused by the need to care for the child;*
- (c) the need to provide suitable accommodation for the child;*
- (d) the age and health of the child;*
- (e) the educational, financial and other circumstances of the child;*
- (f) the availability and cost of suitable child-care facilities or services;*
- (g) the needs and resources of the persons; and*
- (h) all the other circumstances of the case.*

This principle is intended to take account of the economic burden of childcare as it affects the parties and is distinct from parental obligations of support. A key factor to be taken into account, however, is the arrangements made for the aliment of the child and more generally the financial circumstances of the child. It should be noted that this is one of the principles which can be used to justify an order for periodical allowance.¹⁴¹

The fourth principle (s9(1)(d)): Readjustment principle

The fourth principle, commonly referred to as the readjustment principle is set out in section 9(1)(d) in the following terms:

a 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 to adjust, over a period of not more than three years from—

- (i) the date of the decree of divorce, to the loss of that support on divorce;*

¹⁴¹Ibid, s13(2).

(ii) the date of the decree of dissolution of the civil partnership, to the loss of that support on dissolution.

In considering whether to make an order in terms of this principle, the court is directed to have regard to:

- (a) the age, health and earning capacity of the person who is claiming the financial provision;*
- (b) the duration and extent of the dependence of that person prior to divorce or to the dissolution of the civil partnership ;*
- (c) any intention of that person to undertake a course of education or training;*
- (d) the needs and resources of the persons; and*
- (e) all the other circumstances of the case.*

It is important to note that this principle is not intended to provide for a period of readjustment as a matter of course but only where, for example, one party has been substantially dependent on the other during the marriage. Any financial provision which is awarded to cover a period of readjustment is subject to a three year maximum.

The fifth principle (s9(1)(e)): Relief of financial hardship

The fifth principle, set out in section 9(1)(e), provides that:

a person who at the time of the divorce or of the dissolution of the civil partnership, seems likely to suffer serious financial hardship as a result of the divorce or dissolution should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

It is clear that the serious financial hardship must result from the divorce itself and this provision is relatively rarely used. As with the previous principles, section 11 sets out a range of factors which the court should consider:

- (a) the age, health and earning capacity of the person who is claiming the financial provision;*
- (b) the duration of the marriage or of the civil partnership;*

- (c) the standard of living of the persons during the marriage or civil partnership;*
- (d) the needs and resources of the persons; and*
- (e) all the other circumstances of the case.*

As with the third and fourth principles, an order under section 9(1)(e) may include periodical allowance but only where the other orders are not sufficient. Unlike the readjustment principle, there is no time limit on an order under section 9(1)(e) with provision being “reasonable” and over “a reasonable period”.

CONDUCT

The Act sets out in considerable detail the various factors which the court should consider in applying the principles and making orders for financial provision. The one factor which it is specifically directed not to take into account is the conduct of the parties.¹⁴² Conduct of either party should only be taken into account where it has either “adversely affected the financial resources which are relevant to the decision of the court”¹⁴³ or where, in relation to section 9(1)(c), (d) or (e), “it would be manifestly inequitable to leave the conduct out of account”.¹⁴⁴

AGREEMENTS ON FINANCIAL PROVISION

There is specific provision in section 16 of the Family Law (Scotland) Act 1985 for challenge and review of “an agreement as to financial provision to be made on divorce”.¹⁴⁵ Section 16 provides that the court may make an order setting aside or varying such an agreement in two situations. The first applies to any term of the agreement relating to periodical allowance but only where the agreement expressly includes a term providing for such review. The court may exercise this power to vary or set aside “at any time after granting decree of divorce”.¹⁴⁶ The second situation is “where the agreement was not fair or reasonable at the time it was entered into”¹⁴⁷ but in this case the power to vary or set aside may only be exercised “on

¹⁴² Ibid, s11(7).

¹⁴³ Ibid, s11(7)(a).

¹⁴⁴ Ibid, s11(7)(b).

¹⁴⁵ Ibid, s16(1). For more detailed discussion of this provision and of agreements on financial provision generally, see J Mair, F Wasoff, and K Mackay, *All Settled? A study of legally binding separation agreements and private ordering in Scotland*, Final Report, (2013), ch 2.

¹⁴⁶ Ibid, s16(1)(a).

¹⁴⁷ Ibid, s16(1)(b).

granting divorce or within such time thereafter as the court may specify on granting decree of divorce.¹⁴⁸ It is not open to the parties to agree to exclude the operation of section 16(1).¹⁴⁹

A COMMENT

The main purpose of this chapter was to set out the statutory context for the analysis which follows. Conclusions are therefore not necessary nor perhaps appropriate: instead, a comment. In looking at the legislation and in tracing the amendments which have been made since 1985, it is striking how little it has changed in essence but how much it has changed in shape. The original drafting was detailed but concise, the structure was complex but easily navigable and the meaning of each section was clear. The amendments have undoubtedly made this part of the Act more complicated and less accessible. They have been tacked on rather than built in and their addition has detracted from the original design.

¹⁴⁸ Ibid, s16(2)(b).

¹⁴⁹ Ibid, s16(4).

Chapter 5 The research context: methodology

INTRODUCTION

The aim of the research

The purpose of the research was to investigate how the statutory system of financial provision on divorce works in practice in litigated cases. The Scottish system of financial provision is based on a range of orders found in section 8 of the 1985 Act, which are justified by a set of explicit principles found in section 9. The overarching intention was to contribute to current discussions in both Scotland and England on financial provision, access to justice and legal aid, mediation and other forms of alternative dispute resolution.

Since the intention of the 1985 Act was to increase both clarity and certainty (with an associated limitation on judicial discretion) divorcing parties have been encouraged to reach agreements without recourse to court. Some interviewees were, therefore, uneasy that the research focus was solely on litigated cases and, indeed, in phase 1 of the fieldwork, the focus was only on reported cases: *“you’re looking at cases which are necessarily very atypical. You really are not taking a cross-section of how things actually happen. The reported case is the unusual one. The fully litigated case is an unusual one”*. [Solicitor 05] Of course, if this research is considered alone it cannot offer the complete picture of how the statutory framework for financial provision is used – but it does not set out to do that. So no apology is offered for the limited focus, because the purpose of this study is to complement recent research into private ordering¹⁵⁰ by extending the picture to include litigated cases.

Objectives

To achieve this aim we analysed 200 published court cases and then sought the experiences and perspectives of legal practitioners in relation to the use of the statutory framework for financial provision. In particular we examined:

- how the section 8 orders and section 9 principles are used in practice

¹⁵⁰ J Mair, F Wasoff and K Mackay, *All Settled?: A study of legally binding separation agreements and private ordering in Scotland*, Final Report, 2013: www.crfr.ac.uk.

- whether the principles and orders are overly restrictive, limiting flexibility and discretion
- whether the relevant date remains meaningful and how it is established
- what aspects of the provisions are of particular use to litigants
- the place of clean break in current practice
- how practitioners develop their own interpretations of the law
- how the extensive range of awards related to pensions is used in practice.

THE RESEARCH: A CLASSIC DESIGN OF THE NARROWING FOCUS

The research ran from April 2014 to October 2015 and was structured to a classic design, beginning with the wide lens and gradually focusing more narrowly as it progressed. Thus, we began with a very wide focus establishing the historic context of the legislation, tracing how and why it developed. This became the basis for Chapter 3 of this report. The focus then narrowed a step to phase 1 of the fieldwork, a desk exercise taking the form of a survey of 200 published cases of divorce involving financial provision.¹⁵¹ The quantitative nature of this first phase established a broad overview of practice covering the years the Act has been in operation, examining the frequency of use of both the orders and their underlying principles. Thus the survey established a foundation of courtroom practice that formed the base-line for the subsequent interviews. This progressive focusing led to the final narrowing of the lens in phase 2 of the fieldwork. The qualitative nature of this final phase enabled the main themes, which had emerged from phase 1, to be examined in far greater detail and consisted of 29 semi-structured interviews with a range of legal practitioners, namely advocates, judges, sheriffs and solicitors who reflected on their experience.

STAGE 1: THE SURVEY

¹⁵¹ Amongst the 200 cases there were no civil partnership dissolutions that involved financial provision, because there were no reported cases.

Choosing 200 cases offered a large enough sample from which to draw meaningful conclusions. The cases were chosen at random from various databases¹⁵² and, because this yielded fewer than the required number, the remaining cases were found by following up cited cases referenced in those already analysed. The cases spanned the decades of the operation of the Act, covering cases of first instance and appeals in sheriff courts and the Court of Session. The quantitative data of the survey was analysed using the standard statistical software of SPSS. The full SPSS codes can be found in Appendix 1.

Survey topics

The survey topics included the following:

- *Basic facts of case* – covering the details of the marriage, the parties and any children
- *Section 8 orders* – exploring which orders were sought, which granted and whether reference to the orders was explicit or implicit
- *Section 9 principles* – exploring which principles were used to justify orders and whether reference to the principles was explicit or implicit
- *Sharing value of matrimonial property* – whether fair sharing meant equal or unequal sharing, the various aspects of property identified at the relevant date
- *Orders* – covering a capital sum; property transfer; pension lump sums; periodical allowance and incidental orders
- *Rights of third parties* – such as mortgage companies and other creditors
- *Agreements on financial provision* – such as ante and postnuptial contracts; pension agreements; minutes of agreement
- *Provision of details of resources* – where parties were required to provide details of personal resources
- *Interpretation* – covering the interpretation of terms
- *Developing themes* – including such topics as equality; fairness; readjustment; hardship; what is reasonable; clean break principle; avoidance
- *Other legislation cited* – noting legislation cited in the cases.

STAGE 2: INTERVIEWS

¹⁵² www.legalresearch.westlaw.co.uk; www.lexisnexis; www.scotcourts.gov.uk

The interviewees and their backgrounds

The original intention was to interview about 20 solicitors, five advocates, and five sheriffs and judges.¹⁵³ In the event 18 solicitors were interviewed (because by then no new data was being gathered) along with six advocates, two sheriffs and three judges. The interviewees were chosen because they had some level of background in family law and all were used to operating within the statutory framework for financial provision of the 1985 Act. The 29 interviewees spanned a range of experience:

Figure 5.1: Range of experience of interviewees

| SOLICITORS | | ADVOCATES | | SHERIFFS | | JUDGES | |
|--------------------|------|------------------|------|----------|------|----------|------|
| by years qualified | Nos. | by years call | Nos. | by years | Nos. | by years | Nos. |
| below 10 yrs | 1 | fewer than 6 yrs | 1 | 9 yrs | 1 | 5 yrs | 1 |
| 11 - 20 yrs | 5 | 6 or more yrs | 4 | 10 yrs | 1 | 7 yrs | 1 |
| 21 - 30 yrs | 7 | senior counsel | 1 | | | 9 yrs | 1 |
| 31 - 40 yrs | 4 | | | | | | |
| 40 + yrs | 1 | | | | | | |

Two of the judges and one sheriff held specialised roles. One judge had a family law background, while five of the six advocates and both sheriffs had, at one time, practised as family law solicitors. Of the solicitors all were members of the Family Law Association with two thirds being accredited as family law specialists; just over one third were mediators and almost half were collaborative lawyers; three were arbitrators, one was a solicitor advocate and another was dual qualified. Of the advocates, all but one spent the majority of their time on family law, with a high proportion of that time on financial provision cases. All but three of the solicitors practised family law full-time, with the majority spending most of that time on financial provision work. A note of caution here, as one needs to be careful when considering the amount of time an agent spends on family law – it is easy to assume that someone spending only half their time may not be a specialist, which might be far from the truth. For example, there was one interviewee who had, at one time, been a full-time family

¹⁵³ Senators of the College of Justice who sit in the Court of Session.

lawyer, but currently had chosen to reduce that to 50%: “I found, at one point, probably about 95% of my work was family. ... I just found it completely draining. ... Most family lawyers, that’s all they do is family law. I just couldn’t do it. I couldn’t do it. It is draining. ... A family lawyer is the ultimate distress purchase”. [Solicitor 18]

Recruiting interviewees

The advocates were the most straightforward group to recruit because most had attended a seminar explaining the research, given close to the start of the project, by two members of the research team to the Advocates’ Family Law Association. Using their website stable listings,¹⁵⁴ six were recruited with a range of experience. Once they had agreed, further written information was posted to them along with a consent form; a pattern followed for each of the practitioner groups.¹⁵⁵ All arrangements were then made by email, which included sending the vignette that was to be read before the interview. This proved the simplest method of contacting advocates, who were often in court or in consultation.

The members of the judiciary were recruited by means of a longer process. Advice was taken from the Lord President on how to approach sheriffs and judges. He offered the support of his private office, if required, suggesting we approach whichever judges and sheriffs we chose with the proviso that approaches to individual sheriffs should go via their sheriffs principal. We followed this advice. Recruiting sheriffs proved to be painstaking work and took some time, as some were unwilling to participate being on the point of retirement and others simply did not respond; recruiting judges was more straightforward. All members of the judiciary were initially contacted by letter but, in most cases follow-up contact was by email. In some cases, when choosing whom to approach, advice was also sought from contacts in the field, who also paved the way before an initial approach was made.

The largest group of practitioners was solicitors, so a long list was compiled from various sources: the Family Law Association website; the list of accredited family lawyers held by the Law Society of Scotland; those who had appeared in reported cases; and from those who had taken part in previous research and might be willing to contribute once again. Solicitors

¹⁵⁴ www.advocates.org.uk

¹⁵⁵ The package of written information fulfilled the requirements of the Ethics Committee of the College of Social Sciences, University of Glasgow.

were recruited by email with follow-up telephone calls. Once their agreement had been given, and having posted the necessary university package, a series of emails followed. These not only sent information, such as the vignette they needed to read prior to interview, but also served as a reminder. After it was found that the first two interviewees had not read the vignette and did not have it in front of them, another email was inserted as a reminder just before the interview.

A note on legal aid

It was impossible to recruit a balance of agents who did legal aid work and those who did not, because, in the main, agents did not accept legally aided clients. They could no longer afford to do so: *“basically we can’t. We can’t do that work and break even. So we don’t. The one exception really is child abductions”*. [Solicitor 13] A number of agents had done such work in the past either in their current firm or in another. However, even where the firm did accept some such work it was most likely to be for children’s hearings and most unlikely to be for financial provision cases.

A range of interviewees saw legal aid as problematic: *“It’s very expensive to litigate and ... now that we have a shrinking number of practitioners who are prepared to do legal aid, and certainly who are prepared to do financial provision cases on a legally aided basis, you have fewer and fewer of these things actually running to proof”*. [Solicitor 03] So, the knock-on effect of so few agents now doing such cases under legal aid was that the number of litigated cases had reduced. This was not necessarily seen as a positive step, because it meant that cases using principles beyond section 9(1)(a) were now not being tested in court sufficiently frequently:

... 9(1)(c) is a good example of that. ... What it needs ... is for people to be prepared to litigate to the bitter end and get a result which everyone can then use as a precedent and ... therein ... lies the problem ... because people adopt, especially when they are paying for it themselves as opposed to doing it on a legally aided basis, a fairly risk averse approach to these things. [Solicitor 03]

There were some agents, however, who indicated that, on occasion, they would accept financial provision cases under cover of legal aid. Normally, this would not be advertised

and would only be after much consideration: *“we are quite thoughtful about what we take, but there are cases that we take where we ... it's something we can do to help ... if it's something that needs to be done and we've got the resources to do it”*. [Solicitor 01] Interviewees were: *“very choosy about it”*, [Solicitor 16] often carrying out such work for very principled reasons: *“on the whole I don't, but I do represent some clients who are legally aided if I feel that it's the right thing to do, because they are getting effectively bullied into accepting less than they are entitled. So, it's not a complete blanket bar on legal aid but I tend to restrict sort of cases I take significantly”*. [Solicitor 12]

The interviews

The interviews were in-depth, semi-structured, recorded and then transcribed. Those with solicitors and advocates were conducted by telephone. Not all research interviews work well over the telephone, but these two professional groups were particularly suited to such conditions and there were no problems. Not only do telephone interviews cause minimal disruption to the working day of legal practitioners, but also as professionals accustomed to conducting business by telephone, the interviewees were focused and able to answer readily. The interviews with sheriffs and judges were face-to-face in their chambers. The qualitative interview data was analysed using the standard software of NVivo. In order to protect identities, all interviewees were given a code and any references to the names or the locations of their firms (in the case of solicitors) were removed.

The semi-structured interview schedule was developed, in part, from themes that had emerged from the phase 1 survey, but also from initial ideas of team members. Gradually, these were honed and reduced to a manageable number, covering the following topics:

- Background of Interviewee – a snapshot of the interviewee's work and practice
- The 1985 Act – how the principles are used; then each principle in turn; flexibility
- Financial Orders – how the orders are used; flexibility; pension amendments
- Clean Break – the place of the concept in Scots law
- Matrimonial Property – nature of matrimonial property; problems encountered
- Relevant Date – difficulties encountered; impact of section 10(3A)
- Negotiation and Court Action – how negotiation and litigation sit together

- Parties and the 1985 Act – litigants and the statutory framework for financial provision
- Vignette – a scenario offering a common set of circumstances.

These topics, along with the vignette, were sent to interviewees when confirming the date and time of interview. The full schedules can be found in Appendix 1. Before embarking on the interviews, the schedules for solicitors and advocates were piloted with the pilot interviewees making suggestions as to the length, wording and sequencing of the schedules. We are greatly indebted to each interviewee who gave of their time so generously in the midst of very busy working days and to those who gave extra time to address the pilot issues. There were even those who were on the point of retirement but agreed to participate. Each person interviewed answered the questions with a wealth of detail, making the interviews a very enjoyable experience for the interviewer.

The vignette

The interviewees were all legal practitioners but, within that grouping, the range of roles and experience was wide. The purpose of the vignette, therefore, was to gather reflections on a common set of circumstances from all interviewees. Vignettes had been used to good effect in a previous research project,¹⁵⁶ so a similar approach was adopted here. Once again, there were those who felt it was like an exam scenario, but interviewees took it in good part. Interestingly, one interviewee, who had not long completed collaborative training, where they had been given similar scenarios as part of role play exercises, found it strange to have both sides presented: *“Because we obviously always get one side and somebody else gets another side. And it's quite difficult when you almost have sympathy for both sides, because you don't really know how to represent one side while also knowing the other one”*. [Solicitor 17]

CONCLUSION: TEAMWORK

Clearly, this work, however carefully planned, would not have been very effective had there not been a cohesive research team. The team consisted of three members, each with specific and complementary skills, operating in three different, widespread geographical locations

¹⁵⁶ F Wasoff, J Miles and E Mordaunt, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006*, 2010: www.crf.ac.uk/assets/Cohabitation-final-report.pdf.

across Scotland. This worked very well with communication passing freely amongst the team, mainly by email. There were some face-to-face team meetings, but few, as the channels of communication were very clear and open making it easy to operate at a distance. The level of understanding, trust and support between the members established quickly and remained strong, enabling the work to proceed without major hitches.

Chapter 6 Findings from the 200 Cases: a statistical profile of reported cases under the Family Law (Scotland) Act 1985 - October 1986 to April 2014

A PROFILE OF THE PARTIES AND THEIR CIRCUMSTANCES

In our close reading of 200 reported and other cases that were heard in the courts, we documented the information present in the narratives that were capable of being summarized statistically. There was great diversity in the content of cases and the information and level of detail contained within them, with their formats also widely variable across all courts. Thus not all of cases contained information about all of the variables we identified, and there is consequently a high level of so-called “missing” information, that is, information that was either not reported or not relevant to the particular case.

Length and place of marriage

Where recorded (in 45/200 cases), 93% of the marriages took place in Scotland. The median length of marriage, where recorded (in 11/200 cases), was 18 years.

Table 6.1 Length of marriage

| | | Frequency | Percent | Valid Percent |
|---------|--------------|-----------|---------|---------------|
| Valid | 1-5 years | 11 | 5.5 | 9.9 |
| | 6-10 years | 18 | 9.0 | 16.2 |
| | 11-15 years | 15 | 7.5 | 13.5 |
| | 16-20 years | 20 | 10.0 | 18.0 |
| | 21-25 years | 21 | 10.5 | 18.9 |
| | 26-30 years | 13 | 6.5 | 11.7 |
| | 31+ years | 13 | 6.5 | 11.7 |
| | Total | 111 | 55.5 | 100.0 |
| Missing | data missing | 89 | 44.5 | |
| Total | | 200 | 100.0 | |

Children of the marriage/other children

Where recorded (in 149/200 cases), there were children of the marriage mentioned in 80% of cases, 48% with children under 16 years old. There were other children, not of the marriage, in a further 18% of all cases, including cases where there were no children of the marriage.

Employment status of the parties

Where recorded (148/200), 76% of husbands were in full-time employment. Most wives (52% of those where recorded (120/200) were employed; 23% full-time and 29% part-time. In some cases (71/200), one spouse was at home full or part-time, and in 13% of those cases it is recorded that this decision to do so was a joint one.

Housing

The housing tenure of the matrimonial home was recorded in 157/200 cases. Of these, the great majority (149; 95%) involved couples who were owner occupiers. There were only three cases in which the parties were social rented tenants and two cases involving a tenanted farm.

The ownership of the matrimonial home was recorded in just under two thirds of cases (127/200; 64%). Both spouses names were on the title deeds for over two thirds (68%) of these cases. The home was in the husband's sole name in 21% of cases where known, and in the wife's sole name in 8%.

THE DIVORCE ACTION

There has been a fairly steady number of cases involving the 1985 Act that have come through the courts since 1986, with a slightly higher number in the early years, perhaps reflecting a degree of pent-up demand in the early days, or less certainty about court decisions, as shown in the table below summarising the dates divorce actions were raised over time.

Table 6.2 Number of reported divorce actions by time period

| Year divorce action raised | Percent of total number of cases in these years |
|----------------------------|---|
| October 1986-1990 | 23.5 |
| 1991-1995 | 17.0 |
| 1996-2000 | 14.5 |
| 2001-2005 | 18.5 |
| 2006-2010 | 16.5 |
| 2010-April 2014 | 10.0 |
| Total (n=200 cases) | 100% |

The wife was the pursuer and the husband the defender in 75% of actions, the remainder *vice versa*.

WHAT WERE THE ISSUES IN DISPUTE?

The matters at issue were highly diverse but disputes over property predominated. We summarise that diversity below, looking both at the number of cases making specific reference to particular sections of the 1985 Act, as well as to principles underpinning the Act and to other legislation.

References to specific sections of the 1985 Act

The table below lists in descending order the number of cases where reference is made to a particular section of the 1985 Act. Explicit reference is made to the various section 9 principles, most frequently sections 9(1)(a), 9 (1) (b) and to section 8. More common, however, is implicit reference to specific concepts introduced by the 1985 Act such as matrimonial property, the relevant date and the equal sharing principle (and departures from that).

We examined whether references to specific sections of the 1985 Act showed any trends over time. In particular, we calculated the numbers of references and outcomes over different time periods in relation to a capital sum, periodical allowance and a property transfer order being

sought and granted. There was neither an increasing nor decreasing pattern, but rather more “random” occurrences of these issues over time.

Table 6.3 Most common references to specific sections of the 1985 Act

| Section | Number of cases referring to section |
|--|--------------------------------------|
| Identification of matrimonial property disputed? | 163 |
| Net value of matrimonial property disputed? | 160 |
| Relevant date disputed? | 158 |
| Equal sharing principle applied? | 157 |
| Capital sum sought or granted S8(1)(a)? | 144 |
| S8(2) Resources of parties used? | 128 |
| Implicit use of s 8(1)? i.e. non-specific | 126 |
| Principle 9(1)(a) used? | 93 |
| Departure from equal sharing principle? | 81 |
| Implicit use of s 9? ie non-specific | 80 |
| Special circumstances? | 76 |
| Property transfer sought or granted S8(1)(a)(a)? | 75 |
| Periodical allowance sought/ granted/ varied S8(1)(b)? | 73 |
| Principle 9(1)(b) used? | 64 |
| Non-matrimonial property? | 62 |

References to other legislation and principles

Vaguer reference to principles or concepts germane to the 1985 Act was also commonly made, such as to equality, fairness and reasonableness in the circumstances are each cited in over half of cases. The resources of the parties and section 8(2) is mentioned in 64% (128) of cases. Contributions to the marriage, special circumstances and advantage and disadvantage were also mentioned in just over a third of cases. In just under one third of cases, mention is also made to non-matrimonial property. Nearly two thirds of all cases (126; 64%) made some non-specific reference to section 8(1).

Also of interest are those concepts in the 1985 Act referred to in only a small minority of cases, indicating what is not relevant or not in dispute in the great majority. Few made mention of a clean financial break (12%), grave financial hardship (19%), a previous minute of agreement (13%), calculation of pension right (5%) or a period of readjustment (18%). Infrequently specific mention is made to other statutes. As will be discussed in chapter 7, the fact that few cases referred to a clean financial break as one of their issues, chimes with what was said in interviews with solicitors, who regard this concept as central to the fabric of the Act, and at the heart of their approach.

Some awards the courts could make prior to the 1985 Act featured to varying degrees; capital sum awards most commonly and periodical allowance awards least commonly. Hardly any reference was made to pension sharing orders, which were mentioned in only 15% of cases (though two thirds of these were granted).

A number of the new powers that were given to the court by the 1985 Act were mentioned across the sample of cases. For example, a property transfer order was sought in 75 cases (38%), successfully in over two thirds (52) of these.

We now turn to look in more detail at specific key aspects and outcomes.

Identifying matrimonial property and its net value

Identifying what assets constitute matrimonial property is mentioned in a large proportion of cases (163/200; 81%), but is disputed in fewer than half of those, 74 (37%), of cases in total. Equally commonly mentioned is the net value of matrimonial property, mentioned in 160 (80%) cases, and disputed in over half of these, or in 83 (42%) of all cases.

Capital sum

A large proportion of cases (144; 72%) involved seeking and granting a capital sum. The great majority (116; 82%) in which it was sought were granted. Somewhat paradoxical were two cases in which a capital sum was not sought but was nonetheless granted (cf chapter 7 where orders not craved are discussed).

Periodical allowance

Periodical allowance was sought in 30% (60) of cases and in about half (31) it was granted. In a small number of cases, 13, a variation of a pre-1985 Act award was sought, and most of these were granted.

How similar are cases in which periodical allowance was raised as an issue to the entire set of cases? They were similar with respect to most key variables. As noted elsewhere in this report, periodical allowance can be justified only in relation to sections 9(1)(c), (d) and/or (e). It is therefore not entirely surprising that these orders are associated with a higher likelihood that these sections of the Act, and the principles they describe are mentioned. For example, section 9(1)(d) is mentioned in 40% of these cases, compared to 17% overall. Similarly, section 9(1)(e) is mentioned twice as often in these cases compared to those overall. Perhaps surprising is that section 9(1)(c) is mentioned only slightly more often in these cases than in all cases. However, this may be explained, as our interviewees commented elsewhere in this report, by the fact that often the children are already teenagers and almost 16 by the time of the divorce and therefore section 9(1)(c) would not apply. Other comments suggested that cases can sometimes be prolonged so that by the conclusion the child(ren) is/ are too old or that in negotiations, the stronger party will seek to counteract a claim for periodical allowance by offering to take greater responsibility for child care.

The fair sharing principle

Central to the 1985 Act is the fair sharing of matrimonial property, or the fair sharing principle. In 122 (78%) cases an equal sharing of matrimonial property was sought, and was successfully granted in two thirds (83) of those cases. A departure from equal sharing was sought in about two fifths of cases, and granted in just over one half of these. Thus, in the majority of cases, the fair sharing principle was sought as an equal sharing of matrimonial property.

Pensions

It is discussed in chapter 4 in this report that many of the amendments to the 1985 Act are devoted to provisions about different types of pension sharing and their complexities, and yet, from the evidence in these 200 cases, explicit reference to pension sharing is seldom made and it would appear that, at least as far as court cases are concerned, those provisions are hardly used. There were a total of 15 cases where such an order was sought (only 7.5% of the total of 200), of which 10 (5% of the total) were granted. However, of this small number of cases where the information was recorded, all but one involved marriages in which there were children.

This pattern is not unique to cases that are seen in the courts, but is similar to that found in an earlier study of minutes of agreement, i.e. legally binding out of court separation contracts.¹⁵⁷ For these settlements too, while pensions were frequently cited in most agreements, it was mainly to discharge any claim by the other party. In only 19% of agreements that mentioned pensions at all, or 11% of all agreements was provision made for any kind of pension sharing.

CONCLUSION

The sample of 200 reported cases that we examined in detail were very diverse and fairly evenly distributed over the nearly 30 year period that the 1985 Act has been in force. By their very nature of being reported cases that have resulted in a judicial decision, these 200 cases are atypical, compared to the tens of thousands of divorces that have taken place over that period. Comparing this group to all divorces, defended or not, these cases involve longer marriages, and the divorcing couples are more likely to have had children and to have been home owners.

The issues in dispute are also diverse, although one common thread running through a large majority is the centrality of matrimonial property. A majority of cases make mention of identifying and valuing matrimonial property. Similarly, a majority of cases invoke the fair sharing principle for the division of matrimonial property and frequent reference is made in particular to section 9(1)(a).

¹⁵⁷ J Mair, F Wasoff and K Mackay, *All Settled?: A study of legally binding separation agreements and private ordering in Scotland*, Final Report, 2013, p47.

A majority of the cases argue in terms of the general principles central to the 1985 Act, such as reasonableness in the circumstances, fairness and equality. Also found in about a third of cases are arguments in terms of contributions to the marriage and advantage and disadvantage. Notable for its relative absence from these cases is the issue of pensions, which has been the focus of most of the amendments of substance to the Act and yet is seldom raised as an issue.

Chapter 7 Findings from the in-depth interviews

INTRODUCTION

The legislation will soon celebrate 30 years, so practitioners interviewed for this research (i.e, advocates, judges, sheriffs and solicitors) were well used to operating within its framework. It is interesting to note, however, that when asked to reflect on aspects of the Act, some interviewees found it challenging, because they: “*never had to think of anything other than just the application of it*”. [Solicitor 12] A few interviewees, on the point of retirement, had begun work before the Act came into being, so could remember an earlier life, but most had known only the Act and had, in effect, grown up with it: “*you’ve got to remember that I’ve always worked with it ... this is the Act I’ve always used. I’m not young!*” [Solicitor 06]

The interviews were wide-ranging,¹⁵⁸ covering too many topics to be addressed here. Therefore, only certain aspects will be considered in this report: other aspects of this research will be the subjects of later publications.

¹⁵⁸ See Appendix 1 Research Instruments for the full interview schedule.

SECTION 1: THE FIVE PRINCIPLES

INTRODUCTION

The principles are the foundation of financial provision and so will be considered first and in some detail, because it remains relatively unusual for legal principles to be so explicitly aligned to the social policy principles of marital relationships.

The essential nature of the principles

Describing section 9(1)(a) variously as the “core principle” [Advocate 21], the “guiding principle” [Solicitor 12], the “bedrock principle”, the “fundamental” or “default position” [Advocate 25], all interviewees agreed that a court is required to address this principle first. More significantly, interviewees stressed the different essential qualities of the principles: “*Well, that's the thing, you see, because some [principles] are more important than others*”. [Advocate 23] Section 9(1)(a) was placed apart from the other principles; it was of a different order because of its universal nature. So, having addressed that first principle: “*the very basis of the Act*”, [Solicitor 06] only then could arguments be put forward for any of the other principles. This led some interviewees to place section 9(1)(a) at the forefront of their minds with the remainder of the principles forming a backdrop.

Interconnectedness of principles

It is important to consider the interconnectedness of the principles; that is how they interact one with another, for example how section 9(1)(a) and (b) fit together where it should not be a matter of adding on a (b) claim but rather: “*thinking of it as a whole ... looking back to 9(1)(a) and looking to see whether the equal sharing under 9(1)(a) meets the economic advantage/disadvantage arguments*”. [Solicitor 14] Thus, the principles were seen to be divided into: “*9(1)(a) and (b), which are inextricably linked, and then (c), (d) and (e) which are more income-based*”. [Judge 29]

In similar fashion, other principles are linked:

... you see (d) and (e) are really secondary remedies, they are only available to the court in the event that transfer property or repayment of capital is insufficient to achieve a fair sharing, or unlikely to ... that's the effect of the section 13(2). [There is] ... a distinction between the kind of remedies which continue to require an involvement between the parties after divorce, these are the periodical allowance remedies of 9(1)(d) and (e), which are secondary remedies, and the primary ... remedies ... which are in relation to clean break – they are transfer of property of capital or whatever.¹⁵⁹ [Advocate 25]

Thus, the principles were structured in such a way as to require one to: “*put the whole lot together to get an outcome.*” [Advocate 22] However, having looked at fair sharing, the other principles should be seen as free-standing, in no way lessening or weakening the first principle. To that end it was considered that the five principles had not always been interpreted and applied correctly: “*we've tended to talk about the other principles as if they're a derogation from equal sharing, whereas they're not, they're free-standing. They're arguments in their own right, albeit they have to be seen alongside the others.*” [Advocate 22]

This mixture of interconnectedness and yet free-standing nature of the principles was expounded as follows:

... principle (a), of course, is fair sharing, not equal sharing, equal sharing is in 10(1) and the principle, itself, is fair sharing. Before you can decide fair sharing, you have to look at principle 9(1)(b), for example does it apply? Are there economic disadvantages and advantages? So you apply 9(1)(a) first, but you can't get to the end point until you've looked at 9(1)(b) and you've looked at 10(6), of course, in terms of whether there are special circumstances. Once you have got to the point where you think you know what you are going to do on 9(1)(a), 10(1) and (6), 9(1)(b), then and only then can you start thinking – are there 9(1)(c) issues? ... And then (d) and (e), which are quite a big, separate issue by themselves. But, of course, you can't look at (d) and (e) until you know what the capital is. [Judge 29]

¹⁵⁹ See also below at “A NOTE ON THE CONCEPT OF CLEAN BREAK” where the notion of clean break is discussed in more detail.

We will now consider each principle in detail.

SECTION 9(1)(a) THE PRINCIPLE OF FAIR SHARING - STARTING POINT

... the underlying principle is to divide the matrimonial property fairly between the parties. That is the principle that I always try to have at the forefront of what I'm doing, rather than having it just lurking around at the background as a given.
[Advocate 23]

The principle of fair (usually equal) sharing would be addressed first by the court: *“I have always taken the view that the approach of Lord McCluskey and Cunniff,¹⁶⁰ all those years ago, was probably the correct one, which is that it’s the duty of the judge – you must apply 9(1)(a) in any financial provision on divorce case”.* [Judge 29] This was the point where practitioners began: *“the commonest outcome and the default position will be fair sharing, which is taken to mean 50/50 sharing unless there are then circumstances, which might justify a departure from that. So you are starting off almost with a presumption about equal sharing”.* [Solicitor 03]

Clearly, fair sharing covered both assets and liabilities; each can act as:

... a reality check with the client ... for instance, ... policemen have huge pensions, and ... they ... come in and say – ‘It’s my pension, I worked for it, so why wouldn’t I get it?’ ... There is a general perception ... that certain things belong to one party ... and the other party should not have those assets. [Solicitor 06]

Liabilities work in the same way where one party may have a large amount of debt: *“that the other partner allegedly does not know about. ... They often say – ‘No, she’s got that debt, she put it in her name, I knew nothing about it, I shouldn’t pay.’ ... Everything during the course of the marriage is before the court and ... will come under an equitable division”.* [Solicitor 06]

Common approach

¹⁶⁰ *Cunniff v Cunniff* 1999 SC 537; 1999 SLT 992; 1999 Fam LR 46.

There was a common approach adopted by interviewees, albeit some stressed some stages more than others. However, in general their approach was as follows:

- Deal with the practicalities ~ so some agents were at pains to point out that their actual starting point, which would precede consideration of fair sharing, would, in fact, be: “*the practicalities of the situation for the person sitting in front of me – ‘Have you got enough money to live? Do we need to look at aliment? How long can you stay in the house? Can you afford the mortgage? Do you have enough money for the children?’*” [Solicitor 06]
- Draw up a schedule of assets and liabilities ~ this would include the extent and nature of the matrimonial property: “*you’re not going to get anywhere until you’ve got some sort of mutually understood, or agreed schedule of matrimonial property, because until you know the size of the pizza you don’t know how you’re going to divide it*”. [Solicitor 13]
- Meaning of fair sharing ~ then the presumption of fair meaning equal sharing would be explained, even accepting there could be other considerations to take account of: “*And the line I always take with clients is that the default position, in terms of the legislation, is equal sharing. And departure from that is only going to be possible if you can come up with a good argument. And, therefore, equal is supposed to be fair, but unequal can also be fair*”. [Solicitor 13] So, at that point the details of their story would be examined for any other claims under any of the other principles or under special circumstances: “*I would always ... start with ... fair meaning equal sharing and then look to see what circumstances there are which might then deviate from that*”. [Solicitor 11] This part of the process was described as being: “*very integrated, holistic ... not a tick box approach*”. [Solicitor 04]
- Resources ~ some interviewees stressed the need to check: “*can the person afford to pay the figure ... arrived at?*” [Advocate 24]

A fine balancing act

Some interviewees were careful to manage client expectation from the outset as some clients could become: “*possessive of those arguments which they think apply to them.*” [Solicitor 13]

Their advice to clients was to: “*start from a position where we are likely to end up at 50/50 and have moderate expectations that we will achieve anything other than that.* [Solicitor 01]

This was illustrated, by a number of interviewees, with the image of weighing each possible claim and placing it in the balance:

You start from 50/50, you put one or two little bits on one side of the scales, you put one or two on the other side of the scales. You don't often find that that the scales are ... hugely [out of balance]. ... [Then you] stand back at the end – is this practicable, does this work? ... And that's where ... you will often go back and add another one or two ... ounces onto that side of the scales, because ... by doing that you [may] get to an outcome where a particular property can be retained or ... a degree course can be concluded, or whatever. [Solicitor 01]

Overall agents were split as to whether fair normally ended up meaning equal.

Section 9(1)(a) is both the start and the end

While recognising that they would always begin with a presumption of fair sharing, some interviewees saw that they also ended with this same principle: “*it's both the start and the end*”. [Advocate 26] The principle returns at the end of the process when: “*looking at resources and ... what I think is a reasonable and fair division of matrimonial property. I guess 9(1)(a) comes in at the beginning ... and then you test it against it again at the end*”. [Advocate 26] Such a test was called by one interviewee the: “*stand back and sniff test*” [Solicitor 01] when there would be a check, not only on the resources available, but also that the proposed division still felt fair. Others agreed, feeling that it mattered little from which: “*end of that argument you approach ... it should take you to the same end point. And perhaps looking at it from the two different ways is a useful double check, that what you are advising the client to do is reasonable*”. [Solicitor 07]

The meaning of fair

Since any shared vision of fairness is likely to recede quite quickly at the end of a relationship the possibility of an objective benchmark for fairness is at least a help

*towards finding common ground and sometimes the only way that mutually acceptable proposals can be identified.*¹⁶¹

Fairness was seen as: *“a touchstone in section 9(1)(a) which is delightfully clear and certain, and it’s one of the benefits we have.”* [Advocate 22] Section 9(1)(a) introduces the concept of fairness, indicating that: *“the net value of the matrimonial property should be shared fairly between the parties to the marriage”*. While section 10(1) develops the concept further: *“the net value of the matrimonial property ... shall be taken to be shared fairly ... when it is shared equally or in such other proportions as are justified by special circumstances”*.

When fair means equal

Setting aside situations where an equal share does fulfil the requirement for there to be a fair share, there are a number of other reasons why a fair share might result in an equal share – the most basic of which is cost. The cost of litigation could well be greater than the possible financial award: *“An extra 10% is £5,000, if you’re going to pay me more than that to litigate ... let’s ... be realistic about this”*. [Solicitor 20] Such a pragmatic approach leads people to think it can make more sense to: *“bail out and get on with your life”*. [Solicitor 13]

Some interviewees had begun their careers before the 1985 Act came into force and could, therefore, remember: *“in the early days of the Act – certainly my experience of negotiations was perhaps fair being 60/40 in favour of mum. ... As the years have gone on ... it’s now a real struggle to get more than a 50% share”*. [Solicitor 20]

When fair means unequal

Where there are: *“quite a few assets or a lengthy marriage ... there is usually always some adjustment to be done”*. [Solicitor 16] So, a number of interviewees considered that:

... most people now ... [have] some imbalance in either career or ... [items acquired] before they get married or inherit something during the marriage that they then put into matrimonial assets. So it’s quite rare now for that kind of simple approach of the ’85 Act to deliver an almost arithmetical outcome. It’s usually fine-tuning and sometimes quite a major exercise in calibration”. [Solicitor 04]

¹⁶¹ A Dick, “Using the 1985 Act s.9 principles in negotiation and their implications for negotiations involving cohabitants” 2007 SLT 186.

Others agreed that it was relatively rarely: “*as simple as a dead split of the property. ... It’s not just an arithmetical exercise, because in real life it’s never just quite as simple as that*” [Solicitor 05] as it would not be just a question of the extent of the property, but also its nature and liquidity. However, the actual level of the unequal sharing was seen to have changed over the time the Act had been in operation.

... in the very early years of the Act ... there was more enthusiasm for quite radically unequal divisions because of the house versus pension dilemma – so the Cunniff¹⁶² case, there’s [also] ... Peacock¹⁶³ ... where the courts would ... give the wife the house if she had the young children, and he had his pension and his career. And if you actually looked at the sums, it was a very unequal division. That kind of stopped, post-Jacques¹⁶⁴ ... after the House of Lords decision, I think people started to say – ‘You know, 50/50 is the norm. Yes, you can have a bit of unequal division.’ – And so thinking as to how it was all going to be applied did change. [Judge 29]

Interviewees offered numerous examples of outcomes where the result was an unequal sharing.

These fell mainly into two categories, namely – source of funds arguments and section 9(1)(b) economic advantage/ disadvantage claims. Then there were other examples such as section 9(1)(c) where the child had special needs or section 8(2)(b) being reasonable as regards to resources of the parties.

Lack of coherent reasoning

In some cases there was evidence of a lack of coherent reasoning behind the unequal apportionments:

If I was honest, I think what most judges do is look at an equal sharing depending on the asset pool and think – ‘Oh, the wife needs a bit more, and she’s got this argument.’ So they come up with a sum that’s sometimes quite difficult to justify. You’ll see it in the Court of Session decisions as an extra two hundred thousand just

¹⁶² *Cunniff v Cunniff* 1999 Fam LR 46.

¹⁶³ *Peacock v Peacock* 1993 SC 88; 1994 SLT 40.

¹⁶⁴ *Jacques v Jacques* 1997 SC (HL) 20; 1997 SLT 459; 1997 SCLR 108; 1995 SLT 963.

kind of lumped in the wife's settlement, but there's no real proper breakdown of where that came from. [Sheriff 28]

Such an approach was not considered to be: “*intellectually coherent*” [Solicitor 01] and then made worse by agents who compounded this less than rigorous approach by latching onto the percentages¹⁶⁵ used: “*‘Right, we’ve got a million, 50% of that is £500,000. Oh, this feels like a 55/45 case.’*” [Solicitor 01] Such a cavalier use of percentages caused concern to others:

I’ve never subscribed to the school of thought..., and it happens all the time, that a solicitor will say well I want 60% of the property because I’ve got the children. And it just seems to me to be an arbitrary approach. ... I would always approach it from an ... empirical point of view – this is how I’m going to apply it, this is how I quantify my argument under this particular principle. And then, of course, you have to apply the reasonableness – is it reasonable having regard to resources? [Solicitor 18]

Even in cases where the reasoning was set out, some agents were said to take the overly simplistic view: “*‘Oh that’s a 55/45 case, oh that’s a 60/40 case.’*” [Solicitor 01] Because there had been no analysis of the route taken by the court, there was a confusion between the outcome and the cross-check function ensuring the result was fair, reasonable and affordable. For this interviewee cross-checking was crucial at various stages of the procedure. Giving the example of:

... a strong 9)(1)(c) case ... we need to look at what are going to be the capital costs of this women staying in this house, which is within a specific catchment area or whatever. If we need to give her that bolt-on, because she can only get a mortgage up to ... [a certain] level ... [with the] outcome ... for her to keep the house ... that means that she is going to end up with 85% of the net value of the matrimonial property. Does that still feel right? Is it a little bit too far, or not? And so that’s where I use the percentages as that kind of end-stage cross-check rather than as I want to get to a 60/40 or whatever. [Solicitor 01]

¹⁶⁵ See also below at “A NOTE ON THE NOTION OF RECEIVED WISDOM”.

Reflecting on the way the principles were underused, another interviewee considered that even where the principles were used they were insufficiently analysed: “*they don’t break down the thinking on the principles.*” [Sheriff 28] The resultant impression was:

... you can’t but wonder whether or not a judge started at the end result and then worked backwards and felt – ‘What does she get on an equal sharing? Well, I think a reasonable outcome is that she gets a bit more for a house and a bit to adjust, and I’m going to work backwards and refer to the principles from the submissions to do that’. – That might be unfair but that’s the way some of them read. [Sheriff 28]

Why cases do not progress beyond the first principle

I think too many agents don’t think far enough beyond 9(1)(a). They seem to regard the division of the net value of the matrimonial property as being the be-all and end-all. [Solicitor 07]

There was a strong feeling that there had been a tendency to become: “*so hung up on dividing the value of matrimonial property and we’ve failed to appreciate that there are actually these other principles that we can apply*”. [Advocate 22] From the outset it is important to recognise that most cases are straightforward, with no other relevant principles beyond section 9(1)(a). Where there is a mutual acceptance of a 50/50 spilt then the discussion between agents would focus on the mechanics to effect such a division. Having said that, many interviewees did consider that, for whatever reason, there were examples of cases not progressing beyond the first principle when there were arguments to be made: “*There are some agents ... would just say – ‘No, this is it, half, down the middle. That’s the end of it’ – just brushing over it. And I feel they are short-changing their clients. ... There are times that ... a better outcome could have been achieved with a bit of imagination*”. [Solicitor 09]

Naturally, one reason why a case may not progress beyond the first principle is that: “*9(1)(a) is very, very simple to advance, because ... you are not really advancing an argument*”. [Solicitor 12] So it is easy to argue section 9(1)(a): “*because it’s clear and definite and certain – until you get to the issue of sharing. People are less confident about the other principles, about their application*”. [Advocate 22] The first principle was seen as strong, indeed: “*so strong that judges and sheriffs ... have to be persuaded to move away from it and*

... might be said to be reluctant ... because ... the presumption of fair means equal is so strong". [Advocate 24]

There was a recognition that some practitioners were cautious and risk-averse: *"it's a very high-risk way of testing things out, unless there is a huge amount at stake. ... I'm not saying that that's good and that people shouldn't be trying, but I have every sympathy with people that are cautious in their approach to litigation"*. [Solicitor 04] It was, indeed, totally understandable why agents should be cautious in their approach to developing arguments beyond the first principle in the context of litigation: *"I think litigation is a very one-dimensional process to get into. The costs are extremely high. Judges and sheriffs are unpredictable, particularly sheriffs. So it's a very high-risk thing to be creative in a court action"*. [Solicitor 04] The term "cautious" was not necessarily considered to be the most apt description of what was described as:

... a recognition of the level of risk. When you engage in any negotiation or litigation ... risk is a big issue. ... You're factoring in the whole time – 'What is my chance of succeeding with this argument or what is my chance, if I succeed, of sustaining this argument in the face of an appeal?' [Advocate 22]

However, while such an approach might be understandable it was not always seen to be the best approach to adopt: *"when we are busy ... we are risk averse – the client ... [is] spending a lot of money on all of this. We have a tendency to be a little bit formulaic about the way in which we apply the 1985 Act"*. [Solicitor 03] However, it was not solely agents who erred on the side of caution: *"sheriffs also get stuck at the first principle ... I feel that there's an upward struggle to try and convince sheriffs to give you more than 50%"*. [Solicitor 20] For some interviewees the judiciary and subsequent case law acted as barriers to greater use of all the principles: *"judges are to an extent very reluctant to make any awards and certainly any substantial awards under 9(1)(b), (c), (d) or (e). ... The way the case law has evolved, judiciary are hung up on the fair sharing of the net value of matrimonial property"*. [Solicitor 19]

Overall, the reasons for such caution were various and included: the cost of litigation; the risk of expenses being awarded against your client,¹⁶⁶ some uncertainty as to the strength of arguments; it not being worthwhile to gamble over small amounts of money; clients who: “*just want it sorted*,” [Solicitor 16] and changes in society,¹⁶⁷ such as the working pattern of women, that meant some principles, in this instance section 9(1)(b), might now be used less frequently.

There was also concern about how some agents actually approach the principles: “... *a lot of solicitors are driven by practising defensive law, I don’t think they’re adventurous*.” [Solicitor 13] The principles were not being used fully: “*we haven’t been particularly brave and ... the prospects of us being brave are only going to decrease rather than increase*”. [Solicitor 01] In similar manner, a very experienced family lawyer, commenting on the lack of rigour in negotiated settlements, noted how rare it would be to have: “*any kind of detailed analysis of the principles in the Act*”. [Solicitor 13] Another very experienced agent held similar views:

A lot of family lawyers don’t really understand legal principles ... how to apply the law. ... They are ... very good at dealing with practical situations; but they don’t think like a lawyer. When it comes to actually ... taking the principles and applying them to a set of circumstances, in the same way that you would take the terms of a contract and apply it to a set of circumstances. [Solicitor 18]

There were, of course, interviewees who considered the principles were fully used, who did not feel that there were cases, which could have progressed beyond the first principle but failed to do so: “*I’m not sure if that’s my experience*”, [Solicitor 08] “*I’m certainly not aware of any kind of general perception among practitioners that once you get to 9(1)(a) you can stop*”. [Advocate 25]

Offering the example of *Coyle v Coyle*,¹⁶⁸ another interviewee considered that there were cases where section 9(1)(a) fulfilled the claim: “*I don’t think I can accept it was a lack of*

¹⁶⁶ An example can be seen in *Adams v Adams* (No 2) 1997 SLT 150; see also below at “The classic scenario misconceived”.

¹⁶⁷ See below at “Societal changes” and also Chapter 2 where such changes are explored in detail.

¹⁶⁸ *Coyle v Coyle* 2004 Fam LR. See below at “The impact of Coyle” for further exploration of this case.

enthusiasm for the other principles, or a lack of knowledge of them ... it was more the case that attempts to use principle 9(1)(b) to completely disrupt the outcome you would get on 9(1)(a) alone were not successful". [Judge 29] Thus, rather than there being little enthusiasm for the other principles it may well be that disputes: "*can be resolved through 9(1)(a)*". [Judge 29]

Although normally: "*the onus [is] on parties to raise the claims that they want to make, there is a wide discretion available to the court to achieve fairness*". [Advocate 25] Therefore, once in court, there is a safeguard mechanism available, so: "*even where issues are not argued, it's open to the court, if it thinks it's equitable to do so, to make an order which is ex proprio motu.*" [Advocate 25] This was also the experience of others who would have been surprised had their local family bar missed other possible claims. In fact, they would be: "*more likely to try to make a case out of very little*". [Sheriff 27] Offering the example of a case where both parents worked, both with good careers, sharing care of their children and where mother's earning potential was greater than father's, the sheriff had heard mother's agent try to argue section 9(1)(b): "*So I have to say I've been slightly concerned the other way!*" [Sheriff 27]

SECTION 9(1)(b) ECONOMIC ADVANTAGE/ DISADVANTAGE

A principle frequently argued

There were a number of interviewees who considered that section 9(1)(b) was one of the most often argued of all the principles: "*That's my experience here*". [Sheriff 27] Others agreed: "*people are very quick to argue about things like loss of career, or ... they looked after the children, or ... put money into the other party's business. ... I would suggest that that is probably the most used principle, certainly in my practice*". [Solicitor 13]

A section 9(1)(b) argument can be used in two ways because: "*there are two legs to [it], one is the conferring of an economic advantage from your contributions and the other ... is the suffering of an economic disadvantage in the interests of others or the family*". [Advocate 22] So agents reported using it whether they were representing the stronger or the weaker party:

“If I’m acting for the woman, who is the main carer of the children and has given up her career ... if I’m acting for the husband who ... has been working ... 70 hours a week and all the money has come from his efforts ... [in] 95% of my cases I’m using section 9(1)(b)”. [Solicitor 20]

The argument was not confined to use in litigated cases, it was also used as leverage during negotiations: *“there are many cases I’ve had where there has been an adjustment because particularly of career disadvantage”.* [Solicitor 04]

A principle frequently argued about

Considered to be: *“the primary [concern] ... the one that we talk about”*, [Solicitor 01] it was seen as *“a neglected principle”*, [Solicitor 07] one where there had been: *“a fairly restrictive, negative view taken ... not liberally interpreted”.* [Solicitor 03] It was a principle that had been: *“used and abused”.* [Solicitor 18] It was certainly seen as a problem: *“9(1)(b) is a very, very, very difficult one. It’s ... the primary problem”.* [Solicitor 01] Both agents and advocates often raised it, albeit cautiously, with clients as a possible consideration: *“it is very often trotted out ... it’s not a principle ... which is easy to have a lot of success”.* [Advocate 21]

A principle frequently advanced but not insisted

There were a number of reasons that were advanced to explain why a section 9(1)(b) claim might not be followed through. The most obvious reason would be if an award of a capital sum under section 9(1)(a) were fair and reasonable. To that end it was suggested that section 9(1)(b) was not a bolt-on but rather should be considered along-side section 9(1)(a).¹⁶⁹ Furthermore, some interviewees felt that, over the years, as it had become increasingly more difficult for a section 9(1)(b) claim to succeed the result had been that fewer and fewer were even attempted: *“this legislation is now 30 years. ... When I first started tackling it there was a much greater belief that a section 9(1)(b) claim and unequal division was possible. And that has ... slowly been beaten out of us”.* [Solicitor 12]

¹⁶⁹ See also above at “Interconnectedness of principles”.

There was also the suggestion that the use of section 9(1)(b) has been limited because: “*practitioners find it very, very complex, 9(1)(b)*”. [Solicitor 14] The main area of confusion rests in the related questions – must there be: “*a corresponding advantage to any disadvantage suffered, or a corresponding advantage by ... non-financial contributions by the other party?*” [Solicitor 14] So, it was seen as: “*a tough argument to run ... because it's double-pronged. ... If you are going to say the wife is at an economic disadvantage you also have to show that the husband was at an advantage*”. [Solicitor 15] Thus, while section 9(1)(b) requires one party to have suffered a disadvantage in the interests of the other or for one to have derived an advantage as a result of the contributions of the other, this must be tempered by section 11(2) directing the court to consider to what extent any advantage/ disadvantage has already been balanced by the advantage/ disadvantage of the other.

A final reason for the principle being under-used was: “*the bench prefers to have something very quantifiable ... so source of funds, for example, is much easier for them to cope with because you've got an actual figure that goes ... into an asset that's still around*”. [Solicitor 04] So, a case where the contribution was unable to be quantified was far less likely to be successful, such as: “*wives ... trying to say that their support at home [consisted of] ... consulting over the kitchen table, as it were, and this had given their husbands ideas for their business, and this is an economic advantage*”. [Advocate 22] It was seen to be very difficult to: “*put a value on ... a wife having to retrain and get back into the job market. ... You just simply don't know what's going to happen in the future to that person. ... So you cannot say definitively to what extent they are disadvantaged*”. [Solicitor 07] The result is that: “*the courts really do not want to depart from any equal sharing provision unless they absolutely have to and there has to be very clear evidence of economic advantage and disadvantage before they'll do it*”. [Advocate 23]

The impact of section 9(1)(b)

There were two ways in which section 9(1)(b) was used, which demonstrated the impact it had had. First, because the first two principles are so intertwined,¹⁷⁰ examining the second principle affords the opportunity to consider the nature of the “fairness” enshrined in the first principle. So it was felt by some that section 9(1)(b) had made an impact: “*from the point of*

¹⁷⁰ See also above at “Interconnectedness of principles”.

view that it requires you to address your mind to – ‘Now, wait a wee minute, ‘fair account’, ... that’s so discretionary, what is fair account? ... Is there an economic advantage and disadvantage here?’” [Solicitor 20] Secondly, it was a principle readily understood by clients and perceived to be a fair provision because they could: *“recognise that that’s the reason why there might ... [have] to be an adjustment 50/50. So ... that’s achieved its goal ... of changing the way people think”*. [Advocate 25]

However, in the main the opposite was felt to be true, that is section 9(1)(b) had had limited impact: *“... we need to be a lot more proactive, creative and brave with 9(1)(b)”* [Solicitor 01] and there were several reasons for such a feeling. For example, there needed to be a greater willingness to use discretion in the Scottish system, which would allow more use to be made of section 9(1)(b). While accepting that section (9)(1)(a) is the key to the Scottish system offering: *“a beautifully, intellectually coherent, straightforward marital acquest system built in to our Act,”* Solicitor 01 considered that the approach is: *“very straightforward – what is or is not matrimonial property. But we are not properly allowing that to be tempered by a 9(1)(b)”*.

It was felt that overall: *“people were too conservative with it”* [Advocate 22] and that section 9(1)(b) had been applied unadventurously: *“I wonder if it’s down to the innate conservatism of the Scottish legal profession, in fact, the innate conservatism with a small ‘c’ of Scotland”*. [Judge 30] And from that conservative application of section 9(1)(b) had developed the notion that: *“you will not do better than 60/40. ... You might succeed in 55/45, but you tell your client that ... frankly they are never going to get anything beyond that”*. [Solicitor 03] Thus developed the: *“urban myth”*¹⁷¹ [Solicitor 03] that any section 9(1)(b) claim would be severely limited. This results in the self-fulfilling prophecy that a departure from equal sharing will not be huge, so the impression gained: *“is that it’s very hard to succeed in a 9(1)(b) argument”*. [Solicitor 03]

Furthermore, there was seen to be untapped potential in section 9(1)(b) in relation to source of funds arguments: *“So that’s ... where you could achieve a different result if it were mined properly”*. [Solicitor 09] Where there were gifts and inheritances that had been subsumed

¹⁷¹ See also below “A NOTE ON THE NOTION OF RECEIVED WISDOM”.

into the matrimonial pot: “*it’s amazing how many people have said – ‘If only I had known, I would have kept my inheritance separate’*”. [Solicitor 09]

Better use of section 9(1)(b) could be made if greater attention were given to the structuring of any settlement and: “*we could get over our fear of long-term periodical allowance*”. [Sheriff 28] It was suggested that the reason why low awards are made, in many cases, was that there were limited resources immediately available to fund anything higher whereas, with more imagination, higher awards could be made, even in such circumstances. For example, where a couple own a business together rather than the wife transferring all the shares to her husband at the time of the divorce: “*whether it might actually be better for the wife to hang onto the shares and get some dividends, or hang on to some of them and be bought out in chunks over a period of time, or even at retirement*”. [Sheriff 28] Claims, however, are presented as: “*all or nothing, give me as much capital as possible at the time of a divorce ... [which] would mean that the husband ends up with little or no capital. And that’s what judges and sheriffs balk at, in terms of outcome, when one looks at resources*”. [Sheriff 28] It was felt that there was much more scope within section 9(1)(b), which has been underused with awards being made that were too low: “*that’s partly because wife pursuers are not considering what resources ... there [are] and how they might structure a settlement. ... They ask for a huge big capital settlement all in one go, usually to buy a house*”. [Sheriff 28]

The classic scenario misconceived

The context for a section 9(1)(b) argument was referred to by many interviewees as the classic scenario of: “*one party, usually but not invariably the woman, having given up a promising career or having put it on a back burner to support her husband and the wider family*”. [Solicitor 03] This led to a widely held: “*misconception that 9(1)(b) [can be] applied to get an unequal division simply by virtue of the facts – you haven’t worked and you’ve given up a career; therefore there should be an unequal division of property*”. [Solicitor 18]¹⁷² Interviewees referred to *Adams v Adams*¹⁷³ and to *M v M*¹⁷⁴ as examples of

¹⁷² See below at “The impact of Coyle”.

¹⁷³ *Adams v Adams* (No 1) 1997 SLT 144 see also *Adams v Adams* (No 2) 1997 SLT 150 above at “Why cases do not progress beyond the first principle” as an example of expenses being awarded against wife.

¹⁷⁴ *M v M* [2014] CSOH 136; 2014 Fam LR 116.

section 9(1)(b) arguments wrongly applied, along with *Coyle v Coyle*,¹⁷⁵ which had: “reined that argument in a bit”. [Solicitor 18]

The principled nature of the 1985 Act makes it a fascinating piece of legislation to those working in the field of social policy, but for lawyers it presents different challenges related to the application of the law. In terms of social policy, if the legislators intended to help stay-at-home women: “the courts have not done that. Is it right that they didn’t do it? Possibly, yes”. [Judge 29] This interviewee highlighted *Whittome v Whittome* (No. 1)¹⁷⁶ as an example of policy in action, because the judge, Lord Osborne, asked the basic question: “What’s the policy of the Act? The policy of the Act is to share fairly between the parties what they grow as a couple during the marriage”. [Judge 29] It was seen, therefore, as overly simplistic to say that practitioners and the courts have failed to make use of section 9(1)(b), because: “whatever might have been intended in social policy terms, I don’t think the structure of the Act is designed to give people huge extra chunks of money because they entered into a more traditional type of family life than others”. [Judge 29]

It was suggested that where the argument should be used was in circumstances where: “you can actually say ... – ‘I am now earning 20 grand a year you are earning a 100 ... there isn’t ... much of a pot to split and I’m left with the kids’. So that’s an actual disadvantage, but not just – ‘I didn’t work, therefore, I should get a bigger slice of the pie’”. [Solicitor 18]

Societal changes¹⁷⁷

It was noted by some interviewees that there had been a radical change in the working pattern of women over the years since the Act came into force, which was important because section 9(1)(b) was: “principally designed to meet a situation where the husband went out to work or built the business, or whatever, and mum was the homemaker and looked after the children”. [Sheriff 27] Over time there has been a shift to where both parents worked, which some interviewees thought was now more common than the stay-at-home wife and mother: “and that comes from ... the way people are organising their affairs ... the way that women are going back to work after having children that ... [9(1)(b)] is applied less [because] of ... a

¹⁷⁵ *Coyle v Coyle* 2004 Fam LR 2. See also below at “The impact of Coyle”.

¹⁷⁶ *Whittome v Whittome* (No 1) 1994 SLT 785.

¹⁷⁷ See Chapter 2 where societal changes are explored, also above at “Why cases do not progress beyond the first principle”.

change in times". [Solicitor 17] The result is that: "*the pool of people who would be entitled to use 9(1)(b) ... has reduced since '85*". [Sheriff 27]

Scots law ~ no element of compensation

According to interviewees, there are two major issues relating to how parties view their own contributions to a marriage and the contributions made by their spouse, both are: "*very emotive*." [Solicitor 01] Firstly, there is the problem over the very nature of what constitutes a contribution – is work carried out in the workplace of the same order as work carried out in the home? Secondly, is work carried out in the workplace to be afforded the same financial value as work carried out in the home?

At this point the argument fails because in Scots law there is no element of compensation, which for some was seen as a: "*fundamental problem we have with ... how the Act has been applied*". [Solicitor 01] While the matrimonial property will be divided equitably, there is no consideration for the future standard of living of the weaker party, because the valuation of the matrimonial pot takes place at a cut-off point on a specific date. So, the weaker party is not: "*going to be compensated for the fact that she's now ... very disadvantaged in the job market ... [with little] ability to earn income and pension entitlement ... from there on in ... for the rest of her working life. ... That's the kind of scenario where I think it's not taken seriously enough*". [Solicitor 11] Whereas for the stronger party, who may be: "*a partner ... at a certain level of management ... there is value to him in the future for what he has been able to build, up to that point. ... It's now going to take off for him ... and she isn't going to share in that*." [Solicitor 01] Such a lack of looking to the future was seen as being specific to this Act, since it was certainly accommodated in other settings: "*we are quite comfortable recognising in personal injury actions ... [where] there is a concept of future earnings ... [and] other losses, which nobody is saying is easy to quantify. ... We recognise that there is an on-going loss ... and we simply will not do that in financial provision*". [Solicitor 01] Scots law was seen to let down those who, even after an equal division, still end up in a less than advantageous position because they are unable: "*to earn significant sums of money. And I just don't see that the court ever equalises that in Scotland to a fair degree*". [Solicitor 12] If the courts were willing to interpret section 9(1)(b) more broadly, more protection could be afforded to the weaker party: "*but the way the courts have interpreted [9(1)(b)] it's got a much more restrictive application and ... that is disappointing*". [Solicitor 12]

Running successful section 9(1)(b) arguments

Much more likely to succeed would be a case which was clearly quantifiable where:

... two people met at university and [held] equal qualifications, say a medical degree. ... At the time of their separation the husband ... [might be] a consultant and the wife a locum doctor because she has had an interrupted career because they have had a number of children. ... One could look at that situation and it would not be unreasonable to construct the 9(1)(b) argument. [Solicitor 08]

Thus: *“a lot more could be done by people representing wives to put together a stronger case in terms of loss of career because sometimes that’s straightforward to do”*, [Sheriff 28] especially in careers that are graded, such as teaching or nursing, where an employer’s reference could be used.

Interviewees offered examples of cases that had argued section 9(1)(b) to good effect. Noticeably these examples were set in the context of very specific circumstances. The first was set within a farming partnership where the farm had been passed down to the husband over generations. The wife had raised the children but had also been very involved in the running of the farm. Neither the farm nor the family home were matrimonial property: *“all that we really had left to her is an economic disadvantage argument”*. [Solicitor 17] The second example was set within the context of early retirement from university employment where section 9(1)(b) was considered to have been used in a novel way. After a long marriage, the parties, both professors, had decided to retire from their university posts. Because of the way the academic term fell, the wife, being a few months older than the husband, took early retirement before the husband. Having handed in her notice she discovered her husband had been having a long-standing affair – they separated. Had she known this she would probably not have retired: *“So she had an argument based on a loss of pension rights across the notional period from the date in which she gave notice until when she was notionally retired and she also had a loss of income”*. [Advocate 25] A further example was that of *Wilson v Wilson*¹⁷⁸ seen as being: *“very radical, at the time ... where*

¹⁷⁸ *Wilson (Hazel) v Wilson (Stewart James)* 1999 SLT 249.

Lord Marnoch gives her an actual tranche under 9(1)(b) and that was as good as it ever really got". [Judge 29]

Far less likely to succeed were cases where the parties were in lower paid jobs where they were more likely to be able to return at the same pay grade: *"you are not going to succeed in running a 9(1)(b) argument if you were a bank teller or a hairdresser at the start of the marriage and you stopped working for a few years"*. [Solicitor 03] Unless the evidence offered was very exact and robust then any client arguing section 9(1)(b) based on: *"generalities ... is treated scornfully"*. [Solicitor 03]

How sections 28¹⁷⁹ and 9(1)(b) have influenced one another

Despite the feeling that section 9(1)(b) had been underused, fresh approaches to this principle were reported, which were as a result of practitioners having to get to grips with section 28 of the Family Law (Scotland) Act 2006.¹⁸⁰ As section 28 has become more familiar and more frequently used, this has had an impact on section 9(1)(b) arguments based on the 1985 Act: *"people have become much more happy to use it since 2006, because since we've been studying section 28 of the '06 Act, we have rediscovered the interest in 9(1)(b)"*. [Solicitor 05] There has been a circular movement where, initially, section 28 was being interpreted in the light of section 9(1)(b), although: *"there was conflicting judicial authority ... about whether or not it was valid to look at the 9(1)(b) cases. I think the consensus now is that it is valid to look at them, though with caution"*. [Solicitor 05] The circle has now turned further so that section 9(1)(b) is being considered in the light of section 28. The effect has been for practitioners to revisit the section 9(1)(b) provision and look at it with fresh eyes:

... one of the things that's given it an impetus is the cohabitation provisions which turn on economic advantage and disadvantage. ... We did a lot when we argued the idea of Gow v Grant to the Supreme Court to say that this is possible. ... Since Gow v Grant I think I've seen a revival of 9(1)(b). [Advocate 22]

¹⁷⁹ Section 28 of the Family Law (Scotland) Act 2006, see Appendix 3.

¹⁸⁰ Wasoff, F; Miles, J; Mordaunt, E (2010) *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006*, www.crfr.ac.uk/assets/Cohabitation-final-report.pdf for a more detailed examination of s28.

Both section 9(1)(b) and section 28 set out to equalise any imbalances in economic impact of contributions to the relationship and are tested by considering the balance between economic advantage conferred and disadvantage sustained. However, because of the inter-play of sections 9(1)(a) and (b), section 9(1)(b) is not used to the same extent as is section 28(2)(a). Section 28(2)(a), however, is central to a cohabitant's case because there is no equivalent to section 9(1)(a) and thus is used frequently by cohabitants. Except for sharing economic burden of childcare, there is no other statutory basis for cohabitants making a claim for financial assistance at the end of a relationship. The differences between the two provisions are not easy to pinpoint and the two provisions are now generally considered to be very similar except in two aspects: the older provision is by far the more elegantly drafted: "*What the 1985 Act says in a couple of sentences takes a whole paragraph of drafting [in the 2006 Act]*" [Advocate 23] and section 28 has had much more attention from the courts than has section 9(1)(b): "*there are more cases coming through, which I think has probably assisted in the thinking about it*". [Advocate 24]

Since section 28 is so detailed, the type of approach that has developed in cohabitation cases is both forensic and arithmetical: this, despite Lord Hope discouraging such an accounting approach.¹⁸¹ As already noted above, this same approach is now being adopted in section 9(1)(b) claims:

... there are lessons to be learned from potential approaches that could be taken. For example, if you think about somebody who has lost a career ... in a section 28 claim in order to advance that you would probably go down the route of looking at a pension lost calculation and ... at loss of earning capacity and quantifying that, possibly with an employment expert. Now you wouldn't tend to have gone down that route in the marriage context, because you've got the background of the matrimonial property, but there's nothing to stop you doing that in a context of divorce. So, you know, there is something to be learned I think from development and thinking about section 28 that you could bring back across to marriage. [Advocate 24]

The impact of Coyle¹⁸²

¹⁸¹ *Gow v Grant* [2012] UKSC 29; also 2010 Fam LR 21 for first instance.

¹⁸² *Coyle v Coyle* 2004 Fam LR 2.

It is important to recognise that Parliament did not, in the 1985 Act, provide that whenever a couple divorce after a marriage in which one has been the breadwinner and one has been the homemaker, the latter must receive extra and compensatory financial provision on divorce [Lady Smith]¹⁸³

During the course of discussions related to claims made under section 9(1)(b), although no direct questions were posed relating to the case, a number of interviewees referred to the leading case of *Coyle v Coyle*, which had had a profound effect on the approach adopted by practitioners. The judgment was admired by some because the judge: “*seized the opportunity to lay down some general principles, ... looking at the principles and making a genuine and fruitful attempt to apply the principles*”. [Advocate 23] It was: “*a beautiful exposition of what 9(1)(a) and 9(1)(b) are about*”. [Judge 29] But, by others, it was seen to be a barrier to this principle being used to full effect: “*it’s very difficult to get a significant departure from equal sharing. ... The decision in Coyle v Coyle ... made it quite difficult for people to get a decent 9(1)(b) settlement*” [Sheriff 28] and: “*then the door was firmly shut*”. [Advocate 26]

The foundations for Mrs Coyle’s claims were twofold. First, she claimed half the increase in the value of a family business that had occurred during the time of the marriage arguing that such an increase had only been possible because of her contribution to the marriage. Secondly, she claimed a further sum on the basis that she had suffered economic disadvantage as a result of having given up her career. The sum was calculated using the Ogden Tables, more usually used in actions for personal injuries.

The case served as a timely reminder that a section 9(1)(b) claim will not succeed if there is already an award under section 9(1)(a), which is seen to fulfil the requirement for fair sharing: “*It’s the Coyle v Coyle case ... it’s whether or not ... that sharing in the matrimonial wealth ... does actually address any economic advantage or disadvantage*”. [Solicitor 14]

There was an attempt to: “*bring in the value of the non-matrimonial business through 9(1)(b) – but it didn’t work. ... It’s not that it was ignored, it’s just that 9(1)(a) answers, in conjunction with 10(1) and (6), answers quite a lot of the issues. You get to a point where financial provision might be satisfied*”. [Judge 29] The ultimate result: “*for Mrs Coyle was*

¹⁸³ Ibid, per Lady Smith at para 37; see also above at “The classic scenario misconceived”.

not some fabulous award under 9(1)(b), because it's all checks and balances and she was getting a particular advantage under 9(1)(a), as it happened, because of the state of the law on transfers and value at the relevant date and so on". [Judge 29] The judgment held that:

*... the clear imbalance arising from the economic disadvantage sustained by the pursuer will be corrected by an award of the sum which is produced as a result of the equalisation process. Had it been that equalisation could only have been achieved by the awarding of a cash payment, then I would certainly have provided for payment by the defender of a further substantial cash sum as I would not have regarded the sharing of the matrimonial property as adequately recognising the extent of the economic imbalance in this case, where the defender has not been disadvantaged and has, as a result of his working life, an interest in a company and pension scheme which are clearly of substantial value, with the option of carrying on in business for a number of years into the future, all in addition to his share of the matrimonial property, some of which he has converted into valuable investments in heritable property and the pursuer has no qualifications, no job, no pension and, on the evidence, no realistic prospect of earning her living.*¹⁸⁴

For the first claim, where Mrs Coyle argued for recognition of her contribution to the marriage because it had enabled the business to grow: "*You are asking the court to really look at a crystal ball*". [Solicitor 14] There are many imponderables in trying to run this type of argument, because it could be said that had the wife not given up her work then the husband may not have been so successful, as he would have had a greater share of family responsibilities and possibly less time to grow the business. However, it could also be argued that the husband sacrificed his family life in order to provide the family with a better standard of living, which the wife enjoyed. The imponderables are too great: "*how do you quantify the value of non-financial contributions into a marriage? And how do you quantify what economic advantage has been derived by the party from those contributions?*" [Solicitor 14]

As a result of Coyle there has been a: "*fairly unimaginative approach adopted*" [Advocate 26] to section 9(1)(b) claims. There are, for example, farming cases with:

¹⁸⁴ Ibid at para 72.

... essentially inherited property coming down through the generations. ... The wife has worked on that farm for 30 years, and put her hard effort and graft in. ... And I think just giving her enough money to buy ... a cottage somewhere, is not in any way a fair reflection of what she's contributed to that. [Advocate 26]

Again, as a result of Coyle: *"the way that economic advantage has been interpreted is there needs to be a causal link between the contribution ... and the resulting economic advantage – 'Well, you didn't do anything in the business so ... there's no causal link, that business would have grown anyway'"*. [Advocate 24] However, as a result of the crossover interpretation from section 28 claims noted above, it might now be possible to: *"take a slightly broader approach to that and it doesn't need to be a contribution to the business but ... [that] you were contributing to family life, while the other party was going out growing the business. So why should you not share in it?"* [Advocate 24]

For the second claim, where Mrs. Coyle argued she had given up her career: *"it's very, very difficult to actually set up that type of case, except by going back and trying to ... rewrite history – 'Well, if I hadn't given up my career, here is where I would have been and this is what I would have earned' "*. [Solicitor 14] It was for that reason the Ogden Tables were used to calculate future loss of earnings and pension rights. However, while it was accepted that the pursuer had suffered an economic disadvantage in the interests of the defender and the children: *"it was not appropriate to approach the application of the economic disadvantage principle in section as though an award were being made in a personal injuries case"*.¹⁸⁵

Rather than the forensic detail supplied by such as the Ogden Tables, as a result of Coyle the approach was to take figures in the round such as where there had been large increases in property values:

... that's how Lady Smith resolved Coyle, because there'd been a big increase in value and she said – 'Well, I'm recognising the wife's getting the windfall and she can get it, but I'm taking it into account in a general sense'. And I think that's what

¹⁸⁵ *Coyle v Coyle* 2004 Fam LR 2, per Lady Smith at point 6.

was meant to happen ... that judges and, preferably before that, negotiators should take all of these factors into account in the round. [Judge 29]

The forensic line of argument had begun life with some suggestion of success: “*in the initial stages of cases after the '85 Act came into force ... there were promising signs for that to be developed.*” [Advocate 26] However, as a result of Coyle:

... the door was firmly shut on that argument. ... Lady Smith ... shut down that argument really by saying that yes, Mrs Coyle had given up her employment but that any economic disadvantage that she suffered in doing that had been more than made up for by her husband contributing his earnings to the marriage, which I thought was something that they were supposed to do anyway. [Advocate 26]

Thus, having begun with some promise: “*the development of the first strand of that 9(1)(b) argument ... [has been] set back ... and we're only now ... trying to further develop it again*”.¹⁸⁶ [Advocate 26] To take section 9(1)(b) further, it was suggested that there should be a return to the position before: “*the door was slammed in Coyle. ... We should be looking at – what would this woman have in her hand now if she'd been paid a proper wage for that work that she's done? ... If she hadn't done that ... where would that leave the partnership now, if they'd employed someone to do that?*” [Advocate 26]

SECTION 9(1)(c) ECONOMIC BURDEN OF CHILDCARE

It's a factor but it is now the Cinderella, if you like, because it's not very ... much used. There are exceptions to that, of course, but across the board 9(1)(c) is not a major player. [Solicitor 05]

Although section 9(1)(c) was generally considered as a difficult principle to argue and, therefore: “*not a major player,*” interviewees did set out a range of exceptions where it was used in specific circumstances. These exceptions covered enabling the main carer of the children to remain in the matrimonial home; extra expenses such as school fees; and where there were children with special educational needs.

The scope and interplay of the CSA/ CMS, aliment and section 9(1)(c)

¹⁸⁶ See above at “Running successful section 9(1)(b) arguments” and at “How sections 28 and 9(1)(b) have influenced one another” where the more forensic approach to s9(1)(b) is considered.

The courts have tended to construe it very narrowly. So it can be quite difficult to determine the sort of economic burden that it is supposed to address because clearly it's not alimentary payments. [Advocate 21]

It was generally emphasised that section 9(1)(c) was neither about maintenance nor aliment: “*that wasn't the purpose. ... 9(1)(c) is more difficult to argue because the subtlety of it is sometimes missed, it's not just about maintenance*”. [Solicitor 20] Indeed, clients are often confused by the scope of and interplay between the provisions of a section 9(1)(c) claim, a claim for aliment and an award from the Child Support Agency [CSA] or the more recent Child Maintenance Service [CMS], while interviewees felt that the various agencies¹⁸⁷ had limited the use of the 1985 Act:

I think it's quite difficult and ... it's made difficult by the 1991 Act¹⁸⁸ ... because child support is intended to replace aliment, which is intended to reflect the burden of childcare. So if you are trying to argue that somebody is going to have the economic burden of childcare then a very good answer to that is – ‘Well, I'm paying child maintenance and that has an element which covers accommodation, it has an element covering food and sustenance, clothing and ... it's worked out on the basis of the ordinary or average cost of raising a child.’ – So I think that makes life very difficult. [Advocate 26]

The introduction of the CSA (then later the CMS) impacted on the use of section 9(1)(c): “*I would guess that there have been fewer cases here based on 9(1)(c) probably since the CSA came in*”. [Sheriff 27] The result has been that, where regular child maintenance payments are made, there is little chance of succeeding in a section 9(1)(c) claim, unless it is very specifically targeted in one of the areas as noted below: “*It's very difficult ... because ... there is a mind-set that, because the absent parent ... [is] making provision on a month to month basis for the child through their payments to the Child Maintenance Service, that is ... seen as ... them covering ... the future economic burden of caring for the child*”. [Solicitor 17]

¹⁸⁷ See Chapter 9 where the impact of CSA/ CMS payments on the financial provisions framework is considered further.

¹⁸⁸ Child Support Act 1991.

However, there is the further problem in that, even after a CMS assessment, the level of payment does not cover the *actual* alimentary costs of care of the child:

There is a statutory regulation now that says both parents have an equal liability to maintain the children. I have to say, it doesn't work particularly to the advantage of the parent with care, because ... the cost of children far exceeds any statutory amount that the government says you have to pay. [Solicitor 06]

and, however sympathetic, the court is limited in what can be awarded:

And we have cases where they would desperately love to run some sort of proof about the assessments ... you really have to just stop that dead. They will try to say, although there are CSA assessments in place... these are the figures and there you have it. They will still try to run cases that that in no way covers the actual expenditure. And I have to say I'm sympathetic to that, but ... it has to be argued properly and ... the agents have to be clear as to ... why we're leading evidence about that ... because, obviously, we're not free ... to make aliment awards in those circumstances for children. [Sheriff 27]

While means-tested benefits continue to exist, there are cases where the parent with the childcare responsibility can find themselves better off than the absent parent, specifically: “middle-earning families, once you factor in ... all the various tax credits, that actually irons out a lot of the financial discrepancies. ... [So] the one who's paying aliment, ... despite starting with the higher income ... isn't actually as well off, in the end, as the other one”. [Solicitor 04] The welfare landscape had changed over the years of the operation of the Act: “it's not just that lawyers are neglecting parents who have got the care of children, but the benefits that the parents with the care of children get in many mid-ranging families actually make a really big difference”. [Solicitor 04] However, should there be further changes to benefits: “then 9(1)(c) I think would really come to the fore again”. [Solicitor 04]

Providing a house for the children

Set within such complex circumstances, it is hardly surprising that clients did not find this principle easy to grasp. One interviewee explained the on-going economic care of children as

dividing into two with one aspect of it being day-to-day maintenance, which would be: “*dealt with by the CSA ... on an income basis*” and the other aspect being: “*the ... capital expenditure ... what 9(1)(c) is designed to look at and deal with,*” [Solicitor 01], which might be the house for the children to live in. However, the principle was seen: “*as a backdrop if there are children under 16,*” because by using sections 9(1)(a) and (b): “*you should really have got to the house by the time you’ve got [to (c)]*”. [Advocate 22]

Orders relating to the matrimonial property differed radically if the parties had children from parties with no dependent children. In the latter example: “*if the only matrimonial property was the equity in ... [the] house then ... one party [would] ... have to buy the other out or the property [would] have to be sold and the money split*”. [Solicitor 07] However, where the parties had children under that age of 16: “*then the court is simply not going to order a sale. It's going to say – ‘No sorry, you might be due money out of that property, you are going to have to wait’ – and the sale would then be postponed potentially for quite a long time*”. [Solicitor 07]

If the children are very young, this principle is sometimes used to effect a trade-off between home and pension even though this might not result in an equal sharing. It allows:

... the wife to stay in the matrimonial home, and letting the husband keep the pensions, the pensions ... maybe slightly less than what the equity was on the matrimonial home, [but] you can ... bridge the gap. Let's just say, there was say a £20 - 30,000 difference between the two of them. You can bridge the gap by saying the wife should be able to keep the matrimonial home because she's got the economic burden of childcare, she needs to have a suitable home to bring the children up in. And that would be ... a fair way of doing that in terms of fairness overall, regardless of whether or not it's not exactly an equal 50/50 sharing. [Solicitor 14]

In farming cases, where there is often little matrimonial property to be divided or a resources argument is employed to show: “*the land might be worth a lot of money but you can't get any money out of it to pay over the financial provisions ... I would see ... [this principle] being used. And it is used regularly enough ... in a divorce involving a farm*”. [Advocate 24] But the house must be large enough to accommodate the children: “*if you've got a farming case where you've got a child and the husband is saying – ‘All I need to do is buy you a house.’*

Then [we] ... argue ... – ‘Well I need to have a house that I will be able to home my child in, so a one bedroom flat in ... the local market town isn’t going to satisfy that’”. [Advocate 26]

Used to cover extra expenses

This principle was also used to cover the extra expenses related to the lives of children, boosting the percentage awarded: “making it 58% rather than 55, but really it’s not a major factor. It’s because 9(1)(c) is not an alimentary matter – it’s really for the extra expenses”. [Solicitor 05] One such extra expense was recognised as school fees where the children attended fee-paying schools or for: “extra curriculum activities.” [Advocate 21] It had also been used to maintain the lifestyle of children from a very wealthy family:

... who spent ... £50,000 on their half-term holiday and these were children who were very much used to a luxury lifestyle. ... There was a lot of inherited wealth, if we had just divided matrimonial property there was no way that in the shared care arrangement that the wife would have been able to continue the lifestyle that these children were used to and that they would be enjoying when they were with their dad. ... We managed to successfully argue in a negotiation that we needed more than 50% by reference 9(1)(c) on that basis. [Advocate 26]

Used to cover expenses of child with special educational needs

Where children had a significant and on-going level of special educational need this was an important principle. It was used where there were children who needed a high level of care because: “that prevents either one of the parents from achieving their earning potential”. [Solicitor 09] Although such circumstances did not occur frequently, the principle was key in such cases, an example of which was where a wife worked and cared for a child with cerebral palsy: “she had to have her house adapted ... and she’d always have to have such a house. She’d have to adapt her work and her working hours and she’d also have the burden of meeting the cost of professional carers when she went back to work part-time”. [Advocate 25] A further example was of a family with four children where two were on the autistic spectrum, one of whom: “was frequently damaging the fabric of the house and flooding bathrooms.” [Solicitor 11] Both parents worked full-time but almost the only matrimonial property was the family house, which was awarded to the mother using section 9(1)(c): “I

was asking the court to, in effect, give us virtually all of the matrimonial assets, which in reality meant the transfer of the house because she needed this house for the children. And the sheriff agreed with that". [Solicitor 11]

Being positive ~ it's a way of getting periodical allowance for longer than 3 years

As we have seen, this principle can be used as the basis of an order for payment of a capital sum, usually: *"to fund the purchase of a property, to meet childcare costs ... enabling mum to go out and earn a livelihood in her own right;"* [Solicitor 12] however, it can also be used as the basis for an order for periodical allowance and, most significantly, for longer than the three years of section 9(1)(d).

There has been a small resurgence in the use of this principle: *"9(1)(c) ... in my recent experience ... seems to be gaining more prominence as a principle that's relied on"*. [Advocate 21] This has been, in part, because new life was breathed into it from cohabitation claims, which: *"suddenly all went absolutely romping into getting some element, although it wasn't much money, for future childcare. So it seemed to be a point that was actually being taken up in that forum, almost more energetically than in married couples"*. [Solicitor 04] However, the resurgence was also as a result of *W v W*¹⁸⁹ where:

... Sheriff Crowe ... awarded periodical allowance under 9(1)(c), which is very unusual. ... People ... had almost forgotten that you could do that – ... get periodical allowance, potentially, for a longer period of time than the three years, because obviously you can get it until the child is 16. So, I've personally used it more since that case and I'm probably not alone in that. [Advocate 24]

Using section 9(1)(c) to achieve an award of periodical allowance for longer than three years was a timely reminder of the flexibility of the principles:

... there are two or three sheriff court cases in which sheriffs said – 'You know what I'm going to do? I'm going to give her three years periodical allowance under 9(1)(d) and then I'm going to make extra payments for another four or five years. ...

¹⁸⁹ *W v W* 2012 Fam LR 99; 2013 Fam LR 113.

I'm using 9(1)(c) because she's going to have ... these children under 16, and I can't get her into 9(1)(e) on periodical allowance because it's not long-term hardship, but I need to bridge the gap between the end of the three years and when the youngest child turns 16. [Judge 29]

However, it should be noted that it remains difficult to achieve such periodical allowance awards, because: “*Scottish judges and, indeed lawyers, are fairly Presbyterian in thinking that women should adjust within three years and move on with their lives, even when they have a batch of very young children. ... We're just trained to think in that way ... it's just a mind-set that that's how it is.*” [Sheriff 28] Furthermore, the age limit can be misused by making the negotiations more protracted than necessary and thus missing the opportunity for a claim:

... from the husband's perspective I've also misused 9(1)(c) and waited. The mother had the children but we waited until the youngest child turned 16 years and we said – 'Sorry, love, you don't have a 9(1)(c) argument'. ... And ... the [wife's] solicitor rather naively let us drag these negotiations out for 18 months and this was the husband deliberately ... wanting to do that. [Solicitor 19]

Being negative - 16 is too young¹⁹⁰

There was a general concern that this principle only applied to children under the age of 16 years. Because of this restriction it was considered to be: “*a limited provision,*” [Advocate 22] as clients often had teenage children: “*there is no point of giving it welly, because you are only looking at a couple of years or whatever*”. [Solicitor 01] Clients often felt the principle to be unfair, especially where there were children who either had life-long special needs or remained in education for many years after the age of 16. The cut-off age of 16 has become more problematic over the decades since the Act was introduced, as greater numbers of children with long-term special needs are surviving into adulthood and greater numbers of young people are in continuing education than was the case in the 1980s.

¹⁹⁰ See Chapter 9 where this point is explored in more detail and also below at “The age limit of 16 too low”.

Fathers more involved in childcare - a double-edged argument

Numerous interviewees noted the change in childcare arrangements over the years since the introduction of the 1985 Act; where once it was the norm for the wife to have sole responsibility for all childcare, now it is much more common to have both parents involved in the provision of such care: *“fathers ... are now less inclined to fall into the traditional weekend contact regime and it's not uncommon for fathers to be arguing for equal sharing or at least more extensive involvement in the care of children”*. [Solicitor 08] There are consequence to this change, the most obvious being that it is now more difficult to argue section 9(1)(c) for one party because the care is being shared more equally and is much more: *“carefully considered by the parties. ... [It] is more common now for there to be arguments about, or discussion around, a more equal division of the carer's responsibilities for children”*. [Solicitor 08]

However, there is another consequence, which is that if one parent is arguing section 9(1)(c) then the other parent may simply offer to take the children for longer periods: *“So, it's ... a very double-edged argument to make”*. [Solicitor 17] The prospect of such a: *“tactical [offer where there might be] ... a dispute about residence and contact”* [Advocate 21] makes potential claimants very fearful as they are going through a:

... sensitive process in their lives and a lot of parents will ... cling to the children as their ... protective blanket ... and that is their trigger point in things going wrong. If the absent parent comes along and says – ‘Well, if you are complaining about there being any kind of economic burden of caring for you looking after the kids I'll have them’. – They will be scared to make that argument. [Solicitor 17]

The tactics of shared parenting were called into question: *“that's where I ... sometimes doubt ... the motivation particularly of dads pushing for that”*. [Sheriff 27] This sheriff had noted that there were now about equal numbers of section 9(1)(c) claims related to residence and contact and section 9(1)(b) claims. There was:

... a correlation between the disputes in relation to residence and contact and the financial disagreements, because if in the traditional sense you've got a husband

working or with a business, and mum as a homemaker [and then] you have dad pushing for more and more contact ... in some cases it becomes fairly clear that that's to erode the economic burden argument. ... I've noticed ... sadly ... (and it's always hard to tell ... being the sheriff hearing the evidence) ... what's motivating dad to seek either shared residence or very significant levels of contact. [Sheriff 27]

SECTIONS 9(1)(d) ADJUSTMENT and 9(1)(e) SERIOUS FINANCIAL HARDSHIP

Both sections 9(1)(d) and (e) were considered to be misunderstood, that is each principle individually was misunderstood:

And 9(1)(d), of course, is the most misunderstood principle in the Act, or possibly the most misunderstood section in the Act, amongst lay people. ... They have this assumption that women specifically (and there's always gender bias when people say these things) about having an absolute entitlement to periodical allowance ... completely ignoring, of course, what the later sections in the Act say. [Solicitor 13]

9(1)(e) ... is again probably misunderstood. I've heard it described as the wealthy woman's ... principle, where you had to have had a really good standard of living before you can even use section 9(1)(e). [Advocate 21]

but misunderstood also because they are sometimes conflated: *"I think people misunderstand 9(1)(d) and (e). They're not related: 9(1)(d) is about adjustments, and 9(1)(e) is about financial hardship". [Advocate 26]* Sections 9(1)(d) and (e) were described as: *"secondary remedies ... only available to the court in the event that transfer property or repayment of capital is insufficient to achieve a fair sharing ... that's the effect of the section 13(2) and so, they come in at a secondary stage". [Advocate 25]*

Useful principles

Opinion was divided as to how frequently principles (d) and (e) were actually argued successfully. Of those interviewees who indicated that they did use them some were quite guarded in their approach: *"9(1)(d) usually comes into the conversation in some ways, if there*

has been dependency – very often there has been. So 9(1)(d), yes, it comes into the conversation". [Solicitor 05] However, others were more definitely positive: "*Adjustment, yes, quite commonly*"; [Solicitor 03] "*9(1)(d) can be quite frequently relied upon ... [it] is a very useful principle*"; [Advocate 21] "*periodical allowance is still routinely sought and often argued*"; [Judge 29] "*Yes, yes. These have come up in the cases I've done, and [in] one I accepted it and gave the wife a bit extra for three years, for adjustment*". [Judge]

To argue section 9(1)(d) does not necessarily mean that periodical allowance need be sought since an adjustment to loss of support can be met through a capital sum:

... a very early decision on this ... [is] the second McConnell case¹⁹¹ about the relationship between capital sum and income, so that if you have enough of the capital sum you don't need the income. I tend to use ... [9(1)(d)] to say – 'Well, ok give me enough capital sum'. And so, I'm checking back and saying – 'Is the sum that I'm getting from the other principle going to be enough or do I need some more either capital or income?' So, [that's how] I'm using (d). [Advocate 22]

Similarly, section 9(1)(e) was used: "*in capital terms where possible*" [Solicitor 05] "*used more as a lever to get a bit more capital*". [Solicitor 04]

Adjustment was: "*quite commonly used ... as a tactic in negotiation ... and it's very often successful ... in that area.* [Advocate 25] The approach of: "*another few ounces onto the scales*" [Solicitor 01] was actually found to be useful in negotiated and litigated cases alike, because following the: "*general ... perception, which is correct, that the Scottish system and the 1985 Act favours a clean break ... it's less likely that you're going to get periodical allowance ...[so] you might try to get a bit more capital*". [Advocate 24] Therefore, if the stronger party desires a clean break avoiding on-going awards that might last for several years, section 9(1)(d) might be used tactically by the weaker party: "*as a bolt-on that will give ... more capital. ... I'll be ... doing an ... arithmetical calculation of ... another five grand a month ... for three years – 'Go give us another £100k and ... we'll call it quits*". [Solicitor 01]

¹⁹¹ *McConnell v McConnell* (No2) 1997 Fam LR 108.

Thus, for many a sizeable capital award ruled out the need for any on-going periodical allowance: “one I rejected on the basis ... that the wife was getting large chunks of capital and that was sufficient to deal with either adjustment or economic hardship”. [Judge] Thus, the greatest resistance to both (d) and (e) is where: “there’s sufficient assets or a capital sum, the purchase of a house, perhaps a pension sharing order. ... The number of cases where I get periodical allowance are few and far between and when I do ... it is usually for a period of a year to 18 months”. [Solicitor 20]

A number of interviewees reported having the sense that section 9(1)(d) was being used a little more frequently: “there has been something of a renaissance in payments post divorce ... in the last three or four years. ... There is a different bench in the Court of Session and interestingly they are going back almost 20 years ... in terms of recognising ... income needs”. [Solicitor 01] Such post-divorce payments¹⁹² were exemplified in *B v B*¹⁹³ where, although there was no periodical allowance, the wife was awarded both a capital sum and six payments of additional capital sums to be paid over 2½ years. It was suggested that the use of post-divorce payments was a way of resolving the problem of people who were not in a position to realise their capital but who, nonetheless, had a good income: “so, instead of using ... [9(1)(b)] as the bolt-on for the capital, we are resorting back to payments post separation, post divorce”. [Solicitor 01]

Although not using section 9(1)(d) often, one interviewee suggested that it was useful as a measure to plug the gap of support in cases where: “there is going to be quite a significant capital division between the parties. ... 9(1)(d) will ... come into play for a short period of time ... for example, until ... capital is realised and paid over”. [Solicitor 14]

Normally: “in the big money cases, the capital is usually sufficient to allow the wife, stereotypically, to move on, to rehabilitate and not require too much by way of on-going support from income” [Judge 29] but there are cases where periodical allowance, although possibly not the sole issue, is central to the case, such as *Smith v Smith*,¹⁹⁴ where the weaker party suffered poor health. Considered to be: “a very good analysis of 9(1)(d) and (e),” [Judge 29] both principles were argued, resulting in an award of long-term periodical

¹⁹² By post-divorce payments interviewees meant periodical allowance and staged capital payments, thus avoiding counter arguments for lack of resources.

¹⁹³ *B v B* [2012] CSOH 21; 2012 Fam LR 65.

¹⁹⁴ *Smith v Smith* [2009] CSOH 2; 2010 SLT 372.

allowance: “*but I think you have to have ... a fairly strong basis for that, in her case, health problems*”. [Sheriff 28] This word of caution was reflected by others, because the hardship claim in this case was so specific it would be difficult to apply it to other situations: “*I would draw nothing from it other than it's very much on its facts and circumstances*”. [Solicitor 01]

Describing a client with: “*various health issues ... MS and ... mental health difficulties*”, Solicitor 20, in similar fashion, saw section 9(1)(e) as particularly useful. Other interviewees concurred: “*(e) is much less commonly used because ... the kind of serious financial hardship which is envisaged is more and more commonly related ... to people who have some form of disability on-going*”. [Advocate 25] Further similar cases were also described by other interviewees, one: “*was successful it was upheld*” [Solicitor 18] and one not litigated to a conclusion. In the latter case, which was ultimately negotiated, the wife, in her late 50s, had a deteriorating medical condition while the husband earned a good salary. In this case section 9(1)(e) was successfully used: “*partly [to achieve] ... a payment of more capital to her and partly by a continuing maintenance payment up until the hubby retired, which was for a longer period than three years*”. [Solicitor 14]

Various scenarios, at each end of the age spectrum, were put forward for making a section 9(1)(e) claim. With young clients it was suggested that serious financial hardship would rely on a specific set of circumstances that would rarely arise: “*where you have a marriage with very little matrimonial property and where one or other party's income was substantial or at least significant*”. [Solicitor 07] However, even in these circumstances a hardship claim would be difficult to argue because each would: “*have either skills or employability or employment prospects*”. [Solicitor 07] With older clients in: “*more traditional marriages ... people married in the 1960s, early '70s, where the tradition is as soon as you got married you gave up your job*” [Solicitor 20] arguing section 9(1)(e) was possible because they had been very dependent on their husbands' income. However, such cases of dependency were diminishing because of societal changes.¹⁹⁵ Added to age there were also local circumstances to be taken into account. Offering the example of an older client who had given up a career and who would, therefore, find the economic market difficult, one interviewee considered that both (d) and (e) would be recognised by both parties through the capital sum. In that specific location because of local circumstances, it would be an even stronger argument: “*It's*

¹⁹⁵ See Chapter 2 where societal changes are explored, also above at “Societal changes” and “Why cases do not progress beyond the first principle”.

just so incredibly expensive to live ... here so it's incredibly expensive to buy property ... here. If we had ... an elderly couple then I think it would just be recognised". [Solicitor 15]

A further specific use of section 9(1)(d) is when one party has: *"been out of the job market for a long time, and ... they want to retrain"*. [Solicitor 14] However, it was suggested that, unless there are very young children: *"it doesn't tend to be agreed for the full three-year period, it tends to be a bit more ... curtailed"*. [Solicitor 14] Other interviewees agreed that it would be: *"unusual to get the full three years ... [for] 9(1)(d) payments"*. [Solicitor 04] Even when awarded it would likely be: *"on a staged basis"*; [Advocate 24] for example, where there has been interim aliment paid. In such a case there may be: *"payment being made for a tapered period after divorce ... for say a year ... very rarely up to three years, unless there is substantial income and perhaps less capital available"*. [Solicitor 17]

Useful but rarely argued principles

Other interviewees, however, considered that sections 9(1)(d) and (e) were rarely argued: *"9(1)(d) – it's rare ... awards of periodical allowance are fairly rare, I'm afraid, and rarer than they should be"*. [Solicitor 19] Remembering a case where: *"the facts were unusual"*, one sheriff had to think back years to: *"the last time I've presided over a proof where either of those principles was argued. ... I can't think of another financial provision proof in the past five years where anyone has tried to run on either of those"*. [Sheriff 27] While some interviewees reported using section 9(1)(d) on occasion, overall almost no use was currently made of section 9(1)(e): *"I think I might have used it once about ten years ago with an older lady, but I didn't get anywhere with it"* [Solicitor 06] and: *"(e) is like hen's teeth"*. [Solicitor 13]

For some interviewees, although principles (d) and (e) are: *"often pled, they're often pled, but very rarely do they get anywhere. Very rarely, are they insisted ... well, I've never actually seen it taken even to a serious argument before we even get to proof"*. [Judge 30] So, while they are pled it is with little hope of success: *"periodical allowance under 9(1)(d) is regularly sought. So ... when raising an action you would ask the court to award ... interim aliment and then you would ask for periodic allowance for the 3 years: you wouldn't necessarily expect to get it"*. [Advocate 24]

The very phraseology used in (e) made potential claimants pause: “*suffer serious financial hardship*’, just the use of that terminology suggests that ... somebody has got to be very down and out. And I’m just not sure that the wording is helpful for people to take the plunge and use it”. [Solicitor 11] However, examining the phraseology more carefully, it was suggested that (e) is: “*not about absolute poverty, it’s about relative hardship*”. [Advocate 22]

It was generally felt that with wealthy clients: “*It’s very difficult to argue financial hardship when you’re getting financial provision of two million pounds ... it’s too hard*. [Advocate 26] However, a warning note was struck showing the necessity of scrutinising apparent wealth: “*if you think about the wife who has been for 25, 30 years with her husband in a stately home, which is an inherited pile, and she’s been given the heave-ho because he’s got a new one – ... what’s she supposed to do?*” [Advocate 22]

Where there have been long marriages with parties divorcing in their late 50s, it was felt that: “*our maintenance provisions for that age bracket, in particular, are very stark*”. [Sheriff 28] It was particularly important: “*where you have divorced wives who are in their mid to late 50s, where you’re trying to get them to a point where they can preserve their capital until they get to the point when they can ... start taking their pension*”. [Advocate 26] For these women income may be vital because having been: “*very financially dependent on men ... you can get them an outcome where they have a lovely house to live in because ... usually there’s enough capital ...where they can have a mortgage-free home; but what they don’t have is any means of supporting themselves*”. [Sheriff 28] There was a perceived change in the capital versus income argument. Once it had been almost impossible to be granted an award that offered an income because the argument ran: “*you’ve got enough money, you can just use some of your capital. I think that’s changing a wee bit because ... people are starting to accept the argument – why should I use my capital?*” [Advocate 26]

In similar fashion, concern was expressed for the person who became the single parent where the time limitation of three years to adjust appeared: “*unduly circumscribed. ... If you are a female single parent ... [with] the lion’s share of the childcare you are going to be ... at a disadvantage and ... find life difficult even if you are back in the workforce. ... You are conceivably at a disadvantage well beyond this ... adjustment period*”. [Solicitor 03]

A number of interviewees considered that the reason principles (d) and (e) were rarely used in their practice was because of the nature of their client base rather than any fault with the nature of the principles themselves. For example, their clients fell into younger age brackets, where both parties were more accustomed to work while bringing up their families. Also, in the main, interviewees did: *“private work. We tend to ... have wealthier clients”* [Solicitor 09] and where there are more affluent clients there is a greater likelihood of sizeable capital awards. This, in turn, led to their making very few (d) and (e) claims because: *“you can only advance a 9(1)(d), 9(1)(e) argument if the division of the capital isn’t sufficient”*. [Solicitor 12] Therefore, in such cases: *“the application of (d) and (e) ... is so difficult to the point where ... you can float the argument but I think you retreat from that quite quickly”*. [Solicitor 12]

Section 9(1)(e) a forgotten principle

There was a feeling that principle (e) had been sidelined: *“I think it’s just forgotten about”*, [Advocate 21] and: *“I don’t think we’ve been bold enough”*. [Advocate 22] There was wariness about: *“putting it before the court because there is not an awful lot of judicial guidance in relation to 9(1)(e)”*, [Advocate 21] which means that there can be too much risk attached to it because ultimately: *“you are ... using your client’s money so even when you are litigating you’ve got to try to ensure that you are going to hit a certain range of results. ... Running arguments to see how they go ... doesn’t happen”*. [Advocate 21]

However forgotten or sidelined these two principles may have become, it is important to note there was no appetite for either principle to be removed.¹⁹⁶ Referring specifically to (e): *“but it’s good that it’s there”*, [Solicitor 05] this sentiment reflected the general feeling that although rarely used both principles were seen to be a safety net for older divorcing clients, because while: *“most divorcing people are not in their fifties and sixties, certainly not in their sixties ... it does happen, and it’s important that it should be there.”* [Solicitor 05]

¹⁹⁶ Such sentiments are explored more fully in Chapter 9.

SECTION 2: FLEXIBILITY AND CREATIVITY WITHIN THE ACT

INTRODUCTION

Why examine flexibility and creativity within the financial provisions of the 1985 Act at all? There are two reasons; firstly, it has been criticised by some as being overly prescriptive, as removing judicial discretion and secondly being flexible and creative may ensure greater fairness for those who seek to make use of its provisions. The first reason is considered in detail in Chapter 3: The Legal and Policy Context. We will concentrate here on the second reason, that of ensuring a fair outcome for clients.

To achieve a fair outcome is: *“the whole point of the Act”*. [Advocate 21] However, fairness, as we have noted, was considered to be: *“a subjective quality. ... What I think is fair and what my opponent thinks is fair and indeed what the sheriff thinks is fair can all be different.* [Solicitor 18] In order to ameliorate such subjectivity, creativity must be set within the: *“two-fold ... test – the orders have to be justified by the principles, but then also have to be reasonable having regards to parties’ resources”*. [Solicitor 18]

Overall, interviewees considered the principles were sufficiently flexible for their needs, i.e. to achieve fair outcomes for clients. Generally, there was no appetite for changes to the principles because:

Do I wish for more flexibility? No, I don't think so. I think that we gain very much from a reasonably rigid structure limiting judicial discretion. Take the example of the Forth Road Bridge, which is a wonderfully strong structure, thank goodness, because I drive across it every day, but it does sway a bit. And if it didn't sway a bit with changes of temperature and with high winds, it would fall down. It's got to have ... some inbuilt flexibility in it, but I don't want anymore, because that would encourage speculative litigation and go down the English route. [Solicitor 05]

While no one sought change, it should not be assumed that the flexibility of the 1985 Act was simple; in fact, it was achieved not so much by complex but rather by subtle means.

The principles do not sit within the Act in isolation, but rather they are part of an integrated framework set within the double-pronged approach of what is fair and what is reasonable. When the framework is taken as a package it can be very flexible: “*if section 9 was viewed in isolation it wouldn’t be enough, but ... when you then take account of the other sections of the Act [especially] ... the over-arching principle ... of fairness ... that probably gives us the flexibility that we need.*” [Solicitor 20] Such fairness values all contributions to the marriage sharing: “*fairly the fruits of the labour of the parties during their marriage ... that labour can be working, or looking after children, or keeping the house, whatever it may be*”. [Solicitor 20] In like manner, what is reasonable is important because:

... the real restriction is imposed not by the principles but by the realities of the parties’ finances. ... Once you’ve worked out in arithmetic terms what you think would be a good solution, you then have to ... almost start again and say – ‘Well, how does this work? Can we do it?’ – ... And that ... is what allows the court to ... do justice in a case. You can say ... as I have done ... whatever I might like to do, you can only work with the money that’s there, the property that’s there, and therefore ... something has to give and this is ... why I’m going to do it in this way. [Judge 31]

The principles were seen as a positive means of achieving fairness for clients; there was no sense that practitioners were fighting against the principles to achieve such fairness: “*I don’t find them a strait-jacket at all, I find them more like signposts along the way. So no, definitely not a strait-jacket. I don’t feel they stop me doing anything*”. [Solicitor 06] This was an approach adopted by agents and judges alike. Despite the fact that the Act had set certainty before judicial discretion, there was sufficient flexibility within the principles to allow for a level of interpretation:

... in this court we don’t feel so constrained, in the sense that we can bend principle as we want it. ... I don’t find the language in the ... Act inhibits me terribly. ... And there are degrees of flexibility built into it, and I think you can stretch them a fair bit: but I’ve never felt the need to stretch them in a way, which ... would be doing violence to the language of it. [Judge 30]

Flexibility and creativity in negotiated cases

Although the focus of this research was litigated cases, it was inevitable that interviewees also reflected on negotiated cases often comparing the two; after all, for the agents negotiated cases constituted the overwhelming majority of their work. Such comparisons could be illuminating, as was the case here where the general view was that flexibility and flair in finding creative solutions rested in the field of negotiations rather than litigation: *“you tend to be able to be more creative in negotiations and ... in other dispute resolution models. ... In litigation, ... on the whole, you’ve got a more limited set of options available to you”*. [Solicitor 12] While it was not impossible to find a creative solution in a litigated case, more difficult might be convincing one’s opponent: *“the other party is arguing against you and so it’s difficult to get together to come to something which is good for both. That’s where collaboration really scores. In a litigated case, the bench has some creativity and can redress some balances”*. [Solicitor 05]

There was general agreement that the principles: *“act as a basis for you to do as flexible a negotiation as possible”*, [Solicitor 06] enabling the more tailor-made solutions to be found: *“If you do an interest-based negotiation, ... you can find out ... what really matters to everybody and then the principles will normally allow you to craft a settlement ... to meet a great number of those interests”*. [Solicitor 04] Where both parties were able to articulate what they would like to achieve: *“then believe me, both agents would be working towards a flexibility that would allow them to achieve that, because if they agree it themselves, it’s much more likely to work”*. [Solicitor 06] However, even here it was essential to be prepared for what might happen and: *“ring-fence it ... so ... it will work. ... People agreeing things is lovely, that’s really nice, but see when the floozy comes on the scene, suddenly things change. You need to have that ring-fencing. You need to have everything set out and clear so ... you know exactly what’s happening”*. [Solicitor 06] In negotiations it is possible to bend the principles as far as required, indeed, there was no absolute necessity to abide by them at all: *“quite a large number of cases ... are less adversarial and therefore the parties are able to come to some agreement ... not really supported by the principles themselves”*. [Solicitor 05]

Flexibility in reaching an individualised solution allowed for both fair and unfair outcomes. Although reached in accordance with the client’s wishes, a negotiated solution may not be fair by any objective measure. Describing a case where a wife placed greater emphasis on a clean break than a fair share involving a pension share, one interviewee had reached a settlement that: *“was not really a fair settlement but it was the practical settlement. ... It was*

my client who was being disadvantaged ... this was a less than 50% share to her, but ... it was her choice". [Solicitor 09] Thus, sometimes creativity in negotiated cases was driven by issues other than fairness; for example, by concerns over: *"expenses and people being worn out by argument and wishing to restart their lives. And these are things which you can't legislate for"*. [Solicitor 05]

Flexibility and creativity in litigated cases

In a litigated case there is the: *"same scope ... to use the Act as ... in a negotiated one – it's just there's a collision of requests rather than an integration of what people are looking for"*. [Solicitor 04] Rather than expecting the court to come up with creative solutions, it was suggested that such: *"creativity comes before you put it before a sheriff. Once ... in front of a sheriff then there's no room for creativity, his decision rules and that's it ... his decision will be constrained by the rule of law"*. [Solicitor 06] Once before the court, decisions and any hope of creativity is handed over to the sheriff or the judge who not only has to interpret the law ... they are often bound by: *"substantive law, which may not have been well decided. Everybody followed the Wallis case for ages. ... All agreed it gave an unfair outcome but that was it. ... Certainly in the sheriff court they felt they were stuck with the Wallis decision, whether they liked it or not."* [Solicitor 09]

However, sometimes negotiations continued to the door of the court, producing an outcome that no court would have made, such as where a farm was divided between the parties on the morning of proof: *"He had a farm and she had a farm – 'Oh, we are farmers next-door to one another' – this was always a bit dubious because there had been allegations of domestic violence and there were daggers drawn"*. [Solicitor 03] Feeling very unsure: *"about the wisdom of becoming next-door neighbours"* the agent pointed out to them that: *"this was not the sort of solution that a court could or would order"*. [Solicitor 03] The unusual outcome, however, satisfied the parties.

In litigated cases a broad-brush application of the principles was seen as retaining flexibility. When applying the principles the approach adopted was that of balancing issues, of trade-offs: *"there's a great deal of ... on the one hand this, on the other hand that,"* rather than very precise application of the principles: *"the practice ... isn't always ... as defined as the principles would like you to believe ... it ought to be. It's a much more broad-brush"*

approach which is taken". [Advocate 23] It was suggested that this: "*very practical, very pragmatic*" [Solicitor 09] approach to the principles was taken by Lord Tyre:

... he isn't really interested in the nuances of let's ... interpret this little word and do this, that, and the other ... he's not interested so much in laying down principles for substantive law. What he is trying to do is what the court should be trying to do – ... deal with a particular couple or the family who are before him, unravel the mess, and give them a practical solution that lets them live their lives. [Solicitor 09]

Examples of flexibility and creativity¹⁹⁷

Sheriffs were very positive about finding creative solutions: "*I would try and encourage creativity from the point of view of how the settlement's structured*". [Sheriff 28] They had found a variety of ways to be creative:

I've ordered that either the sale or the transfer of the matrimonial home be delayed. I've ordered one party to grant security over it to another party. I've ordered instalment payments of capital sums, scheduled because other assets were going to mature at certain times ... [and] I haven't wanted assets to be encashed, which would cost people money, so I've provided for staged payments and compensated the interest, for want of a better phrase. ... I've always been pretty satisfied about the orders that I've been able to make. [Sheriff 27]

Interviewees offered a range of examples of how they achieve flexibility and creativity, for example through the use of Minutes of Agreement,¹⁹⁸ deferred and staged payments, trust structures and periodical allowance. Minutes of Agreement were seen as the means by which clients could be as flexible and creative as they wished: "*there is room for creative solutions in Scotland because of the fact that ... people enter into Minutes of Agreement, which is obviously a contract between them. And as part of that they can be as creative as they want to be, so long as they can agree*". [Solicitor 17]

¹⁹⁷ See also above at "The impact of section 9(1)(b)".

¹⁹⁸ See J Mair, F Wasoff and K Mackay, *All Settled?: A study of legally binding separation agreements and private ordering in Scotland*, Final Report, 2013: www.cfr.ac.uk, for a detailed exploration of Minutes of Agreement.

Taking the classic example of a family business, which no one wanted to destroy either by taking out money or selling it in order to make a balance of payments, agreement could be reached for the wife to receive: *a deferred payment of her value of the business over a period of years*". [Solicitor 20] In one such case the wife had also been employed in the business, so the agreement reached went further to enable her: *"to work in the business and receive a wage rather than receive maintenance. ... The court could never have done that"*. [Solicitor 20] Such deferred payments could be: *"staged over a particular period or at trigger points in terms of shareholdings being sold. ... In Scotland ... we can be as creative as we like ... so long as the parties are both prepared to sign up to ... it"*. [Solicitor 17] The period over which payments could be deferred and staged might be: *"for much, much longer than ... I would have reasonably anticipated the courts would ever do"*. [Solicitor 20]

Not only might businesses be used in this way but the sale of the matrimonial home might also be subject to a: *"deferred sale ... [as] a more creative package of measures*. [Solicitor 12] This could well arise when there were children under the age of 16, where the desire was neither to disrupt the education of the children attending local schools nor to destroy their circle of friends.

In one judgment there was a creative blurring of the distinction between capital payments and periodical allowance enabling the award to be more tax efficient: *"you can make orders for payments by instalments, which I have done a couple of times. ... On one occasion I did make an order for the periodic allowance for three years, I made it a series of small capital payments because ... nobody would have to pay income tax on it*. [Judge]

In some farming cases where the farm had been in the husband's family for generations and where the wife was not keen to have it broken up, there may be the possibility of: *"looking at trust structures, in particular, moving assets down a generation"*. [Solicitor 01] In such cases the priority for the wife was to see: *"her children are provided for. ... What she doesn't want is the floozy from the pub benefiting from it or, in fact, his new children from the new family"*. [Solicitor 01]

Stressing the need to establish what a client actually wanted to achieve, one interviewee gave examples of agreements reached in connection with periodical allowance that were creative.

The first example was the vintner's wife who sought periodical allowance for a transitional period of a year to enable her to retrain to re-enter the job market. Proving to be a major stumbling block, the interviewee examined the wife's budget, asking what were her priorities. Having been married to a vintner for many years, she had become used to: "*enjoying really nice wine. We eventually settled it on the basis that he would deliver to her door ... x number of cases per month of nice wine and no periodical allowance. ... She was happy because she had what she wanted*". [Solicitor 13] Another illustration of a creative solution was: "*where a husband had almost taken a blood oath on his mother's grave that under no circumstances would he pay his wife a periodical allowance. ... They were locked in this debate about periodical allowance ... without anybody ... [asking] how else can we configure this?*" [Solicitor 13] Taking over the case from another firm, the interviewee suggested a higher capital sum, which solved the problem. In a negotiated case, another interviewee offered the example of a creative solution whereby a male client insisted on paying his wife periodical allowance for 10 years. The husband understood that the court would not make such an award, because it would not be dealt with as a separate issue but would be integrated into the whole framework of financial provision: "*it was an older couple ... – 'No, my wife raised the children. I know our marriage has ended, I can afford to pay her maintenance and I want to keep paying her maintenance'*". [Solicitor 20]

FLEXIBILITY, CERTAINTY AND THE PLACE OF DISCRETION

The codified, principled approach of the '85 Act, offering a level of certainty, was summed up as resulting in: "*people spend[ing] a lot less in legal expenses in Scotland than in other parts of the world, particularly England, and we can give them a reasonable range of outcomes*". [Advocate 22] The structured nature of the principles was generally welcomed: "*I like the principles ... the fact that there is a structured way in which we can advise our clients. ... If you look at England ... they are very much reliant on previous orders ... but also it is often worth their having a go in terms of the litigation ... I don't think that is a nice situation for clients*". [Solicitor 17] Whereas, in Scotland clients could understand, from the outset, what outcomes would be likely: "*a client will come in and say this is my story. ... Because of the flexibility and ... discretion afforded to the sheriff I always say to clients – 'Here is the range of possible outcomes ... that's your parameter'*". [Solicitor 18] The level of certainty meant that practitioners were able to place before a client: "*a set of spread sheets and say – 'Look, the range of ... outcomes ... is between this and this, and if we can get an*

outcome somewhere in this range we'll be doing quite well'. [Advocate 22] Such certainty means: "*Scotland has traded flexibility for certainty ... that's just the way you've got it*". [Advocate 22] And on the whole practitioners liked the way they'd got it, because it was seen to serve the majority well – no mean feat: "*for a vast majority of our cases, the certainty it produces is beneficial to clients because it saves ... money on litigation, ... [reducing] fall-outs over money and children. Because you've got certainty, you know what the outcomes are going to be ... there is a huge benefit in that*". [Solicitor 12]

Flexibility and certainty could be viewed as extremes:

On the one hand, you would have complete flexibility and nobody would know where they were – and in England they just make it up as they go along – and then, on the other hand, you've got a very strict view of the legislation, as if it's kind of, back of an envelope – 'What's the matrimonial property? Divide it 50/50 and that's an end of it', which is far too simplistic. And somewhere in the middle ... you've got something that works, which is a matrimonial property regime, but with an ability to mitigate the worst effects of that by allowing for unequal sharing and economic disadvantage. [Judge 29]

Of course, there is a balance to be struck between flexibility and certainty: it is not a straight either/or. While it was generally recognised that the English system gave a high level of flexibility, it was seen to come at too high a price: "*the only way you can create true flexibility is to have an English system, which isn't based on principle at all, and I wouldn't favour such an approach*". [Judge 29] No one looked with complete admiration at such flexibility, which allowed a high level of discretion to the courts: "*I would be very unenthusiastic about us expressly introducing more discretion, because I see day in and day out the damage that does down south*". [Solicitor 01]

There was simply no appetite for any such change: "*I wouldn't want to see more creativity, more flexibility, in the terms of the statute. I don't think that will be a good idea. We gain so much from the certainty that people can have, and the courts would be much more flooded with speculative cases if we allowed that to happen*". [Solicitor 05] The structured nature of the framework was considered to be helpful: "*because you then know what types of orders the court is likely to make ... it's probably a good thing that there is less creativity when*

placed in the hands of the court'. [Solicitor 17] However, trading flexibility for certainty did not mean the Scottish system was without any flexibility of its own – that was far from the case: *“there is huge flexibility there”*. [Solicitor 18] Indeed, there was a view that: *“the Act provides as much flexibility as you like ... if you read Little v Little¹⁹⁹ and Jacques v Jacques²⁰⁰ together, there’s effectively an unfettered discretion and so it’s not the Act that doesn’t give flexibility”*. [Judge 29]

Interviewees liked the structure the principles afforded their clients, which enabled them to focus more exactly on aspects of their case, avoiding expensive and possibly acrimonious litigation:

A lot of people come in ... and say – ‘I want ... to fight this all the way’. A lot of the time we have to sit down and say to them – ‘Well, you can only fight within these principles ... because if you are unrealistic ... then ... you are less likely to win ... this battle that you think you are going to have’. ... In England they end up in these horrible, costly litigations because they don’t have such structured principles to rely on. So ... in terms of people, from a psychological perspective, I like the fact that the principles are structured. [Solicitor 17]

IS THE ACT INFLEXIBLE?

While there was no feeling that the Act *per se* was characterised by inflexibility: there were a number of issues raised about how flexibly the Act was used in practice.

Aspects of the Act that are underused

A number of interviewees were at pains to point out that the issue was not that there was inflexibility within the Act but rather that: *“we just haven’t used it ... It’s there, it’s there and we are not using it. It’s not that it’s not there”*. [Solicitor 01]

The principles

¹⁹⁹ *Little v Little* 1990 SLT 230; 1990 SLT 785.

²⁰⁰ *Jacques v Jacques* 1995 SLT 963; 1997 SLT 459.

Thus, the principles were considered both flexible and adaptable: “*the inflexibility comes about because people think that they can’t be used or ... are afraid to try to stretch the principles in a way which is perfectly legitimate for them to do*”. [Advocate 24] Obviously, there was an awareness of criticisms of the principled nature of the Act: “*notably, for example, by Lord Hope, about the inflexibility that it imposes. I sometimes wonder whether that inflexibility is ... the fault of practitioners who are like me in this field, who tend to approach this on a rather formulaic and unimaginative basis*”. [Solicitor 03] This interviewee, experienced in both the Scottish and English traditions, felt that: “*when ... everything [is] as codified as it is in the 1985 Act ... we can be guilty of not really reflecting on what it means, but almost make an assumption about what it means*”. [Solicitor 03] It was felt that section 9(1)(b) could be used to far greater effect to find creative solutions where there is little matrimonial property and the use of section 9(1)(a) is severely limited. For example in the classic farming partnership²⁰¹ where the wife over the years has: “*raised the kids ... done umpteen tasks round the farm, helped at harvest. ... It would be inequitable to say ... [she has] no interest in the value of this lovely farming business that has been built up, because it was all owned by ... [her] husband pre-marriage. That is a classic 9(1)(b)*”. [Solicitor 07]

However, to achieve such a result in a litigated case was not easy and caused a degree of frustration: “*the thing I find the most difficult ... is 9(1)(b) ... not being recognised. No amount of creative solutions can help that. If the court’s just not going to recognise somebody’s contribution then, there’s nothing we can do about that*”. [Advocate 26]

Incidental orders

While seeing a certain amount of merit in the fact that the courts are more restricted, it was suggested that a greater level of creativity could be achieved by the courts: “*part of the problem is that there’s not as much use of ... incidental orders that might have been envisaged when the Act was originally drafted*”. [Solicitor 13] Others agreed: “*people need to make more use of Section 14 orders, as ancillary orders ... the flexibility may come from being creative about those*”. [Solicitor 14] Greater use of section 14 was particularly pertinent in relation to orders for sale where a far greater degree of prescription was sought: “*honour by this date, ‘x’ will do ‘y’, so that you can identify ... a contempt provision much*

²⁰¹ See also below at “The various forms of non-matrimonial property”.

more readily.” [Solicitor 01] However, orders lacking such specificity were not the problem of the court but rather the agent: “*we are just cutting and pasting ... our craves of conclusions for sale ... from a style that ... the boss that we started out with got from his boss. There’s no reason at all why we need to stick to those classic craves of conclusions for sale, we can be using section 14, and we are not*”. [Solicitor 01] The incidental orders of section 14(2) were seen as a: “*wonderful catch-up,*” [Solicitor 19] so that interviewees did not feel restricted when looking for solutions: “*I haven’t ... sat down and thought – ‘Hmm, I wish I could do that’ – because I’ll use 14(2)(k) for anything that’s a wee bit out of the ordinary*”. [Solicitor 06]

Principles too harshly interpreted in the past

There had been occasions where, it was felt, that the principles had been applied harshly: “*I think the principles are quite flexible ... where they’ve lost some of their flexibility is in some ... of the harsher decisions, ... for instance the Wallis²⁰² decision, which ruled the books for so long*”. [Solicitor 09] Difficulties were seen in the sheriff courts where some sheriffs have no background in family law: “*they don’t have the breadth of experience and knowledge ... And ... can sometimes ... rigidly apply the section 9 principles, which can sometimes result in an unfair conclusion that wouldn’t necessarily be considered fair by another sheriff, who has experience in family law*”. [Solicitor 20] Similarly, in the Court of Session alike where flexibility: “*has been taken out of the legislation by some of the more stringent Lords Ordinary. But ... it’s maybe coming back in with the replacement of these old-timers with ... the younger, fresher, judges ... a newer ... crop, ... who seem to have a much more common-sense approach*”. [Solicitor 09]

The age limit of 16 too low²⁰³

The only time I have felt a little bit constrained was in relation to 9(1)(c) and children under the age of 16. [Sheriff 27]

²⁰² *Wallis v Wallis* 1993 SLT 1348.

²⁰³ See also Chapter 9 and above at “Being negative ~ 16 is too young”.

When a marriage breaks down: “*very often the children are ... 14, 15 and there is still a fair economic burden in raising them*”. [Advocate 21] The level of support needed could be a considerable financial burden on the parent with care:

I had one particular case where ... the children were 16 and ... twins of 17 ... and they were ... all still at school. So many important decisions about to be taken and ... I felt constricted by the age of 16 there. And it was pretty clear that in the circumstances of that particular case the children were never going to have anything else to do with dad at least in the short term, probably through their university education. [Sheriff 27]

Too restricting for periodical allowance to be limited to three years in section 9(1)(d)²⁰⁴

It was felt by some interviewees that there are occasions when adjustment takes longer than three years: “*where, for example, ... somebody has to undergo a degree course ... and you can't go beyond three years unless you can prove financial hardship ... that's inflexible and unhelpful*”. [Advocate 26] The three year barrier actually reduced any periodical allowance to an artificial maximum of about 18 months because the length would be negotiated back from three years: “*awards of periodical allowance for three years are as rare as hen's teeth, ... awards ... for two years are as rare as hen's teeth. ... And if that was open ended, I think you'd have much more flexibility*”. [Advocate 26]

The various forms of non-matrimonial property

It was considered by some that a level of apparent inflexibility arose because, as noted, Scots law uses a marital acquest system. There were various aspects of the matrimonial property regime that were of concern, for example, at the point when wealth is inherited or gifted²⁰⁵ it is non-matrimonial property, but the use it is subsequently put to may affect whether or not it remains as such or is transformed into matrimonial property:

²⁰⁴ See also Chapter 9.

²⁰⁵ Eg. *Armstrong v Armstrong* Sh Ct F252/07 found at www.scotcourts.gov.uk/opinions/F25207.html: accessed 21.8.14.

*One of the difficulties is that you can get one person, who inherits a sum of money and ... secretes it away and keeps it separate and they win, and then the person who says – ‘Of course I’ll use it to renovate the matrimonial home which you inherited’ – ... they lose. And that’s arguably unfair. But there is an ability within the various provisions of the legislation to, at the very least, mitigate the worst effects of such an outcome.*²⁰⁶ [Judge 29]

For many people their biggest asset is the house they live in, but when this actually belongs to one person in the marriage then problems can arise. The house may have been inherited by one person or the individual may have bought it long before their marriage with no intention of its becoming a matrimonial home. There are various cases covering this issue, such as:

~ *Latter v Latter*²⁰⁷ where the former matrimonial home had been in the wife’s name having been purchased with gifts from her parents and grandparents but had subsequently been improved by the husband’s family;

~ *Corbett v Corbett*²⁰⁸ where, before marriage, a woman was the sole tenant of a house that she subsequently bought with the intention of its being an investment for herself and her daughter. She alone paid the mortgage and bank loans that funded improvements to the house. She then married. In an unsuccessful appeal the husband sought, *inter alia*, to change the finding in connection with the intention when buying the house to include its use as a family home.

Many farms are owned by various members of a family over the generations in a partnership with the result that there may be very little actual matrimonial property: “*the classic farm cases ... where ... wife gives up career to look after children and help with the husband’s farming business but has a fairly minimal role in the business. He runs the business, which is a farming partnership he had an interest in before the marriage*”. [Sheriff 28] While farming cases can cause problems at least there the: “*land ... has an inherent value*”. [Advocate 24] Even more complex cases can arise where the property that is owned by one party is

²⁰⁶ A recent example is *M v M* [2014] CSOH 136; 2014 Fam LR 116, which shows a degree of flexibility and creativity in its outcome.

²⁰⁷ *Latter v Latter* 1990 SLT 805.

²⁰⁸ *Corbett v Corbett* 2009 GWD 27-437.

enmeshed with testamentary dispositions,²⁰⁹ or where there are issues of business partnerships,²¹⁰ or where there is little matrimonial property but where one party owns a business where: “*share has been gained or acquired before the marriage and then, over the course of the marriage the business has grown massively in value, but it’s not matrimonial property. Then ... you fall back on the other principles ... [which] are flexible enough to ... achieve fairness for a party in this case*”. [Advocate 24] The most complex cases, although not frequently encountered in Scots law, were considered to be concerned with trust property.²¹¹

No interim capital sum

Another aspect of having a matrimonial property regime is that it has led to an anomaly in relation to awards of an interim capital sum. There is no provision for such an award in the 1985 Act, unlike the 2006 Act where it is a possible award for a cohabitant. The anomaly arises because in the former, where there is a matrimonial property regime, such a sum could readily be identified because: “*you can often say – ‘As a bare minimum, the pursuer will get ‘x’ and if she could have some now, it would be really helpful.*” [Judge 29] Whereas, in the latter, there is the provision for an interim sum but, because there is no regime of matrimonial property, it is impossible to make such an award: “*I don’t know of anybody who was ever awarded an interim capital sum in a cohabitation case, because ... it’s always uncertain, until you’ve heard the evidence, whether somebody’s entitled to anything*”. [Judge 29] An interim award could be of help to both husbands and wives: for husbands because they could pay the award in place of aliment as the wife could earn interest on the sum, while for the wife: “*in situations of contention, where ... [the] matrimonial home’s being sold, wife wants ... to buy ... [another house] but without an interim capital sum just can’t take that risk. Why shouldn’t the court award an interim capital sum if the husband’s got the money?*” [Judge 29]

THE JUDICIARY

²⁰⁹ *Willson v Willson* [2008] CSOH 16.

²¹⁰ *Marshall v Marshall* 2007 Fam LR 48.

²¹¹ JM Scott, (2009) *Chasing the Assets* paper presented for Central Law Training at “Family Law – The Complex Issues Conference” Edinburgh 21.9.09: <http://new.murraystable.com/news-articles/articles/chasing-the-assets>.

The level and nature of flexibility greatly depends on the judiciary because, despite criticisms to the contrary,²¹² there is: *“a discretion conferred on the sheriff or judge in using the provisions of the ’85 Act. Judgments can be written ... in accordance with what the sheriff or judge feels is fair, very often that will not necessarily be the decision that ... one would hope that it would be, in line with your assessment”*. [Solicitor 08] The sheriff’s approach could be quite idiosyncratic: *“a lot depends on what the sheriff makes of the party”*. [Solicitor 18] Idiosyncrasy can lead to narrow judgments: *“We had a sheriff ... who would always say to clients ... – ‘I know what you are going through. I’ve been divorced and my wife was very difficult’. I always thought – ‘Well, if that’s what he’s saying in open court I wonder how that ... influences his mind when he’s making orders for financial provision?’”* [Solicitor 18] Interviewees considered that if a case could be presented to a sheriff with: *“confidence”* [Solicitor 11] ensuring that the arguments were both: *“realistic and practical ... then it’s very worthwhile running it”*. [Solicitor 15] It was accepted that the courts are limited in their ability to be creative and: *“their hands are tied ... to a large extent ... [but] some sheriffs will do what they can”*. [Solicitor 16]

As noted above, problems may arise where sheriffs have no background in family law: *“there are certain sheriffs who will never depart from a 50/50. That’s just 50/50 – that’s it”*. [Solicitor 18] In such situations there will be little creativity: *“a lot of sheriffs ... have this – ‘Well it’s a fair division, which usually means equal and you’ve got to really have a strong argument to convince me otherwise.’ – So there may be an element of the judiciary needing to be more creative and willing to accept some of these arguments”*. [Solicitor 11] Taking as a starting point: *“judges don’t want to do something which is unfair”*, Advocate 22 aimed to give: *“them the justification at law for a solution which feels right. I’m quite content to frame arguments to help judges exercise discretion. Some ... colleagues don’t like that and find it difficult”*. It was recognised that a certain amount of guidance was needed: *“you need to try and direct a sheriff to a more creative solution and then try and find a principle to hang that on”*. [Solicitor 14]

Views of the judiciary

²¹² Notably Lord Hope, *Miller v Miller and McFarlane v McFarlane* [2006] UKHL 24.

Strangely enough, a similar sentiment was also expressed by a sheriff, who felt that some agents needed to be encouraged to explore wider, more creative, approaches to their arguments. This sheriff was willing to set out options for arriving at fairer outcomes by exploring a variety of avenues, asking agents to consider alternative ways of funding awards, for example:

... in terms of staged payments, in terms of assets changing hands at a later date, in terms of a combination of pension share and capital – ‘Have you considered that?’ And if you’re met with a blank look, then I’ll say – ‘Maybe you’d like to consider that and we’ll recall the case ... at some later point’. But if you’re met by a completely – ‘No, no, no, all she wants is as much capital as she can get now, right’ – you’re stuck with it. So you can be creative within limits. [Sheriff 28]

The risk of appeal

While the judiciary have “*some flexibility within the margins of discretion ... [to resolve] an application of the law ... [that] produces an unfair result*” [Sheriff 28] the margins are defined and to step beyond those margins would be to run the risk of being appealed: “*there’s no point. That just causes more grief and expense for everybody to get to the outcome that you ought to have*”. [Sheriff 28] Appeal was a real risk to which sheriffs were alert, although where creativity had been applied sometimes an expected appeal had not materialised: “*my experience and the experience of colleagues here, has been that in a number of cases perhaps on the face of it surprising solutions were arrived at by the sheriff and no appeals were marked ... [where] I had fully expected there to be an appeal*”. [Sheriff 27] In one case that had come to the attention of this sheriff at a later stage, the creativity had spilled over into negotiations that took place after the judgment: “*notwithstanding that judgment, the parties then went on to agree something slightly different*”. [Sheriff 27]

Solutions that parties have not sought

A possible way of reaching a creative solution was to make an order that was not craved: “*it used to be the received wisdom that unless something was craved you couldn’t grant it. But there is now ... Murdoch²¹³ ... that says ... you can grant orders even though it’s not what’s*

²¹³ *Murdoch v Murdoch* [2012] CSIH 2; 2012 Fam LR 2.

craved, which makes your life a wee bit easier”, [Sheriff 28] such orders needed to be within a sensible range: *“I don’t think you can go off completely on a frolic if it’s not what’s sought.”* [Sheriff 28] This has come about because the weaker party would put all their eggs into one basket, for example in pension sharing where there is a: *“tactical decision. The wife wants to keep the house and her husband to keep his pension. The husband wants a pension sharing order and half the equity in the house. The wife has no crave for pension share because she’s going ... all for broke – let’s get the house”*. [Sheriff 28]

Initially, the courts:

... dealt with that problem by saying that – ‘Well if you choose not to ask for a pension share order and we think that one ought to have been asked for, and you choose to hang your hat on the shoogly peg of getting it all by way of capital, we don’t think giving you it all by way of capital is reasonable then you are just going to get less than you would otherwise have been entitled to’. – ... But ... decisions have now made it clear that the person who holds the pension fund can ask the court to make a pension sharing order in respect of their own pension. [Solicitor 07]

Interviewees varied greatly on how they viewed such a solution. Some saw it as being quite sensible: *“I’ve seen it done ... it struck me as odd until I thought it through. ... I can see the force of it ... it makes sense”* [Judge 30] because it can be a means of extending the possible outcomes: *“I would have no difficulty in considering it alongside all the other craves. I have made an order not craved ... colleagues have made orders not craved by either party. ... There’s some little authority for that. ... Broadly if you are seen to be attempting to share fairly ... you can justify a lot by that”*. [Sheriff 27] On occasion, while fairness was achieved in terms of the: *“monetary result ... it might not necessarily be fair in terms of the orders that are awarded”*. [Advocate 21] Thus, extending the flexibility in the orders was welcomed. However, it was still preferable to:

... try and encourage the wife to put in a crave, so she had a fall-back position ... They don’t always think through the pleadings as carefully as they ought to. ... [I’d] point it out as an option. ... I might try and give a hint at a submissions hearing about what the issues were. I might even ask them to go away and think about it and come back”. [Sheriff 28]

There were others who considered seeking orders against oneself went: “*against every principle of the adversarial system. Of course, incidental orders are very flexible ... – but even the court doing it ex proprio motu is something I’ve never been happy about, but I can see why they did it in Murdoch*”. [Judge 29] For others it sounded:

... very artificial. ... We’re pretty flexible about what we allow people to ask for, at the end of the day. And rather than doing it in an artificial way, if it has to be done that way, so be it, but I would rather at the outset ... at the beginning of the proof, one of the parties said – ‘Well ... I’m not going to oppose an order if the other side ask for it’ – or something like that. Then I would let it go, in as informal a manner as I could.
[Judge 31]

Far from seeing an order against oneself as a development to be welcomed it was felt to be twisting the language too far: “*If the legislation says that either party to a divorce action can apply for financial provision on divorce, you’re really twisting the language to say they can apply for an order against themselves*”. [Judge 29]

Are there barriers to creativity and fairness?

Judges were also mindful of finding creative solutions, as fairness must be achieved: “*I would like to think that I would not find myself in a situation of issuing a judgment, which I thought was unfair*”. [Judge 31] Equally, Judge 30 found it: “*difficult to see a case being presented where I would likely be in that situation, because I just can’t see them presenting a case like that, to be perfectly frank*”. However, were there such a situation, a creative solution would be to: “*bend the language to suit me. ... I wouldn’t feel inhibited by the Act, I think I would have sufficient latitude in the language of the Act to be able to do that*”. [Judge 30]

Thinking of an extreme situation where there might be so little matrimonial property that one party was ending up with what was less than was fair, one judge met the barrier across which s/he was unwilling to cross: “*to go further and to allow the court to delve into property, which is not matrimonial property would be a pretty drastic step to take I think. So, I wouldn’t be in favour of that*”. [Judge 31] What, then, was fairness in such a situation? For

this interviewee what was fair would have to be qualified: *“I would have to be satisfied that it’s fair in the circumstances”*. [Judge 31]

Finding some sheriffs: *“very reluctant to be flexible”* Judge 30 considered it possible that sheriffs might: *“feel a bit more inhibited than what I do”*. Therefore, it might be easier for judges to be more creative in their use of the principles to find fair solutions. Another interviewee agreed with this sentiment: *“judges are far more practical, far more able to... not exactly bend the rules, but use the legislation for a practical effect. ... Sheriffs are more hidebound by what the law says ... they will follow the law. ... If you go to a higher court ... they’re more willing to look round and look at flexibility”*. [Solicitor 06]

SECTION 3: SETTING THE RELEVANT DATE

THE RELEVANT DATE

It is important to establish from the outset the date on which parties separated, because it is from that date that assets and liabilities are tabulated. Initially, it was suggested that many clients fail to understand its significance: *“they think it’s a movable feast until you explain to them that there might be perjury involved if they declare something in an affidavit, which is not true. ... It’s not an accounting date of convenience, it’s a date which has a different catch altogether”*. [Solicitor 13]

In the main, practitioners indicated that after: *“a bit of a flutter in the ... opening exchanges”*, [Solicitor 13] then: *“it’s generally conceded”*. [Solicitor 14] In most cases it little matters if the date isn’t immediately agreed, but every now and again it makes a significant difference. For example, in a time of boom assets may have massively increased in value: *“the difference in value in my guy’s shares between the two relevant dates was about £10 million pounds”* [Solicitor 19] while, in a time of bust, the opposite will be true: *“back in 2008 ... it really, really mattered when share values ... were plummeting, it mattered to get it to the month, if not to the week, because the value of a shareholding could be halved in a very brief period of time”*. [Solicitor 05] Furthermore, there may be tax implications as: *“transfers between husbands and wife within the year of separation are treated as tax neutral”*. [Solicitor 13] In a case where the parties had been separated for about two years, tax became an important aspect, which came to light during a meeting of clients and agents held at the accountant’s office. The accountant began by saying it was a shame the reconciliation failed: *“We had no knowledge of any reconciliation and I’m quite sure that no reconciliation had ever happened, or been attempted. But what he was doing was bringing us into the current tax year, so that there could be transfers of property”*. [Solicitor 13]

Why the date might be contested

“Couples’ lives are complicated”, [Sheriff 28] which means there could be a range of dates taken as the relevant date: *“People do live strange lives”*. [Solicitor 19] When the two dates are compared it becomes a problem as: *“people starting looking at the matrimonial balance sheet and the difference between then and now”*. [Solicitor 13]

There were two main scenarios interviewees dealt with that led to a blurring of boundaries, where: *“there’s just so much ambiguity in the air that it’s difficult to ... pin it down”*. [Solicitor 13] The first was when the parties remained in the same house. Are they simply: *“lodgers or ... two people who were married but ... just miserable? They [may] absolutely regard themselves as separated, but clearly one of them is doing the weekly shop, one of them is sticking washing in. ... They might well do the same thing if they were lodgers”*. [Solicitor 01] The second scenario that led to complications was when one worked away from home, possibly in the armed forces or offshore or for an international company.

Each of these scenarios is made more complex if there is also a slow disintegration of the relationship where: *“people in failed relationships ... don’t bite the bullet and do something tangible about it”*. [Solicitor 13] The relationship drifts so they are: *“under the same roof – he thinks that they are trying to give the marriage a go, she thinks that it’s all over”*. [Advocate 25] One partner may be in denial and being under the same roof may make it more difficult: *“to make it known to their partner the marriage is really over, where that message isn’t landing”*. [Solicitor 04] It can be a fine line: *“between a marriage that is ongoing and in deep trouble ... and a marriage, which is over”*. [Solicitor 07] It is much clearer when one partner has: *“moved out of the house, or when an affair has come to light, or there has been ... reprehensible conduct. ... Where parties gradually grow apart, living under the same roof, maybe sleeping in separate rooms, not socialising, not telling children. That’s when it becomes much more difficult”*. [Solicitor 12]

The purpose of such an empty relationship becomes to: *“maintain appearances and ... they justify that for the sake of the children. ... They find a mode of living where they’re under the same roof ... it’s like a Russian novel”*. [Solicitor 13] In some cases people may fail to bite the bullet for years, keeping up appearances for the sake of the children. It was suggested that not only do people lead open marriages, but that also it is: *“much easier not to confirm reality. ... I’ve got my partner and she’s got hers. ... We come together ... for business events. ... The kids are at boarding school but when they come home ... we are supposed to*

be together. ... We much prefer that the kids didn't know". [Solicitor 19] Such living arrangements may last for a considerable number of years: *"until the children ... go to university. ... Then they leave and ... say – 'But we've been staying in separate rooms and living separately for six years' – then obviously there could potentially be a big difference between the values of property at the two dates"*. [Advocate 24]

Objective identifiers

So what objective tests exist to show when the marriage relationship ended? It remains vague: *"when did your wife stop doing your laundry and cooking your dinner? ... Nowadays many men do their own laundry, do their own dinners. ... So these older notions of what constitutes wifely obligation and conjugal bliss are rather irrelevant"*. [Advocate 23] The problem, of course, is that the date needs to be: *"identified objectively and very often what you are looking at is the subjective intention of parties at a particular point"* [Advocate 25] it is: *"that funny mixture of both subjective and objective"*. [Solicitor 01]

Clive himself suggested considering the following factors when identifying whether a couple were still married:

*... the amount and nature of time spent together, living under the same roof, sleeping together, having sexual intercourse together, eating together, having a social life and other leisure activities together, supporting each other, talking to each other, being affectionate to each other, sharing resources, sharing household and child-rearing tasks and so on ...*²¹⁴

Peoples' lives vary, so what would demonstrate normal married life for one couple, for another might show a permanent split: *"she stopped cooking or he ... stopped doing the gardening or ... their finances ... separated"*. [Advocate 25] It can be very subjective, but one measure is how an outside observer might gauge the nature of the relationship: *"living together as man and wife isn't just about intimacy, it's about how you present to the world and it's not even about intention or how you feel. It's about – would you be considered to be living together as man and wife – and that's very subjective"*. [Solicitor 20] There are details

²¹⁴ EM Clive, *The Law of Husband and Wife* (4th ed), 1997, W Green, para 21.075.

that help to inform how a couple appears to others, indicating a change in the relationship: “*At what point did you stop sending Christmas cards from ‘x’ and ‘y’ ... at what point did you stop getting invited to parties together ...at what point did you start thinking about making separate arrangements for parents’ evenings?*” [Solicitor 01] While such identifiers may appear to be small in themselves and: “*one or other of these badges may not on its own indicate that they have ceased to be husband and wife ... taken together there may be some objective point at which that can be identified*”.²¹⁵ [Advocate 25] One identifier, mentioned by numerous interviewees, was the separation of the parties’ bank accounts, based on *Banks v Banks*.²¹⁶ In a case where the parties were ten years apart, the decision of the judge to choose the date when the bank accounts were separated was described as both a: “*pragmatic and sensible way forward*”. [Solicitor 01]

An issue worth litigating?

Apart from a few exceptional circumstances, interviewees considered there were too many risks to litigate on the relevant date: “*that is a situation quite frankly that you want to avoid*”. [Solicitor 08] Not only was it seen as a waste of money but also the date arrived at by the court was unlikely to be the client’s chosen date, or indeed any sensible date:

I’ve actually watched a sheriff figure out the midway point between my submission and their submission and find the midway point, for no reason other than that’s the midway point. ... I’ve sat there and thought – ‘I wonder what he’s doing up there.’ When he came up with the figure – that’s exactly in between the two of us! ... It costs us ... ten, 15, 20,000 to go through the courts to get some guy up there doing an arithmetical calculation we could have done ourselves! [Solicitor 06]

It is hardly surprising that agents saw little point in such litigation: “*I had a pre-proof on that once, only once, which ran for about five days ... and neither of us [won] – the sheriff ... did not choose either the pursuer’s date or the defender’s date, they gave a different date altogether. It was such a waste of money*”. [Solicitor 09] The money thus expended would not: “*advance the settlement or resolution of the financial aspects of their case, beyond*

²¹⁵ A point also made by Clive, *ibid*.

²¹⁶ *Banks v Banks* 2005 Fam LR 116.

simply ... giving us a starting point”, beside which a client must be prepared for the court: “*to examine the minutiae of their lives*”, [Advocate 25] ending up with: “*almost a win or bust, in terms of credibility*”. [Solicitor 08] Most clients, when faced with such a scenario, agree on a date.

It is a very delicate area to be explored: “*an emotive issue. ... To suggest to someone their marriage has broken down irretrievably at a time when they say – ‘You know what, I was still married at that point’ – is something that parties have incredible difficulty with and are reluctant to accept*”. [Solicitor 08] When: “*one person does not want that gradual decline to happen they can actually develop mental health problems because it's almost a kind of mental torture*”. [Solicitor 17]

Attempting to pinpoint the end of a marriage, especially where the parties remain in the same house can be very intrusive and: “*very uncomfortable cases to run because ... strangers are picking over your domestic habits, trying to determine a before and after and trying to pinpoint where the line is*”. [Solicitor 18] Often, there is not a clear day when the marriage finished it is usually a slow decline.

There are, however, notable exceptions when it might be worth the various risks (and possible humiliations) to establish a particular date. It might, for example, make such a significant difference to the level of award, especially if, as in one case, one person is: “*deliberately attempting to minimise what his spouse would be entitled to ... lying ... [about] the relevant date ... for reasons of financial manipulation*”. [Solicitor 07] Another example was when one party retires, because: “*instead of valuing a pension that's on-going, a lump sum has come. I've had ... cases with a flurry of interim orders to try and stop lump sums being paid out ... in case the husband retires to Spain with the money, or pays off debts ... and the wife is hoping to get a share of that*”. [Sheriff 28]

While there can be: “*genuine differences in how people were perceiving things*”, [Solicitor 04] there are also cases where the level of deceitfulness is such that the weaker party has little choice but to litigate:

... cases of downright disingenuity ... where husbands have been (it is just men) ... running more than one woman and have been dividing their time. And so, he's saying

– ‘Look, I’ve been living with Susan for the last ten years’. And she’s saying – ‘But hang on a minute I knew nothing about Susan until last year, I thought you were living with me and working away’. [Advocate 22]

There were, of course, a small number of extreme cases where it was almost impossible to establish a date: “two cases where there was a disagreement to the extent of 13 to 15 years”. [Solicitor 13] In another such case, where the difference was 14 years, the circumstances were such that the husband worked abroad and would visit for the sake of the children, but they were not living together: “The children were grown, I took statements, both by now adult children, and they weren’t even clear whether their mum and dad were together. ... Just asking them a simple question – ‘When do you think your mum and dad separated?’ And they couldn’t tell me”. [Solicitor 11] Another extreme case involved an argument not only about the date of separation but also about the date of the marriage: “they had gone through a ceremony in Libya, which she thought was a marriage but he didn’t. ... Of course, it was impossible to get any information out of Libya”. [Solicitor 11]

THE APPROPRIATE VALUATION DATE

Section 10(3A) was introduced as a result of the impact of *Wallis v Wallis*²¹⁷ where the matrimonial home had significantly increased in value between the relevant date and the date of decree and where the house was to be transferred rather than sold. The sheriff awarded, *inter alia*, a property transfer order to husband from wife along with a capital sum to wife reflecting half the value of the house at the relevant date and half the increase in the value of the house. The husband’s appeal was rejected by the Sheriff Principal, but accepted by the Inner House, which reduced the capital sum so the increase in the value of the property was no longer reflected. The wife’s subsequent appeal to the House of Lords was rejected.

The impact of the appropriate valuation date

But was the introduction of section 10(3A) actually necessary: “*did it get rid of the Wallis [effect]?*” [Solicitor 19] There was a strong feeling that the section was so badly drafted that it was difficult to know whether it referred to: “*the new value at the relevant date, which is*

²¹⁷ *Wallis v Wallis* 1991 SCLR 192; 1992 SLT 676; 1993 SC (HL) 49.

what it looks like, or ... as resources". [Advocate 22] Indeed, there were interviewees who considered that if all sections of the Act had been employed in Wallis, there was actually no need for any subsequent amendment:

... we've failed to appreciate the relationship between matrimonial property, which ... is identified at a relevant date, which is in the past, and resources, which is what people have got now. Actually I blame the House of Lords for this because they got the decision in Wallis wrong and ... it caused us to divert for years. [Advocate 22]

In other words, the court regarded the increase as part of the matrimonial property rather than as part of the overall resources. When considering the increase in value of the property clearly the court had no discretion when to value the house because section 10(3) says it must be at the relevant date. However, there is discretion, under section 8(2), when it comes to deciding which orders would be reasonable. So rather than giving each party an equal share under section 9(1)(a), had the court regarded the increase in value as part of the parties' overall resources under section 8(2)(b), then a fair i.e. unequal share could have been reached by taking a broader view of the parties' wider resources, because it was not reasonable to go for a straight 50/50 split.

It was considered that windfalls should be seen as part of the overall settlement, taking the picture as a whole: "*that's how Lady Smith resolved Coyle,*²¹⁸ *because there'd been a big increase in value and she said – 'Well, I'm recognising the wife's getting the windfall and she can get it, but I'm taking it into account in a general sense'*". [Judge 29]

There were a number of interviewees who considered the introduction of section 10(3A) had been useful, if for no other reason than it had enabled the current simplified practice to develop of using the current date value, which is for any property that is to be: *transferred ... the presumption is that's the current date value. Nobody spends any time trying to work out whether there's an appropriate date between the relevant date and the current date, which we ought to use, I have to say*". [Advocate 26] However, it was not a complete solution, because: "*there's a wee problem in amongst all of that, which is, again Lady Smith funnily*

²¹⁸ *Coyle v Coyle* 2004 Fam LR 2.

enough, in Watt v Watt²¹⁹ – it's only the current value of your interest. So it's only your half, if you like, that's valued at current value". [Advocate 26] Nor does it address the situation where a property has risen in price but, in the intervening years before proof, one party has paid the mortgage and all the expenses on the house.

Whether or not it was necessary at the time of its introduction, it was certainly not felt to be of use currently; because of the downturn in the housing market there were no current cases of windfalls.

²¹⁹ *Watt v Watt* [2009] CSOH 58; 2009 SLT 931.

SECTION 4: WHAT WORKS FOR LITIGANTS

The 1985 Act was considered to be: “*a manageable, well drafted piece of legislation*” [Solicitor 08] especially: “*in comparison to what we get now*”. [Advocate 26] Inevitably, comparisons were made with the cohabitation provisions in the 2006 Act:²²⁰ “*it's very, very difficult to advise clients at the moment about cohabitation claims because it's so woolly ... whereas the '85 Act has got a bit more direction*”. [Solicitor 11] Comparing the two Acts: “*the 2006 Act – really it's how long is a piece of string? ... It's very difficult to advise clients in those circumstances, because the judicial discretion is so broad and there is so little guidance that you just don't know*”. [Advocate 21] Both: “*the structure and clarity of the Act is admirable. ... Clive got this right. ... I like the construction ... there's a logic to it*”. [Solicitor 13] Not only was it seen as being: “*user friendly for family law solicitors*” [Solicitor 17] but also: “*it's easy to explain to a client*”. [Solicitor 06]

CERTAINTY

Above all, interviewees saw the level of certainty it offered clients being the key element in what works for a party litigant. Certainty worked at different levels, there was, for example, the certainty of outcome. While acknowledging no lawyer could ever tell a client definitely what would happen, interviewees indicated that they could: “*usually say to a client here is the likely range within which the court will determine this matter*”. [Solicitor 07] Several interviewees indicated that: “*good solicitors will be able to ... to give their clients a very sensible estimate of what this is going to cost them ... more or less the first time they see them*”. [Judge 30] Thus, in the majority of cases: “*they could probably walk out of a first meeting and have a broad idea of where they were going with it*”. [Judge 29] Thus, by setting out for a client: “*spreadsheets ... [with] best and worst-case scenarios*” along with the range of decisions from the case law they are able to assess their own:

... range of outcomes and ... margin of risk. ... Then they will take an intelligent decision and negotiate and settle the case. ... There are very few decisions that one reads where you think – ‘Gosh, that's left of field, where did that come from?’ ... They're usually quite conservative. So, I think we have a system where it's possible to

²²⁰ Family Law (Scotland) Act 2006.

advise clients and settle cases because we understand what the range of outcomes is likely to be and that's quite important. [Sheriff 28]

There was the certainty of finality as clients knew that the settlement arrived at was the conclusion: *“certainty is as important as anything else, because parties need to know that that chapter is finished, these relationships can now be safely ... put aside, and I can move on with my life”*. [Advocate 23] Comparisons were drawn with England where it appeared: *“in some situations ... parties are continually ... attached to each other for many years”*. [Solicitor 11] Whereas in Scotland there is the expectation: *“that the court will be looking to re-order the financial arrangements ... to give effect to a clean break, because ... people do ... need to move on and say – ‘That’s now in the past.’ ... It’s a useful starting point for litigants to expect that to be achieved”*. [Sheriff 27]

Such a level of certainty was seen as: *“hugely advantageous”* [Solicitor 01] in both negotiated and litigated cases: *“it sets out the basics that a client can expect from a court. Particularly in the sheriff court it’s unlikely that a court will make any hugely deviant decision from ... what the precedents are. You can generally rely on it”*. [Solicitor 06] However, once again, interviewees were at pains to point out that, although they realised the focus of this research was on litigated cases, most cases were not litigated: *“many, many, many cases can be resolved without the need to go anywhere near court, and that’s a peculiar feature of the 1985 Act ... and it has to be a good thing”*. [Judge 29] Thus there was the certainty there was no need to litigate to achieve an acceptable outcome. It was: *“the degree of certainty ... [that] discourages litigation”*. [Solicitor 05]

The framework was seen to give certainty offered by the clarity of the provisions: *“the simplicity of ... 9(1)(a) ... add it all up and divide it by 2. ... That’s universally understood ... everybody would know that’s the starting point”*. [Advocate 24] And the clarity was seen to underpin the broad approach of the Act: *“the genius of the Act is that ... although there’s lots of discretion and there’s lots of room to play around and it’s broad enough to take in a lot of different circumstances there is still clarity”* [Advocate 21] enabling the lawyer to guide the client to an understanding of: *“what sum of money you are arguing about ... within a certain range what sort of orders are likely to be made. So ... you can give them a worst and a best case scenario with a degree of confidence”*. [Advocate 21] However, it was also clear that clients struggle to accept outcomes arrived at by judges using their discretion. Such

outcomes can seem unfair to a client when, for example, employing a source of funds argument does not automatically lead to a full refund of the inheritance or gift they have invested in the matrimonial property or the stay-at-home mother does not automatically gain financial recognition through a section 9(1)(b) claim.

MATRIMONIAL PROPERTY REGIME

The best thing about the 1985 Act is the idea of matrimonial property. [Advocate 23]

Numerous interviewees highlighted the matrimonial property regime as an aspect of the provisions that worked well for clients, because each aspect is clearly defined: *“there is a clear definition of matrimonial property ... a clear scheme of how all of that matrimonial property should be valued and ... a clear scheme of division thereafter with the ability to have additional add-ons. ... That produces certainty and clarity ... a fantastic starting point”*. [Solicitor 12]

Again comparisons were made with the English experience when: *“making financial disclosure ... drawing up an asset schedule, you are concerned with everything from all sources – inherited, pre-marriage – and then you have to start arguing to exclude things. ... You might be successful, but you might not”*. [Solicitor 03] This interviewee found that approach both: *“unfair and uncertain”* preferring the Scottish approach where: *“the fruits of the marriage shall be shared”*, a period defined by the date of the marriage and the relevant date: *“members of the public find that fair. People don’t react generally in abject horror when you explain that to them ... that works well”*. [Solicitor 03] Indeed, the relevant date itself was also highlighted, being: *“the best way of applying a punctum temporis to the dispute. In England you’ve got all kinds of orders and people get ... ordered to look after one another ... forever and ever and ever and ever and ever”*. [Advocate 23]

THE FRAMEWORK OF THE PRINCIPLES

A key element of why the Act worked well for clients was considered to be the set of principles, because they created the basis of a clear and workable framework: *“Having both the set of ... five principles and also the reasonableness control ... is a very good start”*. [Judge 31] With certain caveats explored above, many interviewees considered the principles

as key because they are, in the main, clearly defined. Furthermore, they steer a careful path as they are: *“nice and high level ... not micromanaged ... but at the same time it’s not palm tree justice where the judge can do what he sees fit in all the circumstances. People have pegs to hang their arguments on ... and therefore people generally will know where they are”*. [Judge 31] While the presumption in favour of equal sharing was seen as: *“a hugely helpful thing for the parties to understand. In fact it’s ... universally well understood. You rarely get a client who comes in and doesn’t understand that the starting point’s 50/50 sharing”*. [Advocate 26]

The principles were considered to be sufficiently flexible to address the needs of a range of clients, some at different stages in their lives from: *“female litigants in ... what would have been seen as a traditional family setup”*, [Sheriff 27] to those with: *“very small babies ... [and those] trying to house teenagers”*. [Solicitor 15] They also worked with those clients who were unwilling to take advice, intending to be: *“as difficult and unreasonable as possible and being able to say to them that the outcome you are proposing is so far outwith the scope of the ’85 Act that ... it has zero chance of happening. The point of it being unarguable is a very good way of reining in someone that is out of order”*. [Solicitor 07]

FLEXIBILITY AND DISCRETION

For many interviewees the framework of provisions contained: *“the tools by which you can put forward ... any arguments you want ... it’s flexible enough to do that”*. [Solicitor 11] There was the possibility of: *“a wide range of outcomes ... which allow ... sufficiently nuanced and subtle outcomes to achieve fairness. ... That is a real benefit [for clients]”*. [Advocate 25] The neat balance of certainty and discretion meant that clients’ needs could be accommodated: *“the adaptability ... and the flexibility ... gives the sheriff ... [the opportunity] to take account of almost any circumstance and to come up with ... a fair decision, a fair division”*. [Solicitor 18] So: *“judicial discretion is built in”*[Advocate 21] to the mix, thus avoiding the formulaic approach found in: *“the CSA, the CMS attempts to try and do something that is absolutely formulaic, it is infinitely industrial scale worse”*. [Solicitor 04]

ACT OFFERS ACCEPTABLE OUTCOME

Overall, interviewees did consider that the Act offered what was needed to achieve acceptable outcomes for litigants: *“Yes, it does ... I can’t recall a case where I’ve finished it and ... thought it would’ve been much better if the Act had allowed us to do something or other that was different”*. [Solicitor 13] There were, of course, a number of caveats, which have been discussed above, including that: not all aspects of the Act have been fully utilised; poor submissions are sometimes made to the court; adjustment can be harshly applied meaning those with very small children and older women lose out; there is no recognition of future earnings; source of funds arguments can lead to outcomes that seem unfair as can arguments dealing with large increases in value of a non-matrimonial asset.

One interviewee pondered on the place of reprehensible behaviour within the provisions. Although not seeking any change to the approach taken by the Act, s/he reflected on outcomes that felt:

...morally unjust, and you think that ... behaviour really ought to be taken into account more. ... I’ve seen some cases where somebody has just been a bad person ... and yet has come away with a correct, reasonable financial provision. There’s always a little bit of one’s heart, rather than one’s head, saying ... that person ought to be punished for this. [Solicitor 05]

However, this interviewee considered it wiser not to take account of behaviour because: *“it just opens up the floodgates of moral issues coming into the division of assets. ... Then you would get much more allegation and counter-allegation and slinging of mud, which in the longer term is just not good for anybody, particularly ... children.* [Solicitor 05]

In similar fashion, another interview mused on the era before the introduction of the 1985 Act when acceptable outcomes for litigants were: *“a lottery”*. [Judge 30] Comparing the two eras showed how well the current framework addressed client needs:

There was still a generation of judges practising in the ’80s who had been in practice in the years immediately after the war ... indeed a few ... [from] before the war, ... who had attitudes which we would now regard as pretty palaeolithic towards women. ... [They] regarded matrimonial property as husband’s property. ... Not all the judges ... there was quite a big divergence in judicial opinion. [Judge 30]

Nature of acceptable outcome

But what is the nature of an acceptable outcome? It could be: *“Where each party is equally unhappy”* [Solicitor 05] – on the face of it a glib response, but actually a very telling one. It is easy when sitting at a desk removed from clients and their concerns to forget the level of human misery that divorce may bring with it: *“it’s a great privilege of a family lawyer to take people who are having such a bad time and try and make it better. ... That’s the joy of the job, to take people who, ... if you do your job right, are going to be happier at the end than they were at the beginning”*. [Solicitor 05] It could be the obverse: *“Two happy clients. ... But, actually, if I achieve a reasonably satisfied client then that’s it. None of them is ever happy, you know, they’re not happy, but I want a client to have a fair and reasonable outcome”*. [Solicitor 06] So, perhaps: *“An acceptable outcome to the client is one where they are equally happy, or equally miserable to the other party’s response”*. [Solicitor 13]

Happiness is rarely a factor of a divorce. Far more significant is to achieve a level of fairness for a client: *“if I can get them to accept the reality of the situation, if they go out of here thinking ... that every aspect’s been dealt with, that I’ve had my corner fought, that I’ve got a fair outcome, that’s all I want my clients to think”*. [Solicitor 06] In order to achieve such fairness a family lawyer spends: *“a lot of time trying to pour oil on troubled waters and finding solutions rather than just resolutions”*. [Solicitor 07] Clients often begin with a list of demands and need to be guided to: *“articulate what they think would be a fair outcome”*, which often means challenging them to imagine if: *“the boot were on the other foot ... if you can get them to consider that, then that goes a long way to resolving the problem”*. [Solicitor 09] Thus, clients were encouraged to think: *“about what’s fair, not only what’s fair to them but what’s fair overall”*. [Solicitor 20] Being pragmatic, an acceptable outcome would, therefore, be one where: *“both parties leave that process with an outcome that they can live with. If ... you meet somebody in a pub sobbing into his beer saying – ‘She took the shirt off my back’, I take the view that you were badly advised, or ... you ignored advice, because that should not be an outcome”*. [Solicitor 13]

It was suggested that most clients would say that the Act serves neither party well at an emotional level, because it does not focus on their individual contributions made to the

marriage. However, that was actually seen as a very positive aspect of the Act, enabling the agent to say to the client:

... this was a partnership. ... And actually this is not about ... the court vindicating your sense of yourself. ... The point is what we are ... doing is a really quite blunt, rough and ready assessment ... that's a good thing. Rather than ... there [being] an overwhelming focus on trying to give weight to things like contributions and needs, which happens down south ... and is so damaging in the longer term. [Solicitor 01]

For a client to feel that an outcome is fair it needs to fulfil their: “*expectations and that's a question of the judgment of the practitioner, as to how you set those expectations*” and the principles are central as: “*the default position*”. [Solicitor 14] Clarifying what a client wishes to achieve within the context of the principles should lead to a reasonable outcome where: “*they were both able to move on without one of them being over burdened one way or the other*”, [Solicitor 15] which may well mean: “*without on-going dependence on the former spouse, if at all possible*”. [Judge 29] While an agent may take account of their client's expectations, a judge takes no account of either party's hopes and feelings: “*I don't take that into account. ... An acceptable outcome for me is one where I feel I've produced the fairest result that I can in the circumstances of the parties' finances*”. [Judge 31]

A number of interviewees stressed that, for an outcome to be acceptable, it must place any children at its heart, enabling the party with care of the children to:

... gather enough from the matrimonial property to maintain the lives of the children in as an uninterrupted fashion as possible. One of the things which adults always forget is that children can be absolutely bloody well mortified by the fact that their parents are divorcing and if they have to ... move from their home ... it cripples these kids. [Advocate 23]

Another way of assessing outcomes is to look at the number of appeals, which: “*are very few ... in family cases. ... There must be some thing about the system that's working pretty well. I don't think it's just the cost of appealing that is inhibiting people ... even in big money Court of Session cases the number of appeals is very few*”. [Solicitor 13]

SECTION 5: THREE NOTES

A NOTE ON THE CONCEPT OF CLEAN BREAK

The notion of clean break has woven its way through a number of sections of this chapter. It is now time to consider it in a little more detail.

The concept of clean break was seen as being very important, because it: “*is what clients want, overwhelmingly*”: [Solicitor 07]

Most lawyers aren't really that concerned about why relationships break up, but if you're ever told, sometimes in a quiet moment your client will start talking to you. And you find that one of the things that is still the case is that ... women complain about being financially controlled. ... There is a certain sort of man, frequently the kind of self-made business person, who just thinks he can control everything – wife, dog, everything. And the women ... have got little or no financial freedom. ... These people are the ones who, when it comes to divorce, ... are fed up with being controlled by some know-it-all husband and they want shot of him. [Advocate 23]

Achieving a clean break is: “*very important indeed. ... The Scottish system, as a whole, is predicated on the clean break being the ideal. ... You can't always achieve it, of course, because the facts don't always support it, but it's a very useful goal and it does mean that people can move on*”. [Solicitor 05] This interviewee neatly summed up the importance and the place of clean break in Scots law, i.e. that it underpins the legislation, that there is a preference for clean break, that it cannot always be achieved, but when it is achieved it allows clients to get on with their lives. Thus, the concept of clean break was seen as: “*the guiding principle*”, [Solicitor 12] it: “*underpins the legislation*”, [Solicitor 14] it is: “*the whole thrust of Scots law*”. [Solicitor 06] The preference is for a clean break, which is what: “*the courts are looking to do. ... It's just accepted that is the principle. ... Where possible ... it is the norm*”. [Solicitor 12] As we have seen,²²¹ it is the way the Act is formulated with: “*a distinction between remedies which ... require an involvement between the parties after divorce ... the periodical allowance of 9(1)(d) and (e), which are secondary remedies, and*

²²¹ See also above “Interconnectedness of principles”.

the primary ... remedies ... which are in relation to clean break ... transfer of property, of capital". [Advocate 25] There are occasions, however, when it cannot be achieved, for example when there are children who require on-going support from the absent parent, when the weaker party needs on-going support or when there are deferred or staged orders. Furthermore, it may not be possible because of lack of realisable assets. So clients seeking to avoid any order, such as PA, which would prolong financial ties need to have enough funds to capitalise – only possible: *"if it's actually affordable"*. [Solicitor 19] Psychologically achieving a clean break: *"for the vast majority of people ... [could be] absolutely critical, absolutely critical"*, [Solicitor 01] because: *"the sooner the parties can get ... their financial position onto a steady footing ... the quicker you are going to get them back on their road and on with things"*. [Solicitor 15]

The inevitable comparisons were drawn with practice elsewhere: *"like England or the Republic of Ireland, where people can keep on coming back to court for further financial provision"*, [Solicitor 19] and where it is: *"incredibly difficult ... for people to get on with their lives"*. [Solicitor 01] Therefore, in Scotland there is just the one opportunity to: *"get it right, and that's it. ... That is far, far better than any residual hanging-on, or – 'Maybe I could come back, or maybe this, or maybe that'. No, this is full and final settlement ... hugely important. The Scots' principle of clean break is a good one"*. [Solicitor 06] Such: *"never-ending commitment that you see in some awards in England ... really is anathema here"*. [Advocate 25] It is worth noting that however much the concept is ingrained in the minds of practitioners, the actual words 'clean break' may not be used: *"it's not a term I really use with clients ... I don't mean that I don't let the words pass my lips ... the spirit of it does come over in what I'm saying. ... I haven't found it a sympathetic term to use and I wouldn't use it as in those words"*. [Solicitor 04]

Clean break also allows for a level of certainty: *"it's better for people to have a clean break because then there's certainty in what the arrangements are; whereas if you have something that is going to drag on longer ... there are so many risks in the future"*. [Solicitor 20] Therefore, by capitalising periodical allowance any risk of the payee defaulting or seeking an order for a material change of circumstance is removed: *"It removes the uncertainty of situations ... [of] instalments over a period of time, or ... periodic allowance ... when things can intervene that are beyond ... the parties' control ... they go bankrupt, they have ill-*

health”. [Solicitor 20] Although, as we saw above,²²² deferred or staged orders are used to good effect to achieve more flexible outcomes for clients, the down-side is obviously no clean break is achieved, running the risk of the orders not being honoured: “*I will agree to sell the house when ... the youngest child leaves home*’. ... *What if you never sell?*” [Solicitor 09] In circumstances where parties have retained a degree of financial interdependence much depends on the nature of their on-going relationship, which frequently: “*doesn’t seem to improve beyond the divorce*”, [Advocate 21] so, unless: “*there is still a degree of trust between them*” [Solicitor 17] it was felt that by using such orders: “*you’re buying the potential for problems later on*”. [Solicitor 13]

While for most interviewees achieving a clean break was so central to their way of thinking it was like operating on automatic pilot, others stressed: “*it’s more important that there’s fair sharing and that may not result in a clean break*”. [Sheriff 27] As Advocate 26 explained: “*I don’t actually spend a lot of time trying to achieve a clean break when I’m factoring that into fairness. If fairness dictates that I will not have a clean break, then I’ll not have a clean break*”. At the start of the Act: “*there was an initial period of time ... when clean break was the be-all and end-all. It was given ... far too prominent a place. ... I understand why people want a clean break ... but I would be anxious that that wouldn’t be at the expense of a fair sharing of the matrimonial property*”. [Sheriff 27] This interviewee had, over the previous five or six years, detected a more relaxed approach to the notion of clean break with a shift in decisions from the Court of Session, in particular. The shift, while not moving away from clean break as a starting point, recognised that it was impossible to achieve in every case and, therefore, involved greater use of orders running into the future because: “*the justice of the situation*” [Sheriff 27] demanded it. This was very re-assuring: “*if you’re working in the sheriff court it gives you a little bit of comfort that your attempts at fair sharing might stand up on appeal ... provided that they’re justified by other principles ... even if you’ve got ... on-going relationships*”. [Sheriff 27]

The concept of clean break is so ingrained in the minds of family lawyers that many of them spoke of it as a principle, as though it were the sixth, unwritten principle: “*I said a moment ago ‘principle’ ... and I did that because I thought – ‘Do you know that’s been elevated ... almost to the status of a principle’*”. [Sheriff 27] Such elevation has been present from the

²²² See section above: “FLEXIBILITY AND CREATIVITY WITHIN THE ACT”.

outset, as in 1990 Wasoff *et al* found in their early study: “*The solicitors tended to give the idea of a clean financial break more prominence than is warranted by the terms of the legislation ... solicitors generally perceived that it was a principle itself*”.²²³ There was general agreement that: “*Scottish family lawyers are very much brought up to have that primarily in their mind ... that’s how we’re all trained to think and have been for decades*”. [Sheriff 28] To that end this interviewee set out the process as:

I would start by saying – ‘Here’s my spreadsheet, this is what wife’s got, this is what husband’s got, this is what the division is. That’s a clean break. How does that work?’ You then do your resources check and only if it’s unfair ... and unworkable do you then go back and look at alternatives. [Sheriff 28]

Effecting a clean break was seen as a matter of both social policy and of law. As social policy: “*in an era when 40% of marriages end in divorce, it can’t be right that people are tied to their ex-spouse ... for long periods of time*”. [Judge 29] As a matter of law it was seen to work well because it enable the system to run more smoothly by not occupying court time with actions to vary long-term periodical allowance orders.

A NOTE ON THE NOTION OF RECEIVED WISDOM²²⁴

You have this ... folklore about what the structure is and what the principles are ... [which] becomes very profoundly embedded. [Solicitor 01]

Variouly called received wisdom, the common wisdom, the urban myth or folklore, a number of interviewees reflected on how practice itself develops. That which becomes standard practice may be embedded in ideas and interpretations of the Act that have developed over time amongst practitioners, even though there is no apparent basis in the legislation itself for such practice. This then becomes the received wisdom on how aspects of the legislation are to be interpreted and applied: “*there is a real tendency to over simplify cases and certain propositions become enshrined in the common wisdom*”. [Solicitor 03]

²²³ F Wasoff, RE Dobash and DS H Marcus, *The Impact of the Family Law (Scotland) Act 1985 on Solicitors’ Divorce Practice*, 1990, Edinburgh, Summary point 5.

²²⁴ See also above at “The impact of section 9(1)(b)”.

There were a number of such pieces of received wisdom that have developed in relation to the financial provision framework.

The most significant pieces of received wisdom to have developed is in relation to the level of awards for unequal sharing. Various percentage splits were suggested as the norm – a norm that had emerged over the years as the perceived wisdom. We saw above how powerful the urban myth was in the context of such percentage splits where the:

... conventional wisdom is that you will not do better than 60/40. ... My understanding is that when one analyses cases in which a 9(1)(b) argument has been made that by and large the departure from equal sharing is not huge. ... [There is a] rule of thumb that is bandied about, and you see these things, the difficulty is that they have a tendency to become almost urban myths amongst family lawyers who then just accept them and proceed on that basis. [Solicitor 03]

This view was supported by other interviewees who indicated that the parameters that: “we are really thinking in are, at best case ... a 60/40 division of the finances. ... To be honest I couldn’t point you to the correct case law that tells me that, but that is a generally held view. ... Through my training that was ... the parameters and we wouldn’t necessarily go beyond” [Solicitor] and: “It’s very rare to have anything beyond the 60/40, parameters. ... [There’s nothing in the] legislation that sets that. ... It seems to just be a working practice, and I don’t know why”. [Judge]

It was felt that too much reliance was placed on percentage outcomes and insufficient regard given to the facts of the particular cases that had led, on those occasions, to those outcomes: “go back and stop and look at what actually ... was the thought process in this case. How did that outcome come about? I think there is a huge problem with that kind of folklore in our jurisdiction that probably doesn’t bear close analysis”. [Solicitor 01]

When there is a lack of rigour in examining the facts of a case and the reasons for the awards made based on those specific facts, the outcome becomes the rule to follow, regardless of the facts. One interviewee had noticed this in source of funds arguments: “I’ve now heard it from two separate QCs in two separate consultations ... that your top line is about 75/25% credit back for source of funds. Now where has that come from? ... [It] has now become our

perceived wisdom". [Solicitor 01] It appeared to this interviewee to be based on a few cases within the last five or six years where the facts of those cases had led to that outcome, but the percentage outcome had taken on the mantle of 'the rule to be followed'. The percentage had turned full circle as the interviewee had: "*now ... heard other agents parrot that back to me*". [Solicitor 01]

The problem of such received wisdom was not confined to how unequal an unequal split might be, but was also of concern in relation to awards of expenses: "*people just keep replicating the arguments without challenging it, because there's nothing set down in substantive law that requires the courts to take the view that they do. It's just something that's become a sort of insidious practice*". [Solicitor 13]

A further example of received wisdom in operation was in relation to valuations when neither the relevant date nor the appropriate valuation date was followed: "*everyone just takes the current value when they are looking for transfers*". [Solicitor 18] This had become the settled way of producing valuations. It was felt that such lack of rigour was twofold in that some practitioners did not refer directly either to the legislation or to the landmark cases but rather followed the myth.

It was felt that, while: "*we are very fortunate to have people ... who do go back and look at these things and analyse*" in fact, there were far too many occasions when what a few significant practitioners said simply: "*becomes gospel and ... [others] don't ever look at it, they don't go back*". [Solicitor 01] Not only was it considered to be important to go back to see what the legislation actually says, but it was also equally important to examine the landmark cases carefully. An example of a landmark case that was erroneously followed was *Cunningham v Cunningham*,²²⁵ where:

... for many years you would hear people say, quite routinely, - 'It doesn't matter if an inheritance was ploughed into the matrimonial home, because it's the matrimonial home it will be treated differently and it will be shared equally'. - I think, actually, if you really look at Cunningham that's not what it says. But it suited people to take some sort of glib, inaccurate principle from it and then use it. [Solicitor 03]

²²⁵ *Cunningham v Cunningham* 2001 Fam LR 12.

The arguments that might be run depended not only on the legislation, case law and their attendant myths, but also on the practice common in the area in which the agents operate: “*there is a mutual respect in the family law community in ... [this area] that very few of us run an argument that couldn’t actually be run. ... [It’s] our local dynamic, yes*”. [Solicitor 15]

A NOTE ON PENSIONS²²⁶

Currently, pension sharing has largely replaced: “*those crazy ear-marking orders*” [Solicitor 07] and, in the main, the introduction of pension sharing was welcomed as ear-marking had been found to be a very cumbersome exercise: “*earmarking is just like suddenly coming into treacle when you try and use it compared with the other bits of the Act*”. [Solicitor 04] Initially, clients often chose not to seek an ear-marked allocation from their spouse’s pension, but now an increasing number of clients do understand the benefit of a pension share: “*especially since the new rules that the government are bringing in*”, [Solicitor 13] will mean that: “*pensions are becoming more liquid*”. [Judge 29] This development was welcomed (albeit it had nothing to do with family law), because up to now pensions had been seen as: “*just a form of matrimonial property, they’re not ... sui generis*”. [Solicitor 05] In those circumstances there were those who would have preferred to understand: “*the pension is a different kind of asset, and not immediately realisable*”. This was expected to change as pensions became more liquid enabling them to be drawn down. Pension sharing orders were, therefore, generally valued, being seen as: “*very useful particularly these days when people can’t raise any capital*”. [Solicitor 19]

When working out the proportion of a pension to be attributed as matrimonial property one interviewee considered that: “*You are stuck with this formula ... and ... there is not a huge amount of wriggle room*”,²²⁷ [Solicitor 16] which limited possible awards. There were, indeed, general concerns at the limitations placed on pension calculations by the use of the cash equivalent transfer value: “*which, of course, is very low but very cheap*”, although, this was becoming less of a problem as: “*there are fewer and fewer final salary pensions*”. [Solicitor 19] A more accurate pension valuation was the continuing service value, which: “*actuaries would argue was much more realistic*”. [Solicitor 19]

²²⁶ See also Chapter 9.

²²⁷ This was a sentiment echoed by Judge 31; see Chapter 9 at “Pension amendments”.

There was further dissatisfaction with the use of the cash equivalent transfer value, especially when a pension is off-set as one party retains the pension intact while handing over a larger capital sum: *“when that is done there is not a huge amount of science about it. ... Interestingly in England if that happens it is routine to discount the value of the pension by 20, 25% to take account of the fact that ... there is some risk associated with it”*. [Solicitor 03] In Scotland no account is taken of the risk that the value of the pension may fluctuate: *“We are missing a trick here because ... people ... [use] cash equivalent transfer value in a slightly glib way ... [and] off-setting is not very scientific”*. [Solicitor 03]

There were concerns over the cost of achieving a pension share: *“it can sometimes cost a thousand, two thousand, to effect a pension share and really, if your pension is anything under ten thousand pounds, it’s actually not worthwhile doing it”*. [Solicitor 06] There were practitioners who considered pensions such a complex area that they would always seek the assistance of an actuary; but others sounded a note of caution as they saw not only the complexity of pension calculations, but also the level of delay and the expense in using actuaries: *“then you get people fighting over ... the actuarial valuation – and there are no more expensive people to engage in a combat than two actuaries”*. [Advocate 23]

Pension orders were seen to be fraught with potential difficulties. There are a wide variety of funds and some have literature that is difficult to understand. One interviewee described a pension that was: *“part of the pension protection fund and figuring out, well first of all, actually being able to understand their literature was like getting another degree”*. [Solicitor 17] This same fund was English, so other difficulties followed as the fund managers failed to understand Scots law on pension sharing arrangements, which highlighted a: *“lack ... of education for pension providers”*. [Solicitor 17] Finally, there followed the problem of confirmation from the fund that any order will be implemented: *“whether they’ll accept an internal or external pension credit ... when you get your decree in court. Then sending it back to the pension provider hoping that they still adhere to what they said in the first place”*. This was an issue raised by a sheriff who saw: *“far more difficulty with agents missing the time limits after orders have been granted, and we’ve had repeated application to relax the provisions for completion of pension orders within the timescale set out in the legislation”*. [Sheriff 27] While no criticism was levelled at agents involved, who had dealt with aspects of the divorce timeously, the problem had arisen with the completion of forms connected to

the pension scheme itself, while in other cases: “*we have had parties declining to co-operate, which has been surprising particularly where it was an agreed order. ... We’ve probably had more trouble with those applications after the decree than with the actual orders*”. [Sheriff 27]

On balance, pension sharing was seen as: “*a complex business, but ... a very good way ... of dealing with cases that have a reasonably high asset value but limited resource and for dealing with your fifty-something woman who’s going to have no income in retirement*”. [Sheriff 28]

SECTION 6: CONCLUSION

This chapter has sought to consider the main findings from the in-depth interviews. The principled nature of this legislation makes it most unusual and, therefore, no apology is offered for spending a fair section of this chapter examining the various aspects of the principles, how they are understood by practitioners, how they are used in practice and how practitioners would like to use them. However, beyond the principles the chapter has also considered other major aspects of the research, namely, the level and nature of flexibility and creativity found within the Act; the importance of the relevant date and the impact of the appropriate valuation date; and not least how the legislation works for clients. Finally, the three notes offer brief considerations on the place of the concept of clean break and how received wisdom develops amongst practitioners. In general the framework, although not perfect, is much admired: the case for change is examined in Chapter 9.

Chapter 8 Findings from the vignette

*a vignette, a short description of a family containing a controlled amount of information*²²⁸

In the final section of each interview, the interviewee was asked for his or her response to “the vignette”:²²⁹ a short scenario dealing with divorce and financial provision. The reasons for including a vignette as part of the overall research methodology are explained in chapter 5 but, put simply, the intention was to introduce a level of consistency to the interviews by asking each of the participants to focus on a common set of circumstances. The vignette is a well-established tool in social science research, where it can be used in sophisticated ways to introduce and test responses to a set of variables. Here a single vignette was used for a simpler purpose.

While dealing with problems is what lawyers do all the time, not surprisingly the vignette caused some mild anxiety for some: “*I don't know if that's the right answer. I don't know if that's the answer that anyone else has given you*”. [Solicitor 14] The purpose of the vignette was not to test individual legal knowledge against either a “model answer” or the answers given by other interviewees but rather to explore how each responded to the same set of circumstances. As this chapter shows there were strong common themes but there were also differences in approach and while these cannot lead to any conclusions they do help to illustrate the many ways in which disputes around financial provision on divorce might be tackled in practice.

HOW TO BEGIN?

The vignette begins by introducing the characters and setting the scene:

George (55) and Sophie (53) have been married for 28 years. They have two children: Alex (20) away at university and Emily (17) in her final year at school. After a few years of growing apart, George has recently informed Sophie that he has been having an affair for some time and that he wants a divorce.

²²⁸ TA Nosanchuk, “The Vignette as an Experimental Approach to the Study of Social Status: An Exploratory Study” (1972) 1 *Social Science Research* 107-120 at 108.

²²⁹ See Appendix 1.

The instruction given to each of the solicitors and advocates was that they should advise Sophie. For sheriffs and judges, two questions were asked. First, would they expect a case like this to come to court or to be negotiated to a conclusion. Secondly, if such a case did come before them, what arguments would they expect to be presented by Sophie's legal representatives.

Presenting a lawyer with a vignette and asking him or her to give advice is in many ways highly familiar while at the same time disturbingly artificial. Lawyers, particularly family lawyers, are faced with real problems raised by real people all the time and, so, while they should be well used to the idea, and very comfortable with their role as advisers and problem solvers, asking them to give advice to a fictional person who presents with a very incomplete set of "facts" brings particular difficulties. Their immediate reaction is likely to be to ask questions²³⁰ but, by the very nature of the vignette methodology, they are met by an interviewer who politely declines to give further information. Should they talk directly to "the client"? Some may do so instinctively but that perhaps tells us more about their personality and their general willingness to engage in role-playing activities than about their usual professional style. Should they explain the law and give detailed legal authority? Again, how they address the legal issues raised by the vignette is not reliable evidence of how they would present their legal advice or opinion in real life. What the range of initial reactions does offer, however, is some insight into various ways in which giving advice might be approached.

Asking questions

Lawyers are trained to ask questions and faced with the deliberately vague facts of the vignette they had many. An obvious place to begin was by asking questions. One solicitor summed it up in the comment that "*the little vignette you've given me here would probably result in spending another two hours with Sophie saying I need to know about x, I need to know about y, I need to know about a, b, c.*" [Solicitor 07] There were questions about what Sophie wanted and what the needs of the children might be but the questions most frequently asked, the "a, b, c", related to the business. "*I'd need to know a lot more about the structure*

²³⁰ A point made very clearly when one interviewee sent a list of questions by e-mail in advance.

of the business” [Solicitor 04]; is it “*a company, a partnership or a sole proprietorship?*” [Solicitor 22]

Giving advice

The instruction given to the solicitors and advocates was to “advise Sophie” and this in itself gave rise to questions. What sort of advice? “*Are you talking just general advice or advice about what, you know, what she should claim?*” [Solicitor 16] There was uncertainty too about the purpose of any such advice: should it be advice in “*terms of what to do or where would be the outcome, or what kind of outcome she might expect?*” [Solicitor 07]

Some interviewees began with legal advice but explicit mention of law at the outset was in fact relatively rare. For one solicitor, a starting point might be that “*I would probably run over, you know, what the law says*” [Solicitor 09]. Another would begin by “*giving her a set of fact sheets ... telling her what the formula in the Act says*”. [Solicitor 13] That same solicitor, however, would be making it clear to his client that “*this is not me speaking, Sophie, this is me telling you what the law says*”.

For some, the starting point was financial: “*we need to get things valued and I need to know what the values of these assets are*”. [Solicitor 20] In a similar vein, another solicitor would begin by sitting Sophie down “*and we would go through all the assets and work out what’s matrimonial property and what’s not*”. [Solicitor 21] Asking questions and giving advice would be about finance in various ways: “*aliment, house, valuation, and whether you’ve got enough money not to qualify for legal aid*”. [Solicitor 06]

For many, the advice would be personal, acknowledging the situation of the client. There was widespread recognition that “*we are dealing with people and regardless of what the law says we are going through a really tough time*”. [Solicitor 17] A common theme highlighted that Sophie would be feeling “*incredibly hurt*” and the appropriate advice might be in terms of “*saying to her do not make any irrevocable decisions*”. [Solicitor 09] At this early stage, the advice would often be not only personal but also highly practical. For one solicitor at least, “*it’s all practical advice at this stage*”. [Solicitor 06]

Identifying objectives

For many, giving appropriate advice depended on identifying the desired outcomes:

Well, what is it that you actually want, Sophie, do you want to live in this house, do you want to buy yourself a new house, do you want to work, what sort of security do you want for the future, what do you want to do with pensions, how do you want this to work out?’ [Solicitor 22]

The focus was often on Sophie and asking her to identify what she wanted to achieve but, sometimes, the interviewee expressed an opinion as to what he or she thought the objectives should be: *“I think the best thing for Sophie would be secure the house in some way”*. [Solicitor 15] Tailoring advice, and subsequently constructing argument, to suit the objectives was not simply a way of making the process client-centred but it might also be described, as one judge commented, as an example of *“thinking tactically, like a lawyer”*. [Judge 29] The relevant law might be clear and settled but the process of giving advice was not a case of “one size fits all.” Rather it was a process of asking *“[w]hat do you want? What are you looking for in the way of an outcome?”* [Solicitor 13] While focusing on Sophie and asking her to identify her objectives, this process was also about managing expectations because *“what the client wants and what the client might be entitled to in a case like this might be completely different”*. [Solicitor 13]

ADVICE TO SOPHIE

Sophie is devastated and extremely angry ... Sophie wants nothing more to do with George and accepts the marriage is at an end. She is raising a divorce action.

The vignette offered some insight into Sophie’s state of mind and her intentions and that is something which was picked up in much of the initial, general advice which was offered. Some common themes in particular emerged.

Do nothing

When asked to advise Sophie, for some the first step was to take action: *“we need to get much more information”* [Solicitor 04]; *“we need to get things valued”* [Solicitor 20]; we

need to “*go through all the assets*” [Advocate 21] and “*we need to ... get in touch with George’s solicitors*”. [Solicitor 06] For others, however, the most important piece of advice was to “*sit back and do nothing, Sophie*” [Solicitor 09]. What the parties at this stage “*should be doing is taking stock ... Don’t go rushing off to a court. And, yeah, sit back, have a think....*” [Solicitor 09]

For some, there were psychological reasons for pausing and taking stock and the dangers of rushing into action when hurt or angry were clearly highlighted. “*You know stand back and think about where you want to be in five and ten years’ time and don’t allow yourself to take decisions now as an emotional response that may have significant long term poor outcomes for you*”. [Solicitor 01] For Sophie, however, taking time and not rushing into making decisions was not only about her emotional and psychological wellbeing. There were also important practical reasons for delay and, in particular, it was pointed out that there were good reasons why Sophie should not rush to raise an action for divorce. The obligation of aliment, by which George would be required to maintain Sophie as his spouse, would end on divorce but, in the meantime, it could provide much needed security. As one solicitor put it, “*let’s get maintenance sorted out so we know what’s happening there*”. [Solicitor 20] The advice from several solicitors was that Sophie should not be rushing to raise an action for divorce but rather pausing, and taking her time:

You can divorce him now if you like, but if you raise the divorce action, Sophie, you take the chance that your husband will look at finalising all financial aspects, and just at the moment, Sophie, I think you need to sit back and consider where we’re going with this. [Solicitor 06]

Negotiate or litigate?

*... She has refused to negotiate with George or his lawyers to reach a settlement ...
He is willing to negotiate with Sophie’s lawyers*

Linked to the advice about taking time and not rushing into court, was a very strong preference for negotiation as the best way forward. There were many different ways of approaching the vignette but negotiation rather than litigation was a common theme which emerged in almost all interviews and, for many, it was the place to begin. The first piece of

advice would be *“not to go to court but ... to try and negotiate”* [Solicitor 04]: a piece of advice sometimes expressed bluntly as in the words of one advocate who exclaimed *“Well, she’s a fool to raise a divorce action without trying to negotiate a settlement!”* [Advocate 23]

Different reasons were given for preferring negotiation to litigation. Sophie’s refusal to negotiate did not make financial sense: *“stances of principle are not good economic decisions, so her refusal to negotiate ... is not a good financial reason”*. [Advocate 26] Negotiation would be better not only in terms of the financial settlement itself but also in terms of the associated costs. A point made in several interviews was that, *“court is an expensive way to negotiate”* [Solicitor 16]; *“If we’re funding a court action, Sophie, you could set aside twenty thousand pounds right now before we even start”*. [Solicitor 06] This was a point reinforced from the other side of the bench: *“I always think it’s terribly sad when people do resort to litigation because I take the view that what you’re going to do is expend significant assets”*. [Sheriff 27] Refusal to negotiate might attract criticism and possibly *“an adverse award of expenses”* [Advocate 24] and the point was made that the *“legal process”* is not only *“financially”* but also *“emotionally expensive.”* [Advocate 26]

Negotiation was better because it could allow for a pragmatic solution; a means of *“getting it sorted”*. [Solicitor 01] Sophie and George’s situation was one where *“all the jigsaw pieces are identifiable”* [Judge 31] and therefore one which was well suited to negotiation. Negotiation would give the parties greater control over their options, in contrast to litigation where *“there’s no necessary outcome. I can’t give you an outcome”*. [Solicitor 06] The facts of the vignette were seen as disclosing a situation *“ripe for a sensible pragmatic mediated outcome”* and both parties were cautioned against rushing into litigation on the basis that it was not a case *“where the law is going to help either of them necessarily because both of them are likely to feel that it was a blunt instrument”*. [Solicitor 01] The message was clear that, by refusing to negotiate, Sophie was *“restricting their ability to find a settlement, which suits their circumstances ... boxing herself in to a corner”*. [Advocate 26]

Exactly how to conduct the negotiation, was a question considered by some. Sophie might not want to deal directly with George but it was for the solicitor to encourage and reassure: *“no let’s negotiate I know that you don’t like him, you don’t have to speak to him I’ll speak to him”*. [Solicitor 15] Part of an initial meeting with Sophie would be spent on considering the various options for dispute resolution, *“whether that’s by a collaborative process”* or if

dispute was restricted “*to a single issue then you might consider arbitration*”. [Solicitor 08] It was seen as a situation where “*it might resolve with specialist family lawyers in a collaborative setting or in, or by series of joint consultations*”. [Sheriff 28]

Although all of the interviewees stressed the importance of seeking a negotiated settlement, it was nonetheless acknowledged that the situation was not necessarily going to be easy to resolve. For various reasons, it was “*a case that might very well proceed to proof*”. [Sheriff 28] To some extent, whether it was negotiated or litigated would depend “*upon the personalities of the parties and the personalities of the lawyers*”. [Judge 29] Even if George and Sophie did try to negotiate a settlement, there was a view that it was likely to be “*a difficult negotiation I can’t see either collaborative or mediation working for the parties*”. [Solicitor 12] Despite the potential difficulties, there was, however, a clear consensus that negotiation should be attempted and whether Sophie liked it or not: “*big deep breath ... we’re looking at a negotiation*”. [Solicitor 06]

The role of conduct

With the news of his affair ... Sophie is devastated and extremely angry, despite having had a brief affair herself several years earlier ... George feels very guilty about the impending divorce and his own behaviour.

While the 1985 Act sets out many factors which the court should take into account in making orders for financial provision, one factor which should not be taken into account is the conduct of the parties. This is subject to an exception where the conduct has adversely affected the relevant financial resources or where, in relation to the principles in section 9(1)(d) or (e), “it would be manifestly inequitable to leave the conduct out of account”.²³¹ Against this clear statutory steer away from considering conduct, it was interesting to see how interviewees would respond to the facts of Sophie’s situation.

Some interviewees adhered firmly to the statutory approach, and stated that “[a]s far as the behaviour of both is concerned that’s completely irrelevant in my view”. [Advocate 24] Another was quick to distance him or herself from considering conduct, in the following

²³¹ 1985 Act, s11(7).

terms: *“I never place an emphasis on why the marriage has gone wrong. And I would be explaining that to her, that is unlikely to be brought up and I won’t be the one to bring it up”*. [Solicitor 15] Sophie should have *“no conception that the Scottish courts punish matrimonial crime”* [Solicitor 08] and she should have no expectation that the conduct of the parties during the marriage would influence the terms of any settlement. It was acknowledged, however, that in terms of opening negotiations *“there is a window where there is one adulterous partner”* and *“if you get in early enough”* you will *“get a better deal”*. [Solicitor 18] For some at least, George’s guilt offered a significant opportunity; *“let’s capitalise on that while we can”*. [Solicitor 03] In order to benefit from George’s guilt, however, time was of the essence so *“let’s get in touch with him ASAP”*. [Solicitor 06] Guilt has *“a shelf life”* and George will only wear *“a hair shirt”* [Solicitor 08] for a limited period of time. When his guilt ceases to be *“a feature ... George’s annoyance will be a feature”* [Solicitor 08] and that would be much less conducive to a favourable settlement for Sophie.

Taking advantage of George’s guilt quickly might help Sophie in the process of negotiation, but focusing too much on it might backfire. Sophie should be encouraged, perhaps through *“some counselling”* [Solicitor 12] to reach *“a positive idea of what her future is ... rather than just a sense that she doesn’t want George to kind of get anything out of this because he’s behaved badly”*. [Solicitor 04] Sophie of course would also be well advised to remember her own behaviour because, while his affair was the immediate focus of attention, the facts also disclosed *“a wee squib later on because she had an affair herself a wee while back”*. [Solicitor 05]

THE LEGAL ISSUES

While the vignette was not intended to be a test of legal knowledge and there is no right or wrong answer, it was designed with certain factual scenarios and statutory provisions in mind. In considering the various responses of the interviewees, therefore, it might be helpful to highlight, as follows, the facts and the statutory provisions, which the researchers had anticipated might be discussed.

The matrimonial home

(i) The facts

... after they were married, they moved into a large house in the Scottish Borders, which George had inherited from his grandmother. There was plenty of space for them to live and also set up a small software development business. A few years later, Sophie inherited £250k from her parents, £150k of which she used to carry out a major renovation of the house, creating separate business and living spaces.

(ii) Legal issues

The facts of the vignette concerning the matrimonial home might give rise to a number of legal issues in terms of the 1985 Act. The definition of matrimonial property for the purposes of the fair sharing principle in section 9(1)(a) focuses on property which is acquired during the marriage, although this strictly bounded period is extended prior to the date of marriage in order to include property acquired for use as a family home.²³² Although the house is factually the matrimonial home, does it fall within this statutory definition of matrimonial property? Might there be an argument that, although the initial inheritance of the house would be beyond the definition of “matrimonial property” might there be an argument to the effect that the property had changed in nature and hence been brought within its scope?

The position is complicated by the fact that Sophie has invested significant personal money in the house both for her family’s comfort and for the good of the business. If the house was regarded as matrimonial property in terms of section 10(4), it would be subject to fair sharing under section 9(1)(a), but the source of the funds invested in it by Sophie could give rise to an argument that fair sharing would not be equal sharing.²³³ The fact that the money was inherited by Sophie might be regarded as a “special circumstance” in terms of section 10(6) leading to the argument that this source of funds should be taken into account, with a consequent departure from equal shares.

If the house did not fall within the definition of matrimonial property, an alternative argument might be made for some sort of balancing payment. Section 9(1)(b) provides that, in making any order, the court should take fair account of any economic advantage derived by either party from the contributions of the other or of any economic disadvantage suffered by either party in the interests of the other or of the family. In applying section 9(1)(b), the court is directed to take into account the extent to which any advantage or disadvantage of one party

²³² 1985 Act, s10(4).

²³³ 1985 Act, s10(1).

has been balanced by the advantage or disadvantage of the other²³⁴ or is corrected by sharing of matrimonial property.²³⁵ Might Sophie's financial investment in the house merit an order under section 9(1)(b)?

(iii) The responses

The legal position in respect of the house was generally regarded as clear. As explained by one solicitor, "*the starting point is that the house is not matrimonial property*". [Solicitor 01] While in terms of the statutory definition in section 10(4), it was clear that the house did not fall within the definition of matrimonial property, there was evident discomfort with that conclusion: "*the house isn't matrimonial property is it? It's grossly unfair*". [Solicitor 19]

For most of the interviewees, it was simply a case of accepting that the house would not qualify as matrimonial property for the purposes of section 9(1)(a) but a few did mention potential arguments in favour of it being included. There were references to the possibility of inherited property becoming matrimonial property where it had changed in some way during the course of the marriage although in this particular scenario it was concluded that in the absence of "*there being a change in the title when the renovations were done ... It's not matrimonial property*". [Solicitor 01] Another hinted, very tentatively, at the possibility of some flexibility in interpretation with a reference to the fact that "*some courts are being a little bit more, quite recently there have been a couple of cases about matrimonial homes and how that is kind of the exception*". [Solicitor 12]

For most, however, it was a case of accepting that the house would not constitute matrimonial property, acknowledging that it would be "*problematic*" [Solicitor 12] for Sophie and then moving on to look for alternative pragmatic solutions.²³⁶ Some were fairly pessimistic about her chances, not only in terms of the house itself but also the money which she had invested in it:

She's looking to recover money that was not matrimonial property or would not have been matrimonial property that she has put in to a property that she doesn't own in terms of onus if you like she's on the back foot on that. It's gone. [Solicitor 01]

²³⁴ Ibid, s11(2)(a).

²³⁵ Ibid, s11(2)(b).

²³⁶ For further discussion of arguments based on s9(1)(b), see below at "Economic disadvantage".

For another, however, there was:

“clearly a major economic advantage argument for her based on the fact that she took her inheritance and ploughed this into the property... we could make a strong argument for the sharing of this property or for her to get a chunk of money out of this property, notwithstanding that it's not matrimonial”. [Solicitor 03]

A further approach was to think about the house in the context of the broader picture where George might be required to make payments to Sophie but might also want to keep his pension and possibly the business intact. One approach might be to think about offsetting; to look at the assets as a whole and to *“see what we could use in terms of offset so that she could have the house”*. [Solicitor 15]

Of all of the legal issues raised by the vignette, the house was perhaps the one which caused most discomfort. The law seemed clear but the consequences of applying it did not sit well with what many thought should be the outcome. Sophie's situation was *“not an uncommon situation, and that's a real problem”*. [Judge 29] For most of the interviewees, there was acceptance that it was a problem followed by some attempt to find a way to deal with it, most likely *“in negotiations”*. [Judge 29] There was some optimism that although *“It's a problem ... it was always a problem a decent judge or a negotiator can resolve – but that's one where I think you need to give Sophie something”*. [Judge 29] In the end, there was some sense that even if the house was not strictly speaking matrimonial property, in terms of section 10(4), *“the house should be really regarded as a joint asset”*. [Solicitor 11]

The business

(i) The facts

The couple met at college when they were both studying electrical engineering and, after they were married, ... set up a small software development business. A few years later, Sophie inherited £250k from her parents, £150k of which she used to carry out a major renovation of the house, creating separate business and living spaces. ...

In the early years they both contributed to the business. Working long hours, they quickly established the software company's reputation. By the time Alex was born, business was going well enough for them to agree they should employ a full-time software developer, who took over much of Sophie's role while she devoted herself full-time to the family. This she has continued to do, while George has worked full-time in the business.

Ten years ago, when the business was doing very well and they had just been awarded a Best Small Business award by Scottish Enterprise, they had the business valued at £2.5 million, its main value now derived from George's intellectual property. In the last few years George has paid himself an annual income from the business of £80k. Unfortunately, the recession had a bad impact on the business and George has confessed that he has been borrowing heavily for years to keep the business afloat. There are now indications that the market is beginning to pick up. Sophie was shocked by this disclosure since they live quite modestly in order to plough as much as possible into the business.

... [George] has explained to Sophie that the value of the business cannot be realised without destroying it altogether ...

(ii) Legal issues

From the facts of the vignette, it seemed likely that the business would form part of the matrimonial property of the couple, having been developed during the marriage and thus falling within the definition in section 10(4). The starting point therefore would be that it was subject to fair sharing in terms of the first principle in section 9(1)(a). There were many uncertainties as to the nature of the business including, in particular, the question of whether it was owned personally by the parties or if it was in the form of a company. To fall within the scope of section 10(4), the property must "belong to the parties or either of them".

In order to apply the fair sharing principle, the net value of the matrimonial property must be calculated at "the relevant date"²³⁷ or, in the event of a property transfer order being sought, the "appropriate valuation date".²³⁸ The value of the matrimonial property would be the "net value" thus requiring the deduction of any debts according to section 10(2). In view of the

²³⁷ 1985 Act, s10(3).

²³⁸ *Ibid*, s10(3A).

apparent changing fortunes of the business, the timing of valuation and the deduction of debts were likely to be particularly important.

The facts of the vignette focused on George's opinion that the business could not be realised in order to pay Sophie without destroying it completely. This raised issues about whether any order for sharing of property, which might be justified by section 9(1)(a), would also be reasonable, in terms of section 8(2), with regards to the resources of the parties.

(iii) The responses

The business was the aspect of the vignette which was most fully developed, and for many it was central to the problem: *"I think it comes down to the business"*. [Sheriff 28] Although there was more detail given about the business than about other issues in the vignette, there were still many unknowns and much of the discussion focused on highlighting these unknowns.

The fact that *"we don't know whether the business is a sole trader, a partnership or a limited company"* [Sheriff 28] was a frequent concern. The first thing to tackle for many in respect of the business would be to look *"at how the business was set up"* [Solicitor 11], with a view to finding out *"what kind of structure it has. Is it a partnership, is it a limited company, who's got shares ... who are partners?"* [Solicitor 04] Questions about the business concerned not only its structure but also its running. To what extent had Sophie been involved in its affairs: *"What does she know? What does she not know? What does she not trust?"* [Solicitor 05] If the business were a partnership, it might be that *"she is still a partner"* [Solicitor 12] or if it is a company, they might both be shareholders and be facing the prospect of having to *"enter into some kind of share-holders' agreement to try to agree how the company should be run"*. [Advocate 24] If it was a company, it was important to recognise that the scope of the 1985 Act for making orders against it *"is ... very limited"*. [Advocate 26] In various ways, the business might give rise to issues, such as *"tax implications"* [Advocate 24] beyond the narrow question of financial provision on divorce.

While there were many questions about the structure and the running of the business, the most important questions related to its value. There were obvious challenges in respect of the business, and indeed of the property more generally, but for many interviewees, in tackling these challenges and finding *"a way through"* them, *"so much would depend on what the*

business is actually now worth". [Solicitor 04] Valuation of the business was key and it was important to have it valued reliably and well. "[I]f we can get a joint valuation, so much the better" [Solicitor 05]; a view reinforced by a sheriff who commented that there would be different ways of valuing the business; "*is the business valued on an asset basis, is it valued on an earnings basis*"? [Sheriff 28] No matter how the business was to be valued, it was essential that it should be done by a qualified person: "*proper, proper input from a business valuer*". [Solicitor 14]

A valuation of the business at the relevant date would be essential to any assessment of how to proceed. If the business were "*still a reasonably prosperous business though less than it was*" [Solicitor 04] then it might be in Sophie's best interests to let it continue because it could represent "*a value of future earnings 'cause things are picking up now*". [Solicitor 05] A business which is still working is "*a functioning business*" [Solicitor 04] but if on the other hand, the business was "*actually on the rocks*" [Solicitor 04], "*a liability and not an asset*" [Solicitor 06], well "*that's a very different situation.*" [Solicitor 04]

There was little doubt that the business would form part of the matrimonial property, and as such Sophie would be "*as much entitled to the value of this business as George is*". [Solicitor 11] The starting point was often quite simple, along the lines that the business was "*matrimonial property so she's entitled to 50% of that*". [Solicitor 21] What was less simple was how best to ensure that Sophie obtained her share; there it was "*a question of how you extract [her share] from the business*". [Solicitor 11] The same phrase was used in several of the interviews and the point was made by many that "*you can't kill the goose that lays the golden egg*" [Advocate 25] and repeatedly the advice was given that "*Sophie you don't want to kill the golden goose*" [Solicitor 05], because if that "golden goose" is allowed to continue, it might provide you with "*a lifestyle for quite a few years going forward*". [Solicitor 12]

Economic disadvantage

One of the aspects of the 1985 Act most often discussed, and sometimes criticised, is the principle in section 9(1)(b) and the extent to which it is, or more significantly is not, used. Section 9(1)(b), it is sometimes said, in practice has not quite matched its potential. While no real conclusions can be drawn from the vignette, it was nonetheless interesting to observe how individuals would respond to the facts and to what extent they would use section 9(1)(b).

(i) The facts

The facts of the vignette set the scene for two potential claims of economic disadvantage: the first based on the situation of Sophie having given up her paid employment in order to care for the house and the children and the second that Sophie had invested a substantial part of her inheritance in the house which George owned in order to create space for their business and improve their living accommodation.

The homemaker scenario

The couple met at college when they were both studying electrical engineering ... They both contributed to the business in the early days, worked long hours and quickly established the software company's reputation. By the time Alex was born, business was going well and they agreed that they should employ a full time software developer who would take over much of Sophie's role while she devoted herself full-time to the family, which she continued to do until the present day. George continued to work full time in the business.

The financial investment

[After they married, they] set up a small software development business. A few years later, when Sophie inherited £250k from her parents, she used £150k of it to carry out a major renovation on the house to create separate business and living space. She put the rest of her inheritance into an individual savings account and, except from dipping into it over the years for family holidays and personal spending, it has remained untouched.

(ii) Legal issues

Section 9(1)(b) provides for account to be taken of any economic advantage derived by one party from the contributions of the other and of any economic disadvantage suffered by either party in the interests of the other. Both of the factual scenarios included in the vignette in principle could be examples of disadvantage suffered by Sophie in the interests of George and their family and both are explicitly mentioned in the legislation. Sophie's financial investment in George's property and her indirect contribution in terms of childcare and caring for the family home are envisaged by section 9(2) and they might have resulted in advantage to George in terms of gains in capital or income²³⁹ and relative disadvantage to herself.

²³⁹ 1985 Act, s9(2).

In considering whether or not to make an order in terms of section 9(1)(b) the court is directed to consider the extent to which any disadvantage or advantage of one party has been balanced by advantage or disadvantage to the other and the extent to which any imbalance has been or will be addressed by the sharing of matrimonial property.²⁴⁰

(iii) The responses

The issue of disadvantage was raised most frequently in conjunction with discussion of the matrimonial home, as shown in this comment:

Well on the face of it, it looks as though the house is not matrimonial property, but she has sunk into that property a lot of non-matrimonial property, inherited money. So there is already a major 9(1)(b) argument in there. [Solicitor 07]

Section 9(1)(b) was typically seen as a way of addressing the unfairness of the home not being categorised as matrimonial property and, in the view of at least one advocate, it was thought to be “*a good 9(1)(b) claim to illustrate how the principles should operate*”. [Advocate 22] It might be a good example and a strong claim but it would require the “*right evidence*” [Sheriff 28] and that, according to one sheriff, was not always something which solicitors provided. “*Many solicitors ... will just give you two valuations of the house, which makes it very difficult because you can’t make factual findings about why the house increased in value. Is it just the market or is it what she did?*” [Sheriff 28] What was required to make the claim “*quantifiable and straightforward*” was to have a surveyor looking at the house and “*asking what the increase in value is as a result of the work that she invested*” and saying “*this is what the house is worth at the date it was acquired ... [t]his is what was invested and [t]his is what the current value of the house is, and the proportion of that attributable to the improvements is x*”. [Sheriff 28]

While there was a consistent view, among those who discussed section 9(1)(b), that Sophie had “*a major economic advantage argument ... based on the fact that she took her inheritance and ploughed*” [Solicitor 03] it into the business, any argument based on her decision to give up work and concentrate on the children and the home was less clear cut or at least more difficult to establish. On the face of it, the imbalance was well set up in “*that*

²⁴⁰ 1985 Act, s11(2).

they both start off, they've both got equivalent degrees, the equivalent qualifications, she's given up, he's carried on, and so she's suffered an economic disadvantage". [Solicitor 18] There was also useful evidence in terms of the career pattern of the full time software developer, who could be "*quite good a comparator*" [Solicitor 12] for Sophie and indeed the fact that George had "*been paying himself £80,000, which is helpful to know because if she'd carried on that's what she would be paying herself too*". [Advocate 26] Even with these helpful aspects of the case, the point was made that there would be "*many sheriffs or judges*" whose response to her claims of disadvantage would be that "*well you had the benefit of not having to work in this stressful job when you were both having to work long hours etc etc business was booming for a while you were taking money out of it, you benefited from that*". [Solicitor 01]

Ultimately the success or otherwise of her claim for a balancing payment under section 9(1)(b) was thought to "*very much depend on how the value of all the rest of the matrimonial pot stacks up*" [Solicitor 14] and the point was stressed that "*presenting an argument to the court about 9(1)(b) is not always an easy case to make*". [Solicitor 16]

Pensions

(i) The facts

She knows that George has a private pension, begun when the business was doing well, into which he has been paying over the years.... The financial adviser at the time had suggested that she should think about her own fund, but it had never seemed necessary.

(ii) Legal issues

It is clearly stated in section 10(5) of the 1985 Act that any rights of either party to pension benefits are included within the fund of matrimonial property to the extent that they are referable to the period beginning with the date of the marriage and ending with the relevant date or the appropriate valuation date. As discussed in chapter 4, the majority of amendments to the Act have related to pensions and in particular the introduction of a range of orders specifically designed to share pensions in various ways.

(iii) The responses

Beyond the bare facts that George had a private pension and Sophie did not, the vignette offered little detail and this may help to explain why there was relatively little comment about it. Several interviewees made no reference to the pension and, for others, it was simply a matter of acknowledging that George had a pension and that it would be part of the matrimonial property. Where it was considered in more detail, it was seen as significant in various ways.

“His pension is definitely in” [Advocate 22] was a response which reflects the legal clarity of the 1985 Act to the extent that pensions, so far as they relate to the period of the marriage, are quite clearly included as matrimonial property. The pension was reasonably accessible and seen as being more straightforward than some of the other assets in the vignette. Whereas it was highly unlikely that the house would be matrimonial property and there were many difficult questions surrounding the business and how to access its value, the attraction of the pension was clear. For that reason,

we will take the pension share thank you very much because there’s something there and there may not be otherwise ... So yes we will take anything that we can readily take so the pension share yes we’ll have that thank you. [Solicitor 01]

An immediate advantage of the pension was that it was accessible, in that it could easily be added into the pot of matrimonial property, but in other ways its distance, and lack of immediate accessibility, was a disadvantage. Sophie would need to bear in mind that she is *“53 and that pension won’t come into effect until [she is] at least 55... A pension is future, it’s not income for you now.”* [Solicitor 06] There was also some reference to the practicalities of pension sharing and the fact that *“pension companies have got 3 months to provide you with the information”*. [Solicitor 20] In order to get to the pension fund, there were administrative processes to be got through.

There were too few comments on the pension to be able to make any meaningful comparisons about how to effect the sharing of it but it might be noted that several solicitors highlighted that, rather than seeing the pension *“in isolation”* [Solicitor 20], it might be better to think of it in terms of offsetting. Accepting that Sophie was entitled to a share of George’s pension, she might be advised to think about trading her share of the pension, perhaps together with the money that she invested in the house, for security in the form of the

matrimonial “*house being transferred to [her] name*”. [Solicitor 06] Similarly, for another solicitor, the way to think about the pension would be in terms of “*him keeping the business and his pension, and she keeping the house*”. [Solicitor 05] Sharing the value of the pension by means of a specific pension sharing order as opposed to off-setting, was rarely mentioned but it was highlighted by one advocate as perhaps “*a good idea for her*” as it “*might give her some capital*”. [Advocate 24] Or, as suggested by another advocate, “*we’d want to get Sophie off to an IFA to see what’s the most beneficial way of releasing the value of his pension*”. [Advocate 26]

The ISA

(i) The facts

Sophie inherited £250k from her parents ... She put the rest of her inheritance [£100k] into an individual savings account and, except from dipping into it over the years for family holidays and personal spending, it has remained untouched.

(ii) Legal issues

The issue that was likely to arise in respect of the ISA was whether or not it was part of the matrimonial property. While the initial inheritance would fall within the exception to section 10(4), would the act of investing the inheritance in the ISA be sufficient change to make the remaining sum matrimonial property? If the ISA was treated as matrimonial property, then what would fair sharing of it be? In addressing that question, the source of the property in terms of section 10(6) might be sufficient to argue in favour of a departure from the presumption in section 10(1) to the effect that fair sharing will be equal sharing.

(iii) The responses

Little was said about the ISA in the facts of the vignette and, therefore, unsurprisingly it attracted relatively little attention. There might be an argument that, although the original inheritance would have been excluded, the ISA had been acquired during the marriage and therefore would constitute matrimonial property: “*It’s a different product and you can say because it’s been put into a different product, because it’s come into a bank account, it’s matrimonial property*”. [Advocate 24] The general consensus, however, was that the original inheritance had “*remained untouched*” [Solicitor 06] and no one could “*see a court being difficult about that*”. [Solicitor 12] The original inheritance and the money in ISA were not substantially different because in the end “*it is really money*” [Solicitor 12]; “*it’s cash and*

it's cash". [Advocate 24] While the ISA would remain Sophie's money, that conclusion brought with it both "[g]ood news and bad news", with the bad news being that in terms of legal aid, she might be beyond the threshold and "*looking at using that inheritance to fund a court action*". [Solicitor 06]

The children

Although the vignette disclosed the fact that Sophie and George had *two children: Alex (20) away at university and Emily (17) in her final year at school*, they did not feature to any great extent in the scenario or in the responses to it. As the children were both over 16, there was no possibility of a section 9(1)(c) argument. Sophie and George might include provision for support for the children within their broader negotiations and of course, "*both children can negotiate with their father in their own right*". [Solicitor 06] There were different views as to how long the children might remain in need of support and while it might be anticipated that Sophie would "*be free of kids quite soon*" [Solicitor 05], there was recognition too that although "*they are grown up ... they will still be reliant on mum and dad for quite some time no doubt*". [Solicitor 17] Particularly if the children continued into higher education, Sophie may "*well have another eight years of supporting the two of them*" [Solicitor 01]; or even more if one of them is "*going to be doing something like architecture which is going to take another forty years or something*". [Solicitor 04]

The children were of principal interest because of the ways in which their needs might influence and shape Sophie's objectives. In talking the situation through, there would need to be consideration of how the "*young people [were] going to make their way, their next stage*". [Solicitor 04] The children were most often mentioned in connection with the matrimonial home and the assumption that Sophie's "*priorities were likely to be housing the two university aged children*". [Solicitor 15] A different view was that, with the children "*moving on*", Sophie might want to think about downsizing, releasing capital and buying herself a "*little place with two or three bedrooms that's not a large house*". [Solicitor 06]

SOME FINAL THOUGHTS

While much of the discussion focused on looking to the past and dealing with what had already been acquired and decisions that had already been made, there was also focus on the

future.²⁴¹ There was recognition that Sophie's future now might not be the future she thought she would have, where they would "*retire and wander off into the sunset hand in hand*" and "*that's quite sad for Sophie*". [Solicitor 06] There was also acknowledgement of the limitations in a case like this of "*a clean break*" which might be "*a bit of a pest because you would want to retain options*". [Solicitor 21] The future for Sophie might not be the one she had planned but she needed to look ahead and think about where she could see herself "[i]n *three or five years' time*". [Solicitor 22] For the immediate future, "*she might want some PA over the next couple of years*" [Solicitor 05] but she could also be encouraged to "*consider her skills and to consider moving forward with something to do*". [Solicitor 15] There was however a realistic assessment of the time she had been out of the workforce and at least one solicitor acknowledged that, depending on the overall matrimonial fund and resources, there might be "*the severe financial hardship argument as well*". [Solicitor 12]

There were options and "[c]lients at this stage need a huge amount of reassurance". [Solicitor 06] Providing that reassurance about the future was a key part of what the family solicitor could do: sending the client "*out the door saying, you know, 'this is the start of a whole new life, okay? Go for it, go with it!'*" [Solicitor 06]

CONCLUSIONS

What to social scientists might be a "vignette", to CPD facilitators is a "case study" but to law students is simply "a problem question" and for some at least of our interviewees that student memory was still fresh: *Nearly an exam question, jeez!* [Advocate] The purpose of the vignette, however, was not to test knowledge or problem-solving skills but rather to explore different approaches to the same situation. If, however, we had been marking the responses as the answers to an exam question, the final comment in red would often have been "Not enough law in this!" and that, in itself, is perhaps worthy of note.

Particularly in the responses of the solicitors, it was clear that law and legal advice was only ever one part of the package. Many of the problems presented by Sophie, and by real clients, were "practical problems" [Solicitor 06] and there were "enormous psychological elements". [Solicitor 04] Although, in responding to the vignette, many of the interviewees made

²⁴¹ Looking to the future and to Sophie's objectives was often in fact the place to begin, as discussed above at "Identifying objectives".

relatively little explicit reference to the 1985 Act, it was clear from the consistency of their responses that their advice was nonetheless embedded in its provisions: there was certainty and security in what the law was. The law was well known and generally settled and, as such, it demanded relatively little attention. It was there to facilitate outcomes and, within an established understanding of the law, there was space to find pragmatic solutions.

Chapter 9 The case for change - is there one? The voices of practitioners

INTRODUCTION

English law is broken and needs mending: but ours doesn't. Ours doesn't. Ours can always be improved, of course it can always be improved; but generally speaking, it's a gem. [Solicitor 05]

Overall, the answer to the question of the title would be – no, with a very few notable exceptions examined below. However, just because the exceptions exist should not detract from a proper recognition of how successful the financial provisions in this Act have been and still are; nor should we lose sight of the fact that because the exceptions are so very few they should be ignored.

THERE IS NOTHING WRONG WITH THE ACT

I think it works pretty well. I would be disappointed if there were radical reforms to the '85 Act. It's nice sometimes to wax lyrical about something I love. [Solicitor 07]

Overall interviewees expressed:

- their admiration for the Act: *“I actually think it's a very good piece of legislation”* [Advocate 22]
- and their pride: *“I do think that we are very fortunate in Scotland”* [Solicitor 12]

for the fact that it was:

- still operating so well after 30 years: *“I think it's been a really forward thinking and flexible piece of legislation”*, [Solicitor 04] *“a very modern way of dealing with things”* [Solicitor 20]
- *“well drafted”* [Sheriff 28] making it: *“quite clear, quite easy to understand, ... easy to use ... and easy to follow”*. [Solicitor 06]

Many interviewees felt an affinity with the Act, almost a loyalty.

Across the range of interviewed practitioners there was no overwhelming desire for major change, neither from agents: *“I don't see anything in the Act, which would require that”* [Solicitor 06] nor from judges: *“I cannot see ... any structural defects in the Act that*

radically require revision” [Judge 30] but rather a feeling that it still had much to give: “*the 1985 Act has taken a long time to [bed in] ... but I think it's almost coming into its own at the moment*”. [Solicitor 11]

Common purpose

One of the original aims of the Act was to ensure that legal practitioners across Scotland would be provided with legislation that they could apply in a standard fashion, whatever the location of their practice and whatever their level of specialisation.²⁴² This commonality of purpose was still important today:

The word ‘collegiate’ is too strong, but there is much more of a community of practice ... than in maybe other areas [of the law]. ... It works because we all operate it in the same way. ... We’re ... not all identical and there are some, who are more collaborative than others but, generally speaking, we all make it work in the same way and we all respect it. And the FLA²⁴³ has got a lot to be proud of by encouraging good behaviour. And so it’s a good thing, being worked well. [Solicitor 05]

There was a sharing of information facilitated by the FLA: “*a site where, if you have a particular technical problem, you post up on the Family Law Website and then within an hour lawyers up and down Scotland have come in with their experience of it and their answers*”. [Solicitor 05]

So, over the years practitioners have become used to operating within the principles whether by negotiation or litigation: “*everybody knows where they stand but that is probably the beauty of the Act*” [Advocate 21] and finding: “*more creative ways of using it ... for example, the section 14 ... Ancillary Order, and how, hopefully we might be able to develop that. There's not an awful lot that I would want to change in the 1985 Act, to be honest*”. [Solicitor 14]

Why change when we’re not using what we have?

²⁴² See Chapter 3 The Legal and Policy Context for a more detailed description of the development of the 1985 Act.

²⁴³ Family Law Association.

No, it's not the statute that's wrong – it's the use of it. ... It's about people actually thinking about the principles and pleading them and using them, and sheriffs and judges going through them and applying them. [Sheriff 28]

Rather than search for possible changes to the Act, some interviewees felt it was important to record the need to make full use of what is already there: *“I think it's more that we need to take responsibility as agents that we've not used it enough”*. [Solicitor 01] If fully used, the Act was seen to provide: *“a mechanism to reach an equitable remedy in all cases. I don't think it's always used to reach an equitable remedy but I think it's there to be used”*. [Solicitor 07] There was also the need to question accepted interpretations of aspects of the Act:

... occasionally, I've looked at these criticisms of Lord Hope and I've thought – ... 'Is the problem really the 1985 Act or is it, in fact, the interpretation of it and the acceptance, almost blind acceptance at times, of what it means on the part of family lawyers that causes the issue?' [Solicitor 03]

Although the climate had changed: *“bench and bar must take equal responsibility ... it was quite difficult to interest sheriffs in the Act”*. [Solicitor 04] Not only had some sheriffs shown a lack of interest but they had also been: *“really hostile ... [when] dealing with family cases that it's just not really been a pleasure to use the Act. [With] some notable exceptions...that's the climate that it's been used against, in terms of the litigation”*. [Solicitor 04] Hoping for yet more specialisation amongst sheriffs, this interviewee could see the Act coming into its own:

... to have the Act dealt with by an informed and interested bench and ... an informed and interested bar would ... make it a really, really good Act. And if that's what happens, if there's more specialisation, that would be good. If it means that people are going to split their time between crime and mainly contact disputes and then occasionally doing financial provision, I think that's a recipe for complete disaster. [Solicitor 04]

Others questioned what causes problems: “*whether the legislation is the problem, or whether the whole interpretation of it is the problem, or whether the problem is actually the way in which family lawyers are approaching the issue, whether it's a ... combination of all three*”. [Solicitor 03]

THE PRINCIPLES

Retain all principles

In general, with a few exceptions considered below, there was a strong feeling that each of the five principles should be retained. It was felt that as a framework the principles gave enough: “*in terms of certainty and guidelines ... to do what needs to be done*”. [Advocate 22] More important than removing or introducing any principle would be to recognise that: “*proper application of the principles we've got is broad enough*”. [Solicitor 05]

Principles cover all eventualities

The principles, as a framework, occupy a middle path, which is difficult to establish because: “*if you make it too specific then you cannot expand it – if you make it too woolly then it's useless*”. [Solicitor 09] Therefore: “*when they are all taken together ... we've got a width of principles ... which cover all bases*” [Advocate 25] and to change this framework would be to undermine the whole approach of the Act.

Section 9(1)(a) to cover “wealth created during the marriage”

This principle was both accepted and admired by practitioners as the bedrock on which the financial provisions were founded. There were no suggestions that any change be made to the notion of fair sharing; however, there was a suggested: “*tweak to 9(1)(a), so that instead of the net value of the matrimonial property being shared fairly [it] would have to be wealth created during the marriage to be shared fairly*”. [Solicitor 19] An example was offered of where this change could have a positive effect, where greater fairness could be achieved. It was the case of a wife who, in settlement got the house, while her husband, who had begun a limited company before his marriage, retained the whole company that had grown by then to be worth £11 million. Similar situations were frequently seen in second marriages: “*So that's*

the one thing I would want to do ... instead of being hung up on matrimonial property I would now be looking at the wealth created in the marriage". [Solicitor 19]

Section 9(1)(b) tempting to make more specific

The actual meaning of economic advantage and disadvantage was called into question:

I would like a clearer exposition of what is meant. ... You can say – ‘Oh, you know, economically advantaged’ – and then what you really mean is that somebody stayed home and looked after the kids. Whatever that is, it's not economic ... you're not conferring an economic advantage on somebody. [Advocate 23]

Seeing the good intentions behind the principle, this interviewee considered it was: “*very poorly expressed*”. For Sheriff 27 it was not how the principle was expressed that caused some concern but rather the fact that: “*it smacks of another era really*”. Reflecting on how current families operate, s/he saw families where arrangements varied from those: “*where both parents work, ... [to those] where mum ... has the traditional role as homemaker*”. [Sheriff 27] However, that was not a reason to remove this principle: “*it still needs to be there, but certainly the landscape has changed*”. [Sheriff 27]

Any temptation to re-visit this principle, making it overly specific, was seen as: “*a false temptation to go with, because I think what we actually need is ... the development of ... where ... [9(1)(b)] was going before Lady Smith slammed the door on it*”.²⁴⁴ [Advocate 26] So, if the principle were to become more specific, the possibility of circumstances that had not been thought of would be removed: “*from what is the expression of a general principle. ... We should keep it the way it is*”. [Advocate 26]

Section 9(1)(c) raising the age from 16²⁴⁵

Overall, the most commonly suggested change was to raise the age from 16 years in section 9(1)(c). This suggestion came from a wide range of interviewees, because it was recognised that there was an assumption in (c) that, once children reached the age of 16: “*the child is old*

²⁴⁴ *Coyle v Coyle* 2004 Fam. L.R.

²⁴⁵ See also Chapter 7 at “Being negative ~ 16 is too young” and at “The age limit of 16 too low”.

enough to look after itself and you don't have any responsibilities – I wish!” [Solicitor 19] Many interviewees were parents themselves and could readily understand how greatly the lives of current 16 year olds differed from 16 year olds in the 1980s, with the subsequent knock-on effects for the burden of their care and support. Accepting that in Scots law legal capacity, generally, is 16 there was concern to recognise within section 9(1)(c) the financial needs of young people, who may: *“remain either at school or college or university, further education of whatever kind and acknowledge that parents do continue obviously to support them and sometimes beyond”*. [Sheriff 27]

The current age limit imposed by section 9(1)(c) was possibly the greatest concern to interviewees because there was no alternative way of addressing the issue other than the young person pursuing an aliment action on their own behalf; but such a course of action was not seen as an answer: *“it's sad when you have to deal with those. ... From a judicial perspective it's particularly difficult to see those cases where a young person has to take, usually, dad to court at that stage and ... that is quite destructive of family relationships”*. [Sheriff 27]

There was one interviewee who considered it preferable to drop this principle altogether because: *“it can be subsumed within 9(1)(b) as a sort of contribution ... to the family, which includes the requirement to look after them, provide a home, provide support for them – so I would drop 9(1)(c)”*. [Judge 29] That having been said, the interviewee was at pains to point out that s/he had no: *“bee in my bonnet about that. ... It's not that important”*.

Section 9(1)(d) adjustment period of three years too restrictive²⁴⁶

Another suggested change that exercised a wide range of interviewees was the restriction to three years of periodical allowance contained within section 9(1)(d): *“I'd like to ... remove the maximum of three years”* [Advocate 26] *“I think five years would be better”*. [Solicitor 19] It was felt to be: *“quite harsh”* [Solicitor 14] and there needed to be: *“more flexibility ... for some people, providing longer than three years to get PA. ... It's just for a very small number of cases”*. [Judge 30]

²⁴⁶ See also Chapter 7 at “Too restricting for periodical allowance to be limited to three years in section 9(1)(d).”

The problem was outlined as follows:

You think – ‘We’ve done a deal, we’ve split the assets down the middle, you’ve got another couple of years really minor financial support coming in, then you’ve got your child support and you are on your own.’ – And you cast forward to where that person will be in five years’ time ... if you actually do that you begin to realise that there are some people who are going to be struggling quite significantly if their support is cut after three years. And this might be in circumstances where their ex is earning very significantly and able to go from strength to strength, whilst they are not. [Solicitor 03]

While it was recognised as being possible to get PA for longer than three years, if for example, there were young children,²⁴⁷ it was also recognised that it would be most unlikely:

We just settled one Court of Session one ... where the wife got six months PA. And so, ... usually ... I would never encourage ... a client ... [to seek] a claim for PA. I will tell them that they have this claim and I will certainly ... do nothing to build up their expectation. ... I’ll be telling them ... 18 months is possibly ... a reasonable aspiration. ... If you just look at the case law we just don’t do it – we love clean break. [Solicitor 19]

Section 9(1)(e) hardship can still exist

This principle is rarely used, but a number of interviewees were keen to retain it: “*it’s used sparingly, but just because it’s used sparingly doesn’t mean that it doesn’t have purpose*”. [Advocate 21] There was genuine concern over the fate of the least used principles: “– *it worries me that sections 9(1)(d) and 9(1)(e) may be dropped ... because nobody is using them*”, [Solicitor 20] and: “*just because you don’t apply them that often doesn’t mean to say there is not that rare case*”. [Solicitor 12] It was felt that there will be some cases that continue to need them: “*you can never tell who is coming through your door or what their life has been like*”. [Solicitor 15]

²⁴⁷ An award of periodical allowance can be for longer than 3 years under s9(1)(c).

Offering a current example of serious financial hardship, Solicitor 06 described the situation of two people in their 70s where:

... the case turns on whether the house is sold, and he's put out of the house that he's lived in for the last forty-odd years in order to give her a cash settlement, or she accepts a lesser cash settlement. So you're looking at serious financial hardship, because she'll also be entitled to half his pension, so his income will half, his accommodation will cease to exist.

However, not everyone was keen to retain this principle: *"I think as time goes on ... the social need for it, is becoming less and less. I wouldn't be sorry to see that go. ... I, for my part, would take a fair bit of persuading on ... serious financial hardship. ... Anything that they allow the periodic allowance [to] hang on, I think is probably disappearing now"*. [Judge 31]

Principles not needed ~ simply restate

There was one interviewee who was a lone voice in stating that: *"I think we've got enough principles ... people ... I don't think they feel they want a principle"*, suggesting that the five principles could be restated: *"simply to say that there's a principle that a fair sharing is an equal sharing and the court is entitled to take any ... clear economic advantage or disadvantage into account for that"*. This interviewee was not at ease with legislation founded on principles. It may be significant that the interviewee was one of a small number in our sample who did not have a family law background.

HOW AMENDMENTS HAVE STOOD THE TEST OF TIME

There was a feeling that the Act worked as a cohesive whole: *"I'm not aware of any structural problem with it that needs to be sorted"* [Judge 31] and, therefore, any changes, however minor, could alter the impact of the whole: *"I would be wary of too much tinkering"*. [Advocate 21] There had, indeed, been some amendments over the years, which had not necessarily brought about the desired effects.

Pension amendments²⁴⁸

The greatest number of amendments have been in relation to pensions and of all the amendments the pension sharing order was considered to be the most useful because it is easy to quantify: “*you get your cash equivalent transfer value, and you get a pension sharing order for either a specific sum, which then factors into your overall financial provision*”. [Advocate 26] While there were those who valued the: “*nice clear formula to apply*”, [Solicitor 06] the amendments have not been universally welcomed, but have been seen as an example of: “*how things potentially go wrong when you start trying to micromanage them. ... The less that people try to tinker ... the better it is*”. [Judge 31] This interviewee reflected on a case where the pension: “*fell outwith the scope of ... the statutory instrument*”, which had enabled a sensible and fair solution to be found; whereas had it been necessary to adhere to the amendments then the flexible solution arrived at would have been impossible.²⁴⁹ There was a feeling that it could be useful, when calculating a pension share, to be able to: “*depart from the sixth formula on occasion*”. [Solicitor 16]

Relevant date amendment²⁵⁰

Possibly the most familiar of any amendment is the introduction of the appropriate valuation date in section 10(3A), devised to address: “*the Wallis mischief*”.²⁵¹ [Solicitor 18] However, the amendment had given rise to some: “*slight uneasiness*” [Solicitor 04] because it was: “*very badly drafted*” [Advocate 22; Judge 29]

There appears now to be three possible dates that could be used, that is the relevant date as in section 10(3); the appropriate valuation date as in section 10(3A); and the closest date to the court action. Many interviewees simply spoke of using the last, which seemed the most sensible: “*it should have been possible to make it clear that for joint assets, regardless of when the relevant date is, that they should be valued at the point of division*”. [Solicitor 18]

²⁴⁸ See Chapter 8 where pensions are discussed in more detail.

²⁴⁹ See Chapter 8 where this issue is raised at “A NOTE ON PENSIONS”.

²⁵⁰ See Chapter 8 where this issue is discussed in more detail at “THE APPROPRIATE VALUATION DATE”.

²⁵¹ *Wallis v Wallis* 1991 SCLR 192; 1992 SLT 676; 1993 SC (HL) 49.

The introduction of section 10(3A) had given rise to the: “*this bizarre situation whereas in one case you can have two relevant dates – the date of separation and the appropriate evaluation date*”. [Solicitor 18]

OTHER SPECIFIC SUGGESTIONS FOR CHANGE

Full disclosure from the outset

Even though it was more a question of court procedure than a change to the ‘85 Act, several interviewees expressed the need for full disclosure of all assets: “*not just matrimonial property but resources as well*” [Solicitor 07] from the outset:

A requirement that both parties fully disclose all assets and liabilities before they’re allowed to even start a divorce action. ... I would like to see a basic rule that says, – ‘You are not raising a divorce action until I have a sworn statement giving all assets and liabilities. And see, if you’ve lied, you’re paying the whole expenses of the action’. [Solicitor 06]

It was felt that a great deal of time and effort was wasted trying to track down bank statements and loan documents when it was obvious they must exist: “*We spend far too much unnecessarily fishing about for information that should be provided voluntarily*”. [Solicitor 07] A similar form to the English Form E Financial Statement²⁵² was suggested:

... because once you have that basic information then applying the principles is much easier. It is just arithmetic. But often the situation is that parties don’t think that that bank account counts, don’t think that that pension counts, not prepared to disclose their company accounts, you know, all this is basic stuff – give me the information! [Solicitor 06]

The current arrangements were called into question, because they do not work in practice. There is already: “*a rule that requires you to list ... [the matrimonial property], which I have to say is widely ignored, if not pretty much universally ignored – ... it’s not effective*”.

²⁵² <http://hmctsformfinder.justice.gov.uk/courtfinder/forms/form-e-eng.pdf> accessed 7.7.15.

[Solicitor 07] The problem with the current arrangements is that agents feel they are being asked to duplicate work: “*if you are framing your divorce writ correctly your writ will list what the matrimonial property is. ... So the forms that we are supposed to fill in now simply duplicate what you’ve got in your court pleadings. So people are looking ... and thinking what a bloody waste of time*”. [Solicitor 07]

More clarity sought on source of funds

... I honestly felt – this isn’t fair – and if it doesn’t feel fair then surely it can’t be fair in accordance with the principles of the Act. [Solicitor 20]

Despite being able to use section 10(6), the level of fairness achieved in source of funds arguments remains a troubling issue for a range of interviewees: “*the sheriff made that clear to us – we can keep going with this proof but with all the sums you’ve lodged – you chose to make that matrimonial property and that’s the way the cookie crumbles*”. [Solicitor 20]

Interviewees sought greater clarity:

... there has to be more clarity in source of funds. I know we have section 10(6) that deals with source of funds, but I worry that increasingly I have clients where they have inherited lots of money, they’ve put it into a matrimonial home, they’ve then sold that matrimonial home, purchased another matrimonial home in joint names and, although we’ve all the various cases on it, Cunningham²⁵³ and all the rest of it, that give guidance on what should happen there, ... there is sometimes unfairness in that situation. [Solicitor 20]

However, greater clarity must not become too rigid. One interviewee reflected that over the years: “*I have thought ... about how you ... can you create a more formula-based source of funds, whereby ... if you have a source of funds that were invested ten years beforehand, then you get 10% and so forth*”, [Solicitor 12] but then immediately ruled out such a change because:

²⁵³ *Cunningham v Cunningham* 2001 Fam LR 12.

... it's better to actually have a wider discretion. ... What I've realised from my ... many years in practice is that the source of funds ... circumstance can be so different that it would be very, very difficult, if not impossible, to legislate for all examples and you've really just to have a general provision and allow people to exercise common sense when applying it. [Solicitor 12]

So: “not rigidity of rules, but ... well, you see, I think the courts could have given guidance on that and never did”. [Judge 29] More clarity would lead to better advice being available to clients: “more clarity so that ... lawyers know what to advise clients and clients know what their expectations can be. ... Source of funds could be clearer”. [Solicitor 20] This was a matter of fairness for:

... the average person in this country, who had parents who maybe died and they've shared the proceeds of that parents' home with their siblings and there's a wee pot of fifty thousand left and they put it into the house. That causes real grief in many cases and ... it's not something that even now solicitors and advocates can give reassurance on, one way or the other. ... I just wonder whether one might be able to tighten that up. [Judge 29]

Compensation and maintenance

Several interviewees indicated that they would like the courts: “to recognise ... that classic wife situation, that compensation ... needs to be addressed in order to deliver an outcome that is fair”. [Solicitor 01] Again it was understood that such a shift in focus would not necessarily require a change in the law:

... it's the application of the Act rather than the Act itself. I would like to see us being less cautious about awarding maintenance for longer periods in some cases, particularly in long marriages and I would like to see a more creative use of section 9(1)(b) in particular. But the law's there, it's the case law that's wrong. [Sheriff 28]

Compensation and maintenance are not concepts that sit easily within Scots law, but there were interviewees who spoke in these terms in connection with wives from long marriages who had no future prospects of earning, unlike their husbands. These concepts are English in

nature, not Scottish and while no one was suggesting: “going over to that system where joint lives order are much more common, I do sometimes wonder if the substantive fairness has been done to women”. [Solicitor 03] So, once again, it was a matter of fairness: “the fundamental problem ... we have in holding our head up across the globe in saying ... we have a fair system”. [Solicitor 01]

The powers of the court

There were two examples of where interviewees suggested that the court should take on greater powers.

Court to police orders that it makes

The first example was where a court makes an order, say for the sale of a house, but one party fails to comply:

I would give the court more of a role to play in policing the orders that it makes. ... In that situation there should be an ability to go to the court and say – You have made an order for the sale of that property, this person is playing silly buggers – and have the court step in and exercise effective, expeditious and cost effective monitoring of the enforcement that was ordered. At the moment it's too expensive. [Solicitor 07]

Return child maintenance to the court from CSA²⁵⁴

The second example was to return the powers of child maintenance to the court. The introduction of the CSA/ CMS has led to a fracturing of the framework of financial provision, because the courts no longer regularly dealt with this aspect of child support. Accepting the fact that it was most unlikely to happen, one interviewee did consider that it would be fairer to restore to the courts the power to:

²⁵⁴ See Chapter 7 where this is considered in more detail at “The scope and interplay of the CSA/ CMS, alimnt and section 9(1)(c)”.

... aliment in respect of children ... because the ... formulaic approach [of the CSA] to the making of an award of child aliment is ... [removed] from the wider reality, which is the outcome of a divorce. ... They are not taking into account what sort of capital or transfer of property or whatever's gone on. And I sense sometimes that there is an unfairness about that. [Advocate 25]

Dissipation of assets, section 10(6)(c)

... a wee bit more on 'destruction, dissipation, or alienation of property' – that's always difficult – 10(6)(c)". [Solicitor 20]

In similar fashion to source of funds, more clarity was also sought in connection with dissipation of assets first a definition of the term and then guidance to show what evidence would be required: *"What's considered to be dissipation? ... Saying he spent all his money on a horse and never won or whatever – is that really enough, do we really need to go back to 9(1)(b)?" [Solicitor 20]*

Future-proofing equality ~ recognition of future earnings

One interviewee suggested that the equal sharing principle should include a reflection of the future earnings of the stronger party: *"I would like there to be recognition of the future earnings and ... that should be viewed, in effect, as an asset where there should be some form of sharing". [Solicitor 12]*

Pre-nuptial agreements

Another interviewee suggested that: *"more specific provision [be] made about pre-nuptial agreements, how they should be treated". [Solicitor 17]*

CONCLUSION

There are two major themes running through this research. Firstly, there is the warning not to tinker with aspects of the Act, because any proposed changes must be considered within the

bigger picture taking account of how each section of the Act fits with another. Secondly, there is the much repeated comment that practitioners are not using what is already available, so it would be wiser to begin to do that before any changes are contemplated. While this chapter does contain some suggested changes, they should be read within the context of these two themes; points that will be explored more fully in the next chapter.

Chapter 10 Endnote

INTRODUCTION

An interesting Act

The broad aim of this research was to contribute to our understanding of how the statutory framework for financial provision on divorce in Scotland has worked in practice over the period of almost 30 years since it came into force. The 1985 Act lies at the heart of much family law practice in Scotland and the effective functioning of the legislation is therefore of prime importance in ensuring that Scots family law is appropriate to meet the needs of families in Scotland. Beyond Scotland, the Act has attracted interest as an example of a modern, principle-based regime; often in positive terms although sometimes too as the focus for criticism. Set within the European context, the statutory system for financial provision on divorce tends to highlight the mixed origins of the Scottish legal system: it shares a matrimonial property regime approach with other European civilian systems while retaining an element of judicial discretion which links it back to the common law tradition of its English neighbour. How the 1985 Act works in practice is therefore likely to be of interest not only within Scotland but as a point of comparison for other jurisdictions.

The 1985 Act marked a very significant change in the Scottish legal approach to financial provision on divorce; quite distinct from the previous more discretionary system. It was a change which had close links with the move signalled by the Divorce (Scotland) Act 1976 towards no-fault divorce; a link which was reflected in the 1985 Act's preference for clean break and private resolution, neutrality towards fault and focus on independence and moving forward. This new system of financial provision was conceived at the beginning of the 1980s; an era of optimism about feminism and gender equality, following close on the introduction in the 1970s of statutory commitments to equal pay and equal treatment for women. The 1985 Act emerged at a time of transition from a more traditional breadwinner/homemaker model of marriage to a modern vision based on equal partnership. After 30 years, there are still debates about no-fault divorce and there is ongoing frustration at the slow progress towards gender equality and particularly towards equal pay. It is interesting to see how the 1985 Act has fared during that period of social change.

The 1985 Act is a notable piece of legislation for many reasons, not least the way in which it combines family law and family life. Clearly drafted and carefully constructed, it epitomises the attention to detail of a lawyer and demonstrates a keen understanding of the mechanics of the legal and judicial process. It is law for lawyers. It is also, however, notable for its grounding in social policy, research evidence and family life; demonstrated through the statutory principles and guidance which reflect a variety of models of marital and family relationships. How this combination works in practice is of considerable significance for the purposes of wider lawmaking and legal reform.

A note on numbers

The first phase of our research was based on analysis of data collected from a sample of 200 cases which had been decided over the period of almost 30 years since the 1985 Act came into force. The sample size was determined as a result of our preparatory research which indicated that there was unlikely to be a substantial pool of published cases beyond this target of 200. This initial impression was confirmed by the practical difficulties involved in reaching the target.²⁵⁵ There may be more published decisions but not significantly more. When taken in conjunction with the findings from earlier research which indicated increasing use of separation agreements,²⁵⁶ our first conclusion must be that the legislation has been successful in achieving one of its aims which was to encourage parties to reach their own agreements about the financial and property consequences of divorce.

Civil law statistics in Scotland offer only limited information on divorce and do not contain details of the number of actions which include any crave for financial provision. It is therefore not possible to assess how this sample of published decisions relates to the total number of judicial decisions or indeed the overall number of claims for financial provision. Statistics are, however, now available which show the breakdown between ordinary and simplified applications, with the latter being possible only where there is no claim for financial provision.²⁵⁷ It is however, The lack of detailed statistics makes it impossible to

²⁵⁵ See chapter 5.

²⁵⁶ J Mair, F Wasoff and K Mackay, *All Settled?: A study of legally binding separation agreements and private ordering in Scotland*, Final Report, 2013

²⁵⁷ The online divorce and dissolution tables for 2013-14 are available at <http://www.gov.scot/Publications/2015/07/9805/downloads>, at Table 9.

assess to what extent our sample is representative: what we do know, indicates that adjudicated cases are atypical²⁵⁸ and those which have been selected for publication and reporting are likely to be important, unusual or interesting in some way. This research can, therefore, make no claims to be representative of how issues of financial provision are dealt with. What it can do, however, is to focus on a substantial sample of decisions which are likely to cover the full range of problematic issues which have arisen on financial provision since the 1985 Act came into force.

Over a period of almost 30 years, 200 cases is not a particularly large sample but, in a small jurisdiction with a strong preference for negotiated settlement, it is not insignificant. It would be sufficient to show trends and patterns if there were any of significance. Despite detailed data being collected from the cases, using an extensive list of codes, statistical analysis has disclosed little evidence of any discernible trends. While the number of cases decided in the early years of the legislation was slightly higher, the differences were relatively small. The issues raised over the full period, and the use made of different sections of the Act, showed no obvious patterns but instead appeared diverse and apparently random.²⁵⁹ To some extent this is a consequence of the relatively low volume of litigation but it also reinforces the views expressed in interviews to the effect that there are no significant problems with the legislative framework, it works well and, contrary to suggestions that it is overly rigid, in fact it provides ample scope for flexible and diverse outcomes.

KEY MESSAGES

The 1985 Act sets out a complex statutory framework and any assessment of its operation over several decades ought to respect that complexity and detail. The careful consideration that preceded the legislation should be reflected in our response to its operation. This research was undertaken with a view to exploring how the legislation works in practice but not necessarily with the intention of making any recommendations. We are in no rush to jump to conclusions about its use. There are, however, three key messages which have emerged strongly and consistently throughout the research.

²⁵⁸ Morris, Pegg and Warner, *Family Business in the Scottish Sheriff Courts in 1992* (1997: Scottish Office, Edinburgh).

²⁵⁹ For full discussion, see chapter 6.

It's good legislation

Overwhelmingly, the message from the practitioners we interviewed was that they welcomed and appreciated the legislation. The 1985 Act was regarded as being “a very good piece of legislation” [Advocate 22]: “a gem” [Solicitor 05]. It is clear and well drafted. It is complex and sophisticated but it has been carefully constructed and the provisions are well signposted and well integrated. Through its principles, the legislation offers certainty but the detailed guidance and range of factors within which those principles must be applied ensure flexibility and scope for creative outcomes. There was widespread respect for the legislation and almost no desire for change. In fact there was a positive message from practitioners that they did not want substantial change.

There were many aspects of the legislation which were thought to contribute to its success but the section 9 principles in particular were praised. They were seen as achieving clarity and certainty while still allowing for flexibility. The first principle was quite clearly the starting point and the most significant; a view endorsed in the statistical analysis. The other principles featured in the cases to a much lesser extent but they were nonetheless used and in the interviews the point was stressed that each of them was needed and there was no enthusiasm for changing them. Central to the success of the legislation was the combination and interconnectedness of the individual principles and of principles with the other guiding factors. Section 8(2) in particular, which requires the application of the principles against a broader context of what is fair and reasonable with regard to resources, was key to achieving an acceptable balance between certainty and discretion.

There was also strong approval of the concept of “matrimonial property”, with many interviewees highlighting the clarity and certainty of the matrimonial property regime as being an aspect of the legislation which worked well. While this was clearly a strength of the statutory system, difficulties were raised by some around the challenges of dealing with arguments about source of funds where non-matrimonial property became matrimonial during the relationship. While this particular issue might benefit from further clarification, the basic regime of matrimonial property was thought to be of central importance to the success of the Scottish system.

It was notable throughout the research that this respect for the legislation was shared by all of the groups of interviewees. Although solicitors, advocates, sheriffs and judges might look at the legislation from slightly different perspectives and would use it in different ways, they were united in their satisfaction and praise. They all agreed that the legislation gave them the tools they needed; it facilitated their work and they did not feel constrained by it. The strongest message to emerge from this research was that, from the vantage point of almost 30 years after its introduction, the 1985 Act works.

Still room for development

While the legislation itself was sound and there was no need, or appetite, for change, there was also a clear message to the effect that it could be used to still greater effect. Once again, this was a consistent message across all groups of interviewees. Reflecting on their experience, many expressed views about the possibilities for more imaginative use of the legislation; the need sometimes for more ambitious construction of argument; the importance of providing the necessary evidence to allow the sheriff or judge to make more creative judgments. If there were problems with the law of financial provision, it was not the fault of the legislation itself but of those who used it. Occasionally interviewees in one group, for example sheriffs, indicated things that those in another group, for example solicitors, might do more to make the legislation work better. It was notable that these comments were very evenly matched across all groups and there was no sense of fault lying in any one particular area or of one group blaming another. Rather there was a collective acknowledgement that the 1985 Act worked well but had the potential to work even better: a view summed up by this comment from a sheriff: *“It’s about people actually thinking about the principles and pleading them and using them, and sheriffs and judges going through them and applying them.”* [Sheriff 28]

Negotiate don’t litigate

The third clear message that emerged from the research was that there was an overwhelming preference for negotiation over litigation. The provisions of the 1985 Act were seen as central to both. As noted above, the relatively low number of published decisions over a period of 30 years is one indicator of a preference for settlement rather than judicial resolution. In its Report in 1981, the Scottish Law Commission (SLC) expressed the view that *“any solicitor*

in any part of Scotland, even if not a divorce specialist, should be able to turn to a statute on financial provision on divorce and find some clear statement of the underlying principles on the basis of which he could advise his client and seek to negotiate a settlement."²⁶⁰ A relatively low number of reported cases, evidence of increasing use of separation agreements entirely without judicial involvement, together with extremely strong views in favour of negotiation throughout our research confirm that the legislation has been highly successful in meeting this objective of the SLC.

While there was no doubt that negotiation rather than litigation was better for the parties, there was recognition of the importance of litigation. The courts, it was suggested by some, could have exerted a more positive influence over the developing use of the legislation by giving greater guidance. This, it was observed, had not happened to any great extent. On the other hand, in a system where there were relatively few reported cases, one single decision could have what was perceived as a negative influence over a long period of time in a way which was less likely to happen where there was a greater volume of cases. In family law, and in particular Scots family law, where the drive has for so long been away from the courts, it is interesting to note the longer term impact of this trend. Courts may rarely be good for individual families but they do have an important role to play in the development of family law.

FOR FURTHER THOUGHT

The burden of childcare

There was only one aspect of the Act where there was any sustained suggestion for change and that was section 9(1)(c). Even then, the change was one of scope rather than substance. The current principle, to the effect that the economic burden of childcare should be shared equally between the parties, only applies in respect of children up to the age of 16 and it was commented in several interviews that this age was probably too low. Particularly in respect of children with special needs or who were in continuing education, it was unrealistic to assume that the need for parental care or support would cease at the age of 16. In practice, children might continue to be dependent for several more years. There were other ways in which the

²⁶⁰ SLC (No. 67) *Family Law: Report on Aliment and Financial Provision*, 1981, p81.

needs of the children might be taken into account, for example, the need to care for dependent children on a longer term basis might be a special circumstance under section 10(6) justifying an unequal division of matrimonial property. A more direct approach, however, would be to acknowledge explicitly, through reform of section 9(1)(c), that children often continue to require support from parents beyond the age of 16. This is already reflected in the provisions relating to statutory child support²⁶¹ and the obligation of aliment where in certain cases the entitlement can continue until the age of 25.²⁶²

The homemaker wife²⁶³

The 1985 Act is associated with the clean break philosophy and a determined move away from any expectation of continuing maintenance for an ex-spouse, most often an ex-wife. It was a move which reflected the optimism of the 1970s which had seen the introduction of the Equal Pay Act 1970 and the Sex Discrimination Act 1975. Eric Clive himself commented in respect of marriage that there is “something fundamentally repulsive about the whole idea of dependent women.”²⁶⁴

While the 1985 Act did not favour ongoing maintenance, it did recognise in various ways the position of a spouse who had adopted a “homemaker” role within marriage. First, the fair sharing of matrimonial property would give her security in a share of property of which she might not legally be the owner and which might have been purchased entirely through her husband’s earnings. The starting point of the framework is therefore a principle which looks at joint matrimonial enterprise rather than financial and property status. This equality of waged and unwaged spouses is further confirmed by the express provision in section 10(6) to the effect that there is no source of funds argument in favour of unequal sharing based simply on the fact that the property was purchased out of the income of one spouse earned during the marriage.

²⁶¹ Child Support Act 1991, s55.

²⁶² Family Law (Scotland) Act 1985, s1(5).

²⁶³ The legislation of course is entirely gender neutral but in practice claims for disadvantage, by giving up paid employment to care for the family, are much more often raised by women. In fact, that was the situation in all of the cases in our sample and therefore the word “wife” will be used here.

²⁶⁴ EM Clive, “Marriage: An Unnecessary Legal Concept” in JM Eekelaar and SN Katz, *Marriage and Cohabitation in Contemporary Societies* 71 at 73.

Section 9(1)(c) and (e) might also be relevant where one spouse has been financially dependent on the other during marriage and particularly where there are children. The aspects of the Act, however, which are most often highlighted in the context of women who take on the primary homemaker/carer role through marriage are the principles in section 9(1)(b) and (d). To what extent do these principles offer appropriate protection? Are they unduly harsh or restrictive?

One starting point might be the statistics about the parties in our sample of reported cases. Where recorded (148/200), 76% of husbands were in full-time employment. Most wives (52% of those where recorded (120/200) were employed; 23% full-time and 29% part-time. In some cases (71/200), one spouse was at home full or part-time, and in 13% of those cases it is recorded that this decision to do so was a joint one.²⁶⁵ Slightly more than half of wives were employed but notably many of them were employed part-time. Thus, while married women's labour market participation has increased over the period since 1985, these figures demonstrate the substantial labour market disadvantage and unequal position of divorcing wives.

Section 9(1)(b) was argued in 64 out of the sample of 200 cases which resonates with the view expressed in interviews that it is one of the principles, other than 9(1)(a) about which parties most often argue. It is more difficult, however, to show the outcome of these arguments. The presumption in the 1985 Act is that fair sharing of matrimonial property will be treated as equal sharing unless there are special circumstances. It is possible that a successful argument of economic disadvantage under section 9(1)(b) might lead to an additional award over and above equal sharing. Our sample of cases showed that equal sharing was sought in 79% of cases and granted in approximately two thirds. The reasons for departure from the presumption of equal sharing are varied but there is evidence that while 50:50 sharing is the norm it is by no means the only option.

The experience of interviewees was that section 9(1)(b), while quite frequently argued, could be difficult to win, for a variety of reasons. It was often regarded as a "bolt-on" to section 9(1)(a), rather than an independent principle and it was therefore difficult to move beyond equal sharing. There were practical challenges in terms of providing appropriate evidence in

²⁶⁵ For further discussion, see chapter 6.

the situation where the argument was based around a potential career which had been given up in favour of family and care. There were underlying obstacles in terms of making the argument that home-based work was comparable to external employment and in persuading some sheriffs or judges to engage with assessment of comparative values.

The use of section 9(1)(d) had been even more limited than that of section 9(1)(b). A period of readjustment was mentioned in only 18% of cases and this was reinforced by the data of interviews to the effect that it was a provision, together with 9(1)(e) which was overlooked. One of the criticisms made by Lord Hope of the 1985 Act was the very limited scope for periodical allowance and in particular the harsh outcomes for wives as a result of the three year limit. Periodical allowance under any of the provisions was only sought in 60 cases (30% of the sample) and granted in half (31 cases).

Whether the outcome of the limited availability of periodical allowance is harsh is not something which this research can tell us but it is certainly clear that periodical allowance is rarely sought or granted. It is also clear from our statistical analysis that it has become even rarer over time. To that extent the legislation in practice has achieved one of its aims: the limited use of periodical allowance. In respect of section 9(1)(b), it was less clear that it was successful. Again there was no desire for statutory change but rather a more effective use of the existing provision.

Pension sharing

It is sometimes said that the limited availability and use of periodical allowance in Scotland is balanced by the provision for pension sharing. Certainly, as discussed in chapter 4, much of the substantial amendment of the 1985 Act has been focused on the introduction of a range of pension orders. Analysis of our sample of 200 cases, indicates however that, at least as far as court cases are concerned, these provisions are rarely used. A specific pension sharing order was sought in only 15 cases (7.5% of the total of 200), of which 10 (5% of the total) were granted.

This pattern is not unique to cases that are seen in the courts, but is similar to that found in an

earlier study of minutes of agreement, i.e. legally binding out of court separation contracts.²⁶⁶ For these settlements too, while pensions were frequently mentioned in agreements, it was mainly to discharge any claim by the other party. In only 19% of agreements that referred to pensions, or 11% of all agreements, was express provision made for any kind of pension sharing.

It is important to stress that these findings relate only to express arrangements for pension sharing. It is very clear that the value of any relevant pension benefits will form part of the matrimonial property and, of course, this may be shared in other ways through capital sum payment or transfer of property. What our findings do highlight is that, although the value of pensions may be shared on divorce, they are rarely shared by means of pension sharing orders.

The experience of pension orders might be compared with that of periodical allowance. The 1985 Act was designed to limit the use of periodical allowance orders and in that it has been clearly successful. With pension orders the opportunity to use an increasing range of types of order does not seem to have been taken up to any significant extent either in the published cases or in our random sample of legally binding separation agreements.

Principles in practice: built to last

The main motivation behind this research was to explore how the statutory provisions of the 1985 Act, and in particular the section 9 principles, work in practice. Our conclusion must be that they work extremely well. The statutory framework is regarded as well drafted and well designed and, whether in litigation or negotiation, it is generally capable of producing appropriate outcomes.²⁶⁷ The legislation operates through a carefully constructed combination of principled certainty and detailed but flexible guidance. Within the boundaries of a clear and familiar regulatory framework, all of the interviewees were comfortable with the freedom and scope they had to construct arguments and frame settlements which would meet the needs of the claimant. For them, a principled framework was not a formulaic, rigid

²⁶⁶ J Mair, F Wasoff and K Mackay, *All Settled?: A study of legally binding separation agreements and private ordering in Scotland*, Final Report, 2013, p47.

²⁶⁷ It is of course important to emphasise that this research looks only at the perspectives of legal professionals and not at the parties themselves. Nor is it capable of assessing to what extent these outcomes are “appropriate” in a broader social welfare context.

or harsh one. They were unanimous in their appreciation of a statutory system which worked well and which enabled them to work well.

Social science research is often focused on areas which have been identified as in some way problematic. Researchers are perhaps more commonly concerned with criticism than with positive comment. Research findings often highlight areas of law which are in need of reform. Against that background, this research project has been rather unusual since the key findings to emerge from it are positive. This is a well-designed statutory framework with no fundamental need for reform. It is regarded as combining certainty with flexibility in a way which facilitates the work of each group of legal actors who put the legislation into practice.

The legislation is praised not in a complacent way but in a way which reflects the views of the lawyers that they have something good with which they can work. Their respective roles, in putting the legislation into practice, are vital and there it is acknowledged that there is scope for further development. That view is not so much an admission of any particular failing in the past but rather a positive recognition that the statutory framework provides the flexibility they need to keep the legislation working well over time.

This research was focused on one particular aspect of Scots family law; financial provision on divorce. The messages, however, which emerge from it – about the benefits of carefully considered and constructed legislation; the effective combination of clarity, certainty and an element of flexibility, and the ways in which a detailed legislative framework can be used in practice – are of much wider significance for family law and family justice.

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Wilson v Wilson 1999 S.L.T. 249

APPENDIX 1: RESEARCH INSTRUMENTS

1. SPSS DATA COLLECTION HEADINGS

200 published cases of financial provision on divorce were analysed using the following variables

| | VARIABLE DESCRIPTION |
|-----|--|
| | BASIC FACTS OF CASE |
| 1. | case reference |
| 2. | pursuer |
| 3. | defender |
| 4. | place of marriage |
| 5. | date of marriage |
| 6. | date of separation |
| 7. | year born husband |
| 8. | year born wife |
| 9. | number of years of marriage |
| 10. | length of marriage |
| 11. | date when action 1 st raised in court |
| 12. | children of the marriage |
| 13. | number of children of the marriage |
| 14. | other relevant children |
| 15. | employment status of husband |
| 16. | employment status of wife |
| 17. | one party works other stays home either full or part-time |
| 18. | owner occupier/ tenants when house is matrimonial home |
| 19. | name on title deeds |
| 20. | homes owned other than as matrimonial homes |
| | DETAILS OF SECTION 8 ORDERS SOUGHT AND GRANTED |
| 21. | 8(1)(a) capital sum |
| 22. | 8(1)(aa) transfer of property |
| 23. | 8(1)(b) periodical allowance |
| 24. | 8(1)(baa) pension sharing order |
| 25. | 8(1)(ba) order under s 12A(2) or (3) |
| 26. | 8(1)(c) incidental order within meaning of s 14(2) |
| 27. | 8(2) |
| 28. | 8(3) |
| 29. | 8A pension sharing orders: apportionment of charges |
| 30. | implicit use of s 8(1) ie non-specific use |
| | s 9 PRINCIPLES USED TO JUSTIFY ORDERS AND ASSOCIATED s 11 FACTORS |
| 31. | 9(1)(a) matrimonial property shared fairly |

| | |
|-----|---|
| 32. | 9(1)(b) economic advantage/ disadvantage |
| 33. | Factor 11(2) |
| 34. | 9(1)(c) fair sharing of economic burden of child care, under 16 |
| 35. | Factor 11(3) |
| 36. | 9(1)(d) transitional allowance limited to 3 years |
| 37. | factor11 4 |
| 38. | 9(1)(e) allowance for serious financial hardship |
| 39. | Factor 11(5) |
| 40. | Factor 11(6) |
| 41. | Factor 11(7) conduct |
| 42. | 9(2) meaning of eco adv & contributions |
| 43. | implicit use of s 9 ie non-specific use |
| | s 10 SHARING VALUE OF MATRIMONIAL PROPERTY |
| 44. | 10(1) fair = equal |
| 45. | 10(1) departure from equal division |
| 46. | 10(2) net value of matrimonial property |
| 47. | 10(3) relevant date |
| 48. | 10(3A)(b) appropriate valuation date |
| 49. | 10(4) identifying what is matrimonial property |
| 50. | whether gifts/ inheritance from 3 rd party/ acquired before marriage/ acquired after relevant date/ or any combination of former |
| 51. | 10(5) life policies or pension benefits payable on death |
| 52. | 10(6) special circumstances |
| 53. | 10(7) resumed cohabitation |
| 54. | 10(8); 10(8A) calculation of pension rights according to regulations |
| | s 12 ORDERS CAPITAL SUM/ TRANSFER OF PROPERTY/ PENSION LUMP SUMS |
| 55. | 12 orders for payment of capital sum or transfer of property |
| 56. | 12A order for payment of capital sum – pension lump sums |
| | s 13 ORDERS FOR PERIODICAL ALLOWANCE |
| 57. | 13(1) |
| 58. | 13(2) |
| 59. | 13(3) |
| 60. | 13(4) |
| 61. | 13(5) |
| 62. | 13(6) |
| 63. | 13(7) |
| | s 14 INCIDENTAL ORDERS |
| 64. | |
| | s 15 RIGHTS OF THIRD PARTIES |
| 65. | 15 |
| | s 16 AGREEMENTS ON FINANCIAL PROVISION |
| 66. | 16 antenuptial/ postnuptial contracts/ pension agreements |

| | |
|-----|---|
| | s 20 PROVISION OF DETAILS OF RESOURCES |
| 67. | 20 party to provide details of personal resources |
| | s 22 EXPENSES OF ACTION |
| 68. | 22 |
| | s 24 MARRIAGE NOT TO AFFECT PROPERTY RIGHTS OR LEGAL CAPACITY |
| 69. | s24 |
| | s 27 INTERPRETATION |
| 70. | s27 interpretation of terms |
| | s 28 AMENDMENTS, REPEALS AND SAVINGS |
| 71. | s28 |
| | DEVELOPING THEMES |
| 72. | equality |
| 73. | fairness |
| 74. | disadvantage/ advantage |
| 75. | contributions leading to adv/ disadv |
| 76. | readjustment |
| 77. | hardship |
| 78. | reasonable |
| 79. | clean break principle |
| 80. | minutes of agreement |
| 81. | avoidance s 18 |
| | OTHER LEGISLATION CITED |
| 82. | Divorce etc (Pensions) (Scotland) Regulations 2000 |
| 83. | Children (Scotland) Act 1995 |
| 84. | Divorce (Scotland) Act 1976 |
| 85. | Welfare Reform Pensions Act 1999 |
| 86. | Family Law (Scotland) Act 2006 |
| 87. | Succession (Scotland) Act 1964 |
| 88. | Divorce etc (Pensions) (Scotland) Regulations 1996 |
| 89. | Occupational Pension Schemes (Disclosure of Information) Regulations 1996 |
| 90. | Occupational Pension Schemes (Transfer Values) Regulations 1996 |
| 91. | Pension Schemes Act 1993 |
| 92. | Personal Pension Schemes (Disclosure of Information) Regulations 1987 |
| 93. | Pensions Act 1995 |
| 94. | Matrimonial Causes Act 1973 |
| 95. | Taxation of Chargeable Gains Act 1992 |
| 96. | Sheriff Courts (Scotland) Act 1907 |
| 97. | Matrimonial Homes (Family Protection) (Scotland) Act 1981 |
| 98. | Sheriff Court Ordinary Cause Rules 1993 |

| | |
|-----|--|
| 99. | Debtors (Scotland) Act 1987 |
| 100 | Court of Session Act 1988 |
| 101 | Administration of Justice (Scotland) Act 1933 |
| 102 | Civil Evidence (Scotland) Act 1988 |
| 103 | Partnership Act 1890 |
| 104 | Civil Evidence (Scotland) Act 1995 |
| 105 | Criminal Procedure (Scotland) Act 1995 |
| 106 | Mental Health (Care and Treatment) (Scotland) Act 2003 |
| 107 | Mental Health Tribunal for Scotland (Practice and Procedure) (no. 2) Rules 2005 |
| 108 | Mental Health (Scotland) Act 1984 |
| 109 | Partnership Act 1890 |
| 110 | Limited Partnerships Act 1907 |
| 111 | Agricultural Holdings (Scotland) Act 2003 |
| 112 | Bankruptcy (Scotland) Act 1985 |
| 113 | Companies Act 1985 |
| 114 | Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters |
| 115 | Civil Jurisdiction and Judgments Act 1982 |
| 116 | Civil Jurisdiction and Judgments Act 1991 |
| 117 | Domicile and Matrimonial Proceedings Act 1973 |
| 118 | Social Work (Scotland) Act 1968 |
| 119 | Legal Aid (Scotland) Act 1986 |
| 120 | Bail etc (Scotland) Act 1980 |
| 121 | Child Support Act 1991 |
| 122 | Family Law Act 1996 |
| 123 | Administration of Justice Act 1982 |
| 124 | Requirements of Writing (Scotland) Act 1995 |
| 125 | Companies Act 1948 |
| 126 | Conveyancing and Feudal Reform (Scotland) Act 1970 |
| 127 | Companies Act 1862 |
| 128 | Companies Act 1980 |
| 129 | Trusts (Scotland) Act 1961 |
| 130 | Matrimonial and Family Proceedings Act 1984 |
| 131 | Family Law Act 1986 |
| 132 | Criminal Justice Act 1988 |
| 133 | Sheriff Court (Scotland) Act 1971 |
| 134 | Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 |
| 135 | Court of Session Act 1868 |
| 136 | Child Support Act 1995 |
| 137 | Pension Sharing (Valuation) Regulations 2000 |
| 138 | Sea Fishing (Conservation) Act 1992 |
| 139 | Police Pensions Act 1976 |

2. INTERVIEW SCHEDULE – SOLICITOR (adapted for each interviewee)

CODE (DATE)

INTRODUCTION – *Thanks and reminder that focus is financial provision in litigated cases.*

BACKGROUND OF INTERVIEWEE

How long have you practised as a solicitor?

How much of your time is spent in family law?

You are/ are not a member of the Family Law Association; accredited as a Family Law Specialist; a mediator; a collaborative lawyer; a notary public; accept legally aided clients.

Accurate?

Roughly, how much of your time relates to financial provision?

Any financial provision cases litigated to a conclusion with judicial determination? (Number?)

THE 1985 ACT – *Will consider (a) the principles and (b) the financial orders.*

How the principles are used

How principles used – backdrop, set scene, underpin approach? (Take client through each?)

Noted any differences in way principles used in negotiated cases compared with litigated cases?

Fair/ equal sharing s9(1)(a) – Principle normally addressed first by court

Your starting point – start with fair sharing or is fair sharing end point?

Does fair normally end up meaning equal? (Example of where fair did not mean equal?)

Sometimes cases do not progress beyond the first principle. Why? Caution?

Economic advantage/ disadvantage s9(1)(b)

9(1)(b) much used, in your experience? (Why/ why not?)

Novel approach when introduced, expected to make big difference – achieved potential?

Economic burden of childcare s9(1)(c)

And how easy is it to argue this principle?

Adjustment and serious financial hardship ss9(1)(d)(e)

Do you often use these principles?

Flexibility

Ever had occasion to feel you would have liked greater flexibility re principles? Explore.

If likely outcome of case was feeling unfair – any room for creative solutions? Explore.
Any principles you would now drop from legislation? Or introduce?

FINANCIAL ORDERS

Most frequently used orders/ least used? (Why?)

Ever had occasion to feel would have liked greater flexibility re available orders? Explore.

Pensions

Pension amendments useful? (Context of use?)

CLEAN BREAK

Important to achieve clean break? (Forefront of your mind?) Explore.

MATRIMONIAL PROPERTY

Problems encountered in relation to matrimonial property?

Majority of cases negotiated to conclusion but some litigated – why?

RELEVANT DATE

Cases where proved difficult establishing relevant date? (Details)

Impact of s 10(3A)? (Difficulties as a result of having these two different dates?)

NEGOTIATION AND COURT ACTION – *how negotiation and litigation sit together*

All cases start being negotiated? (Negotiation ever follow court action?)

Why might negotiation fail? (Some cases bound to be litigated? Any triggers to litigation?)

Considerations when advising client which court would best serve them?

Variations in practice between sheriffs as a group and judges as a group? (Expand?)

PARTIES AND THE 1985 ACT

In summing up Act what aspects work well for a litigant? Why?

Aspects you would like to change? Why?

Does Act offer what you need to achieve acceptable outcomes for litigants?

Nature of an acceptable outcome?

Powers available to court sufficient or excessive in terms of financial provision?

VIGNETTE – *Common set of circumstances, no right or wrong answers.*

Acting for Sophie, the wife – what would be your initial advice?

Anything else to add to main part of interview or to vignette?

3. INTERVIEW SCHEDULE – ADVOCATE (adapted for each interviewee) CODE (DATE)

INTRODUCTION – *Thanks and reminder that focus is financial provision in litigated cases.*

BACKGROUND OF INTERVIEWEE

*You have particular interest in Family Law; year of silk was ****; year of call was ****; practised as solicitor for ** years. Accurate?*

How much of your work now is in area of family law?

Roughly, how much of your time relates to financial provision? (Opinions & court work?)

THE 1985 ACT – *Will consider (a) the principles and (b) the financial orders.*

How the principles are used

How principles used – backdrop, set scene, underpin approach? (Take client through each?)

Noted any differences in way principles used in negotiated cases compared with litigated cases?

Fair/ equal sharing s9(1)(a) – Principle normally addressed first by court

Your starting point – start with fair sharing or is fair sharing end point?

Does fair normally end up meaning equal? (Example of where fair did not mean equal?)

Sometimes cases do not progress beyond the first principle. Why? Caution?

Economic advantage/ disadvantage s9(1)(b)

9(1)(b) much used, in your experience? (Why/ why not?)

Novel approach when introduced, expected to make big difference – achieved potential?

Economic burden of childcare s9(1)(c)

And how easy is it to argue this principle?

Adjustment and serious financial hardship ss9(1)(d)(e)

Do you often use these principles?

Flexibility

Ever had occasion to feel you would have liked greater flexibility re principles? Explore.

If likely outcome of case was feeling unfair – any room for creative solutions? Explore.

Any principles you would now drop from legislation? Or introduce?

FINANCIAL ORDERS

Most frequently used orders/ least used? (Why?)

Ever had occasion to feel would have liked greater flexibility re available orders? Explore.

Views on orders against oneself?

Pensions

Pension amendments useful? (Context of use?)

CLEAN BREAK

Important to achieve clean break? (Forefront of your mind?) Explore.

MATRIMONIAL PROPERTY

Problems encountered in relation to matrimonial property?

Majority of cases negotiated to conclusion but some litigated – why?

RELEVANT DATE

Cases where proved difficult establishing relevant date? (Details)

Impact of s 10(3A)? (Difficulties as a result of having these two different dates?)

NEGOTIATION AND COURT ACTION – *how negotiation and litigation sit together*

Part played by advocates in negotiation?

All cases start being negotiated? (Negotiation ever follow court action?)

Why might negotiation fail? (Some cases bound to be litigated? Any triggers to litigation?)

Considerations when advising client which court would best serve them?

Variations in practice between sheriffs as a group and judges as a group? (Expand?)

PARTIES AND THE 1985 ACT

In summing up Act what aspects work well for a litigant? Why?

Aspects you would like to change? Why?

Does Act offer what you need to achieve acceptable outcomes for litigants?

Nature of an acceptable outcome?

Powers available to court sufficient or excessive in terms of financial provision?

VIGNETTE – *Common set of circumstances, no right or wrong answers.*

Acting for Sophie, the wife – what would be your advice?

Anything else to add to main part of interview or to vignette?

4. INTERVIEW SCHEDULE – SHERIFF (adapted for each interviewee)

CODE (DATE)

INTRODUCTION – *Thanks and reminder that focus is financial provision in litigated cases.*

BACKGROUND OF INTERVIEWEE

As a solicitor you worked At that time, member of the FLA; lawyer-mediator; collaborative lawyer. Appointed resident sheriff at ... Sheriff Court in

Work of sheriff very diverse – how much relates to financial provision?

How has specialisation of family law sheriffs in Glasgow and Edinburgh affected your work?

THE 1985 ACT – *Will consider (a) the principles and (b) the financial orders.*

How the principles are used

In your judgment in ... each principle set out. More than backdrop? (Prominent in your thinking?)

Fair/ equal sharing s9(1)(a) – Principle normally addressed first by court

As sheriff, cases you see likely to be arguing for unequal sharing? (Categorise reasons)

Sometimes cases do not progress beyond the first principle. Why? Caution?

Economic advantage/ disadvantage s9(1)(b)

9(1)(b) much used, in your experience? (Why/ why not?)

Novel approach when introduced, expected to make big difference – achieved potential?

Economic burden of childcare s9(1)(c)

And how easy is it to argue this principle?

Adjustment and serious financial hardship ss9(1)(d)(e)

These principles often argued?

Flexibility

Ever had occasion to feel you would have liked greater flexibility re principles? Explore.

If likely outcome of case was feeling unfair – any room for creative solutions? Explore.

Any principles you would now drop from legislation? Or introduce?

FINANCIAL ORDERS

Most frequently used orders/ least used? (Why?)

Difficulties quantifying orders on basis of information provided to you?

Ever had occasion to feel would have liked greater flexibility re available orders? Explore.
Views on orders against oneself?

Pensions

Pension amendments useful? (Context of use?)

CLEAN BREAK

Important to achieve clean break? (Forefront of your mind?) Explore.

MATRIMONIAL PROPERTY

Problems encountered in relation to matrimonial property?

Majority of cases negotiated to conclusion but some litigated – why?

RELEVANT DATE

Cases where proved difficult establishing relevant date? (Details)

Impact of s 10(3A)? (Difficulties as a result of having these two different dates?)

NEGOTIATION AND COURT ACTION – *how negotiation and litigation sit together*

All cases start being negotiated? (Negotiation ever follow court action?)

Reaction to case where no attempt to negotiate – encourage parties to so?

Why might negotiation fail? (Some cases bound to be litigated? Any triggers to litigation?)

Variations in practice between sheriffs as a group and judges as a group? (Expand?)

PARTIES AND THE 1985 ACT

In summing up Act what aspects work well for a litigant? Why?

Aspects you would like to change? Why?

Does Act offer what you need to achieve acceptable outcomes for litigants?

Nature of an acceptable outcome?

Powers available to court sufficient or excessive in terms of financial provision?

VIGNETTE – *Common set of circumstances, no right or wrong answers.*

Would you expect this case to come before you?

What arguments would you expect to be presented by Sophie's agent?

Anything else to add to main part of interview or to vignette?

5. INTERVIEW SCHEDULE – JUDGE (adapted for each interviewee)

CODE (DATE)

INTRODUCTION – *Thanks and reminder that focus is financial provision in litigated cases.*

BACKGROUND OF INTERVIEWEE

Your year of call was ... and your year of silk was In ... you became ...

Could you tell me a little about your current role?

Specialism in judiciary in area of family law? (More specialism expected?)

THE 1985 ACT – *Will consider (a) the principles and (b) the financial orders.*

How the principles are used

In your judgment in ... each principle set out. More than backdrop? (Prominent in your thinking?)

Fair/ equal sharing s9(1)(a) – Principle normally addressed first by court

As judge, cases you see likely to be arguing for unequal sharing? (Categorise reasons)

Sometimes cases do not progress beyond the first principle. Why? Caution?

Economic advantage/ disadvantage s9(1)(b)

9(1)(b) much used, in your experience? (Why/ why not?)

Novel approach when introduced, expected to make big difference – achieved potential?

Economic burden of childcare s9(1)(c)

And how easy is it to argue this principle?

Adjustment and serious financial hardship ss9(1)(d)(e)

These principles often argued?

Flexibility

Ever had occasion to feel you would have liked greater flexibility re principles? Explore.

If likely outcome of case was feeling unfair – any room for creative solutions? Explore.

Any principles you would now drop from legislation? Or introduce?

FINANCIAL ORDERS

Most frequently used orders/ least used? (Why?)

Difficulties quantifying orders on basis of information provided to you?

Ever had occasion to feel would have liked greater flexibility re available orders? Explore.

Views on orders against oneself?

Pensions

Pension amendments useful? (Context of use?)

CLEAN BREAK

Important to achieve clean break? (Forefront of your mind?) Explore.

MATRIMONIAL PROPERTY

Problems encountered in relation to matrimonial property?

Majority of cases negotiated to conclusion but some litigated – why?

RELEVANT DATE

Cases where proved difficult establishing relevant date? (Details)

Impact of s 10(3A)? (Difficulties as a result of having these two different dates?)

NEGOTIATION AND COURT ACTION – *how negotiation and litigation sit together*

How does case management work in Court of Session?

All cases start being negotiated? (Negotiation ever follow court action?)

Reaction to case where no attempt to negotiate – encourage parties to so?

Why might negotiation fail? (Some cases bound to be litigated? Any triggers to litigation?)

Variations in practice between sheriffs as a group and judges as a group? (Expand?)

PARTIES AND THE 1985 ACT

In summing up Act what aspects work well for a litigant? Why?

Aspects you would like to change? Why?

Does Act offer what you need to achieve acceptable outcomes for litigants?

Nature of an acceptable outcome?

Powers available to court sufficient or excessive in terms of financial provision?

VIGNETTE – *Common set of circumstances, no right or wrong answers.*

Would you expect this case to come before you?

What arguments would you expect to be presented by Sophie's advocate?

Anything else to add to main part of interview or to vignette?

6. VIGNETTE

George (55) and Sophie (53) have been married for 28 years. They have two children: Alex (20) away at university and Emily (17) in her final year at school. After a few years of growing apart, George has recently informed Sophie that he has been having an affair for some time and that he wants a divorce.

The couple met at college when they were both studying electrical engineering and, after they were married, they moved into a large house in the Scottish Borders, which George had inherited from his grandmother. There was plenty of space for them to live and also set up a small software development business. A few years later, Sophie inherited £250k from her parents, £150k of which she used to carry out a major renovation of the house, creating separate business and living spaces. She put the rest of her inheritance into an ISA and, except for dipping into it over the years for family holidays and personal spending, it has remained untouched.

In the early years they both contributed to the business. Working long hours, they quickly established the software company's reputation. By the time Alex was born, business was going well enough for them to agree they should employ a full-time software developer, who took over much of Sophie's role while she devoted herself full-time to the family. This she has continued to do, while George has worked full-time in the business.

Ten years ago, when the business was doing very well and they had just been awarded a Best Small Business award by Scottish Enterprise, they had the business valued at £2.5 million, its main value now derived from George's intellectual property. In the last few years George has paid himself an annual income from the business of £80k. Unfortunately, the recession had a bad impact on the business and George has confessed that he has been borrowing heavily for years to keep the business afloat. There are now indications that the market is beginning to pick up. Sophie was shocked by this disclosure since they live quite modestly in order to plough as much as possible into the business.

With the news of his affair, in addition to the debts, Sophie is devastated and extremely angry, despite having had a brief affair herself several years earlier. She has refused to negotiate with George or his lawyers to reach a settlement. She knows that George has a private pension, begun when the business was doing well, into which he has been paying over the years. Apart from that everything had gone into the business. The financial adviser at the time had suggested that she should think about her own fund, but it had never seemed necessary.

Sophie wants nothing more to do with George and accepts the marriage is at an end. She is raising a divorce action. George feels very guilty about the impending divorce and his own behaviour. He is willing to negotiate with Sophie's lawyers, but has explained to Sophie that the value of the business cannot be realised without destroying it altogether.

APPENDIX 2

Family Law (Scotland) Act 1985 (as amended)

8 Orders for financial provision

(1) In an action for divorce, either party to the marriage and in an action for dissolution of a civil partnership, either partner may apply to the court for one or more of the following orders—

- (a) an order for the payment of a capital sum. . . to him by the other party to the action;
- (aa) an order for the transfer of property to him by the other party to the action;
- (b) an order for the making of a periodical allowance to him by the other party to the action;
- (baa) a pension sharing order;
- (bab) a pension compensation sharing order;
- (ba) an order under section 12A(2) or (3) of this Act;
- (bb) an order under section 12B(2);
- (c) an incidental order within the meaning of section 14(2) of this Act.

(2) Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any, as is—

- (a) justified by the principles set out in section 9 of this Act; and
- (b) reasonable having regard to the resources of the parties.

(3) An order under subsection (2) above is in this Act referred to as an ‘order for financial provision’.

(4) The court shall not, in the same proceedings, make both a pension sharing order and an order under section 12A(2) or (3) of this Act in relation to the same pension arrangement.

(5) Where, as regards a pension arrangement, the parties to a marriage or the partners in a civil partnership] have in effect a qualifying agreement which contains a term relating to pension sharing, the court shall not—

- (a) make an order under section 12A(2) or (3) of this Act; or
- (b) make a pension sharing order, relating to the arrangement unless it also sets aside the agreement or term under section 16(1)(b) of this Act.

(6) The court shall not make a pension sharing order in relation to the rights of a person under a pension arrangement if there is in force an order under section 12A(2) or (3) of this Act which relates to benefits or future benefits to which he is entitled under the pension arrangement.

(7) In subsection (5) above—

- (a) ‘term relating to pension sharing’ shall be construed in accordance with section 16(2A) of this Act; and
- (b) ‘qualifying agreement’ has the same meaning as in section 28(3) of the Welfare Reform and Pensions Act 1999.

(8) The court shall not, in the same proceedings, make both a pension compensation sharing order and an order under section 12B(2) in relation to the same PPF compensation.

(9) The court shall not make a pension compensation sharing order in relation to rights to PPF compensation that—

- (a) derive from rights under a pension scheme which is subject to an order made under section 12A(2) or (3) in relation to the marriage or (as the case may be) civil partnership or a previous one between the same persons,
 - (b) derive from rights under a pension scheme which were at any time the subject of a pension sharing order in relation to the marriage or (as the case may be) civil partnership or a previous one between the same persons,
 - (c) are or have been the subject of a pension compensation sharing order in relation to the marriage or (as the case may be) civil partnership or a previous one between the same persons, or
 - (d) are the subject of an order made under section 12B(2) in relation to the marriage or (as the case may be) civil partnership or a previous one between the same persons.
- (10) Where, as regards PPF compensation, the parties to a marriage or the partners in a civil partnership have in effect a qualifying agreement which contains a term relating to pension compensation sharing, the court shall not—
- (a) make an order under section 12B(2); or
 - (b) make a pension compensation sharing order, relating to the compensation unless it also sets aside the agreement or term under section 16(1)(b) of this Act.
- (11) For the purposes of subsection (10)—
- (a) the expression ‘term relating to pension compensation sharing’ is to be construed by reference to section 16(2AA) of this Act; and
 - (b) a qualifying agreement is one to which section 110(1) of the Pensions Act 2008 relates.

8A Pension sharing orders: apportionment of charges

If a pension sharing order relates to rights under a pension arrangement, the court may include in the order provision about the apportionment between the parties of any charge under section 41 of the Welfare Reform and Pensions Act 1999 (charges in respect of pension sharing costs) or under corresponding Northern Ireland legislation.

8B Pension compensation sharing orders: apportionment of charges

The court may include in a pension compensation sharing order provision about apportionment between the parties of any charge under section 117 of the Pensions Act 2008 or under corresponding Northern Ireland legislation.

9 Principles to be applied

- (1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that—
- (a) the net value of the matrimonial property should be shared fairly between the parties to the marriage or as the case may be the net value of the partnership property should be so shared between the partners in the civil partnership;
 - (b) fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family;
 - (c) any economic burden of caring should be shared fairly between the persons—
 - (i) after divorce, for a child of the marriage under the age of 16 years;

- (ii) after dissolution of the civil partnership, for a child under that age who has been accepted by both partners as a child of the family or in respect of whom they are, by virtue of sections 33 and 42 of the Human Fertilisation and Embryology Act 2008, the parents,
 - (d) a 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 to adjust, over a period of not more than three years from—
 - (i) the date of the decree of divorce, to the loss of that support on divorce;
 - (ii) the date of the decree of dissolution of the civil partnership, to the loss of that support on dissolution,
 - (e) a person who at the time of the divorce or of the dissolution of the civil partnership seems likely to suffer serious financial hardship as a result of the divorce or dissolution should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.
- (2) In subsection (1)(b) above and section 11(2) of this Act—
 ‘economic advantage’ means advantage gained whether before or during the marriage [or civil partnership] and includes gains in capital, in income and in earning capacity, and ‘economic disadvantage’ shall be construed accordingly;
 ‘contributions’ means contributions made whether before or during the marriage or civil partnership; and includes indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family.

10 Sharing of value of matrimonial property or partnership property

- (1) In applying the principle set out in section 9(1)(a) of this Act, the net value of the matrimonial property or partnership 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.
- (2) Subject to subsection (3A) below, the net value of the property shall be the value of the property at the relevant date after deduction of any debts incurred by one or both of the parties to the marriage or as the case may be of the partners —
- (a) before the marriage so far as they relate to the matrimonial property or before the registration of the partnership so far as they relate to the partnership property; and
 - (b) during the marriage or partnership, which are outstanding at that date.
- (3) In this section ‘the relevant date’ means whichever is the earlier of—
- (a) subject to subsection (7) below, the date on which the persons ceased to cohabit;
 - (b) the date of service of the summons in the action for divorce or for dissolution of the civil partnership.
- (3A) In its application to property transferred by virtue of an order under section 8(1)(aa) of this Act this section shall have effect as if—
- (a) in subsection (2) above, for ‘relevant date’ there were substituted ‘appropriate valuation date’;
 - (b) after that subsection there were inserted—
- ‘(2A) Subject to subsection (2B), in this section the “appropriate valuation date” means—
- (a) where the parties to the marriage or, as the case may be, the partners agree on a date, that date;
 - (b) where there is no such agreement, the date of the making of the order under section 8(1)(aa).

(2B) If the court considers that, because of the exceptional circumstances of the case, subsection (2A)(b) should not apply, the appropriate valuation date shall be such other date (being a date as near as may be to the date referred to in subsection (2A)(b)) as the court may determine.’; and

(c) subsection (3) did not apply

(4) Subject to subsections (5) and (5A) below, in this section and in section 11 of this Act ‘the matrimonial property’ means all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)—

(a) before the marriage for use by them as a family home or as furniture or plenishings for such home; or

(b) during the marriage but before the relevant date.

(4A) Subject to subsections (5) and (5A) below, in this section and in section 11 of this Act ‘the partnership property’ means all the property belonging to the partners or either of them at the relevant date which was acquired by them or by one of them (otherwise than by way of gift or succession from a third party)—

(a) before the registration of the partnership for use by them as a family home or as furniture or plenishings for such a home, or

(b) during the partnership but before the relevant date.

(5) The proportion of any rights or interests of either person —

(a) under a life policy or similar arrangement ; and

(b) in any benefits under a pension arrangement which either person has or may have (including such benefits payable in respect of the death of either person),

which is referable to the period to which subsection (4)(b) or (4A)(b) above refers shall be taken to form part of the matrimonial property or partnership property.

(5A) Where either person is entitled to PPF compensation, the proportion of the compensation which is referable to the period to which subsection (4)(b) or (4A)(b) above refers shall be taken to form part of the matrimonial property or partnership property.

(6) In subsection (1) above ‘special circumstances’, 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 family 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;

(e) the actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce or the dissolution of the civil partnership.

(7) For the purposes of subsection (3) above no account shall be taken of any cessation of cohabitation where the persons thereafter resumed cohabitation, except where the persons ceased to cohabit for a continuous period of 90 days or more before resuming cohabitation for a period or periods of less than 90 days in all.

(8) The Secretary of State may by regulations make provision about calculation and verification in relation to the valuation for the purposes of this Act of benefits under a pension arrangement or relevant state scheme rights.

(8A) Regulations under subsection (8) above may include—

- (a) provision for calculation or verification in accordance with guidance from time to time prepared by a prescribed person; and
 - (b) provision by reference to regulations under section 30 or 49(4) of the Welfare Reform and Pensions Act 1999.
- (8B) The Scottish Ministers may by regulations make provision for the purposes of this Act about—
- (a) calculation and verification of PPF compensation,
 - (b) apportionment of PPF compensation.
- (8C) Regulations under subsection (8B) may include provision—
- (a) for calculation or verification in a manner approved by a prescribed person,
 - (b) by reference to regulations under section 112 of the Pensions Act 2008.
- (9) Regulations under subsection (8) or (8B)] above may make different provision for different purposes and shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

11 Factors to be taken into account

- (1) In applying the principles set out in section 9 of this Act, the following provisions of this section shall have effect.
- (2) For the purposes of section 9(1)(b) of this Act, the court shall have regard to the extent to which—
- (a) the economic advantages or disadvantages sustained by either person have been balanced by the economic advantages or disadvantages sustained by 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.
- (3) For the purposes of section 9(1)(c) of this Act, the court shall have regard to—
- (a) any decree or arrangement for aliment for the child;
 - (b) any expenditure or loss of earning capacity caused by the need to care for the child;
 - (c) the need to provide suitable accommodation for the child;
 - (d) the age and health of the child;
 - (e) the educational, financial and other circumstances of the child;
 - (f) the availability and cost of suitable child-care facilities or services;
 - (g) the needs and resources of the persons; and
 - (h) all the other circumstances of the case.
- (4) For the purposes of section 9(1)(d) of this Act, the court shall have regard to—
- (a) the age, health and earning capacity of the person who is claiming the financial provision;
 - (b) the duration and extent of the dependence of that person prior to divorce or to the dissolution of the civil partnership;
 - (c) any intention of that person to undertake a course of education or training;
 - (d) the needs and resources of the persons; and
 - (e) all the other circumstances of the case.
- (5) For the purposes of section 9(1)(e) of this Act, the court shall have regard to—
- (a) the age, health and earning capacity of the person who is claiming the financial provision;
 - (b) the duration of the marriage or of the civil partnership;

- (c) the standard of living of the persons during the marriage or civil partnership;
- (d) the needs and resources of the persons; and
- (e) all the other circumstances of the case.

(6) In having regard under subsections (3) to (5) above to all the other circumstances of the case, the court may, if it thinks fit, take account of any support, financial or otherwise, given by the person who is to make the financial provision to any person whom he maintains as a dependant in his household whether or not he owes an obligation of aliment to that person.

(7) In applying the principles set out in section 9 of this Act, the court shall not take account of the conduct of either party to the marriage or as the case may be of either partner unless—

- (a) the conduct has adversely affected the financial resources which are relevant to the decision of the court on a claim for financial provision; or
- (b) in relation to section 9(1)(d) or (e), it would be manifestly inequitable to leave the conduct out of account.

12 Orders for payment of capital sum or transfer of property

(1) An order under section 8(2) of this Act for payment of a capital sum or transfer of property may be made—

- (a) on granting decree of divorce or of dissolution of a civil partnership; or
- (b) within such period as the court on granting the decree may specify.

(2) The court, on making an order referred to in subsection (1) above, may stipulate that it shall come into effect at a specified future date.

(3) The court, on making an order under section 8(2) of this Act for payment of a capital sum, may order that the capital sum shall be payable by instalments.

(4) Where an order referred to in subsection (1) above has been made, the court may, on an application by—

- (a) either party to the marriage;
- (b) either partner,

on a material change of circumstances, vary the date or method of payment of the capital sum or the date of transfer of property.

12A Orders for payment of capital sum: pensions lump sums

(1) This section applies where the court makes an order under section 8(2) of this Act for payment of a capital sum (a ‘capital sum order’) by a party to the marriage or a partner in a civil partnership (‘the liable person’) in circumstances where—

- (a) the matrimonial property or the partnership property within the meaning of section 10 of this Act includes any rights or interests in benefits under a pension arrangement which the liable person has or may have (whether such benefits are payable to him or in respect of his death); and
- (b) those benefits include a lump sum payable to him or in respect of his death.

(2) Where the benefits referred to in subsection (1) above include a lump sum payable to the liable person the court, on making the capital sum order, may make an order requiring the person responsible for the pension arrangement in question to pay the whole or part of that sum, when it becomes due, to the other party to the marriage or as the case may be to the other partner (‘the other person’).

(3) Where the benefits referred to in subsection (1) above include a lump sum payable in respect of the death of the liable person, the court, on making the capital sum order, may make an order—

- (a) if the person responsible for the pension arrangement in question has power to determine the person to whom the sum, or any part of it, is to be paid, requiring them to pay the whole or part of that sum, when it becomes due, to the other person;
 - (b) if the liable person has power to nominate the person to whom the sum, or any part of it, is to be paid, requiring the liable person to nominate the other person in respect of the whole or part of that sum;
 - (c) in any other case, requiring the person responsible for the pension arrangement in question to pay the whole or part of that sum, when it becomes due, to the other person instead of to the person to whom, apart from the order, it would be paid.
- (4) Any payment by the person responsible for the pension agreement under an order under subsection (2) or (3) above—
- (a) shall discharge so much of the liability of the person responsible for the pension arrangement to or in respect of the liable person as corresponds to the amount of the payment; and
 - (b) shall be treated for all purposes as a payment made by the liable person in or towards the discharge of his liability under the capital sum order.
- (5) Where the liability of the liable person under the capital sum order has been discharged in whole or in part, other than by a payment by the person responsible for the pension arrangement under an order under subsection (2) or (3) above, the court may, on an application by any person having an interest, recall any order under either of those subsections or vary the amount specified in such an order, as appears to the court appropriate in the circumstances.
- (6) Where—
- (a) an order under subsection (2) or (3) above imposes any requirement on the person responsible for a pension arrangement ('the first arrangement') and the liable person acquires transfer credits under another arrangement ('the new arrangement') which are derived (directly or indirectly) from a transfer from the first arrangement of all his accrued rights under that arrangement; and
 - (b) the person responsible for the new arrangement has been given notice in accordance with regulations under subsection (8) below,
- the order shall have effect as if it had been made instead in respect of the person responsible for the new arrangement; and in this subsection 'transfer credits' has the same meaning as in the Pension Schemes Act 1993.
- (7) Without prejudice to subsection (6) above, any court may, on an application by any person having an interest, vary an order under subsection (2) or (3) above by substituting for the person responsible for the pension arrangement specified in the order person responsible for any other pension arrangement under which any lump sum referred to in subsection (1) above is payable to the liable person or in respect of his death.
- (7ZA) Subsection (7B) applies where a right under an occupational pension scheme to payment of a lump sum in respect of death would, but for the provisions of Chapter 3 of Part 2 of the Pensions Act 2004 (c 35), arise during an assessment period (within the meaning of section 132 of that Act).
- (7ZB) An order under subsection (3) shall not take effect until the assessment period comes to an end for a reason other than the giving of a transfer notice under section 160 of that Act.
- (7ZC) For the purpose only of giving effect to subsection (7), the court may deal with an order under subsection (2) so that it—
- (a) is addressed to the Board of the Pension Protection Fund instead of the person responsible for a pension arrangement; and
 - (b) takes effect in respect of an entitlement to compensation payable under Chapter 3 of Part 2 of the Pensions Act 2004 or the Northern Ireland provision, instead of rights

in relation to any lump sum referred to in subsection (1) which is payable to the liable party.

(7A) Where—

(a) the court makes an order under subsection (3); and

(b) after the making of the order the Board gives the trustees or managers of the scheme a notice under section 160 of the Pensions Act 2004 ('the 2004 Act'), or the Northern Ireland provision, in relation to the scheme, the order shall, on the giving of such notice, be recalled.

(7B) Subsection (7C) applies where—

(a) the court makes an order under subsection (2) imposing requirements on the trustees or managers of an occupational pension scheme; and

(b) after the making of the order the Board gives the trustees or managers of the scheme a notice under section 160 of the 2004 Act, or the Northern Ireland provision, in relation to the scheme.

(7C) The order shall have effect from the time when the notice is given—

(a) as if—

(i) references to the trustees or managers of the scheme were references to the Board; and

(ii) references to any lump sum to which the person with benefits under a pension arrangement is or might become entitled under the scheme were references to the amount of any compensation payable under that Chapter of the 2004 Act, or the Northern Ireland provision, to which that person is or might become entitled in respect of the lump sum; and

(b) subject to such other modifications as may be prescribed by regulations by the Scottish Ministers.

(8) The Secretary of State may by regulations—

(a) require notices to be given in respect of changes of circumstances relevant to orders under subsection (2) or (3) above.

(9) Regulations under subsections (7C)(b) and (8) above shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(10) The definition of 'benefits under a pension scheme' in section 27 of this Act does not apply to this section.

(11) In subsections (7ZC) to (7C) 'the Northern Ireland provision', in relation to a provision of the 2004 Act, means any provision in force in Northern Ireland corresponding to the provision of that Act.

12B Order for payment of capital sum: pension compensation

(1) This section applies where the court makes an order under section 8(2) for payment of a capital sum (a 'capital sum order') by a party to a marriage or a partner in a civil partnership ('the liable person') in circumstances where the matrimonial or (as the case may be) partnership property within the meaning of section 10 includes any rights to PPF compensation.

(2) On making the capital sum order, the court may make an additional order requiring the Board of the Pension Protection Fund, if at any time any payment in respect of PPF compensation becomes due to the liable person, to pay the whole or part of that payment to the other party or (as the case may be) other partner ('the other person').

(3) Any such payment by the Board of the Pension Protection Fund—

- (a) shall discharge so much of its liability to the liable person as corresponds to the amount of the payment, and
 - (b) shall be treated for all purposes as a payment made by the liable person in or towards the discharge of the person's liability under the capital sum order.
- (4) Where the liability of the liable person under the capital sum order has been discharged in whole or in part, other than by a payment by the Board of the Pension Protection Fund, the court may, on an application by any person having an interest, recall the order or vary the amount specified in such an order as appears to the court appropriate in the circumstances.
- (5) The court may not make an additional order under subsection (2) in relation to rights to PPF compensation that—
- (a) derive from rights under a pension scheme which is subject to an order made under section 12A(2) or (3) in relation to the marriage or (as the case may be) civil partnership or a previous one between the same persons,
 - (b) derive from rights under a pension scheme which were at any time the subject of a pension sharing order in relation to the marriage or (as the case may be) civil partnership or a previous one between the same persons,
 - (c) are or have been the subject of a pension compensation sharing order in relation to the marriage or (as the case may be) civil partnership or a previous one between the same persons, or
 - (d) are the subject of an order made under subsection (2) in relation to the marriage or (as the case may be) civil partnership or a previous one between the same persons.

13 Orders for periodical allowance

- (1) An order under section 8(2) of this Act for a periodical allowance may be made—
- (a) on granting decree of divorce or of dissolution of a civil partnership;
 - (b) within such period as the court on granting the decree may specify; or
 - (c) after such decree where—
 - (i) no such order has been made previously;
 - (ii) application for the order has been made after the date of decree; and
 - (iii) since the date of decree there has been a change of circumstances.
- (2) The court shall not make an order for a periodical allowance under section 8(2) of this Act unless—
- (a) the order is justified by a principle set out in paragraph (c), (d) or (e) of section 9(1) of this Act; and
 - (b) it is satisfied that an order for payment of a capital sum or for transfer of property or a pension sharing order or pension compensation sharing order under that section would be inappropriate or insufficient to satisfy the requirements of the said section 8(2).
- (3) An order under section 8(2) of this Act for a periodical allowance may be for a definite or an indefinite period or until the happening of a specified event.
- (4) Where an order for a periodical allowance has been made under section 8(2) of this Act, and since the date of the order there has been a material change of circumstances, the court shall, on an application by or on behalf of either party to the marriage or his executor, or as the case may be either partner or his executor, have power by subsequent order—
- (a) to vary or recall the order for a periodical allowance;
 - (b) to backdate such variation or recall to the date of the application therefor or, on cause shown, to an earlier date;
 - (c) to convert the order into an order for payment of a capital sum or for a

transfer of property.

(4A) Without prejudice to the generality of subsection (4) above, the making of a maintenance calculation with respect to a child who has his home with a person to whom the periodical allowance is made (being a child to whom the person making the allowance has an obligation of aliment) is a material change of circumstances for the purposes of that subsection.

(5) The provisions of this Act shall apply to applications and orders under subsection (4) above as they apply to applications for periodical allowance and orders on such applications.

(6) Where the court backdates an order under subsection (4)(b) above, the court may order any sums paid by way of periodical allowance to be repaid.

(7) An order for a periodical allowance made under section 8(2) of this Act— (a) shall, if subsisting at the death of the person making the payment, continue to operate against that person's estate, but without prejudice to the making of an order under subsection (4) above;

(b) shall cease to have effect on the person receiving payment—

- (i) marrying,
- (ii) entering into a civil partnership,
- (iii) dying,

except in relation to any arrears due under it.

14 Incidental orders

(1) Subject to subsection (3) below, an incidental order may be made under section 8(2) of this Act before, on or after the granting or refusal of decree of divorce or of dissolution of a civil partnership.

(2) In this Act, 'an incidental order' means one or more of the following orders—

(a) an order for the sale of property;

(b) an order for the valuation of property;

(c) an order determining any dispute between the parties to the marriage or as the case may be the partners as to their respective property rights by means of a declarator thereof or otherwise;

(d) an order regulating the occupation of—

- (i) the matrimonial home; or
- (ii) the family home of the partnership,

or the use of furniture and plenishings therein or excluding either person from such occupation;

(e) an order regulating liability, as between the persons, for outgoings in respect of—

- (i) the matrimonial home; or
- (ii) the family home of the partnership, or furniture or plenishings therein;

(f) an order that security shall be given for any financial provision;

(g) an order that payments shall be made or property transferred to any curator bonis or trustee or other person for the benefit of the person by whom or on whose behalf application has been made under section 8(1) of this Act for an incidental order;

(h) an order setting aside or varying any term in an antenuptial or post-nuptial marriage settlement or in any corresponding settlement in respect of the civil partnership;

(j) an order as to the date from which any interest on any amount awarded shall run;

(ja) in relation to a deed relating to moveable property, an order dispensing with the execution of the deed by the grantor and directing the sheriff clerk to execute the deed;

(k) any ancillary order which is expedient to give effect to the principles set out in section 9 of this Act or to any order made under section 8(2) of this Act.

(3) An incidental order referred to in subsection (2)(d) or (e) above may be made only on or after the granting of the decree.

(4) An incidental order may be varied or recalled by subsequent order on cause shown.

(5) So long as an incidental order granting a party to a marriage the right to occupy a matrimonial home or the right to use furniture and plenishings therein remains in force then—

(a) section 2(1), (2), (5)(a) and (9) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (which confer certain general powers of management on a spouse in relation to a matrimonial home), and

(b) subject to section 15(3) of this Act, section 12 of the said Act of 1981 and section 41 of the Bankruptcy (Scotland) Act 1985 (which protect the occupancy rights of a spouse against arrangements intended to defeat them),

shall, except to the extent that the order otherwise provides, apply in relation to the order—

(i) as if that party were a non-entitled spouse and the other party were an entitled spouse within the meaning of section 1(1) or 6(2) of the said Act of 1981 as the case may require;

(ii) as if the right to occupy a matrimonial home under that order were ‘occupancy rights’ with the meaning of the said Act of 1981; and

(iii) with any other necessary modifications; and

subject to section 15(3) of this Act, section 11 of the said Act of 1981 (protection of spouse in relation to furniture and plenishings) shall apply in relation to the order as if that party were a spouse within the meaning of the said section 11 and the order were an order under section 3(3) or (4) of the said Act of 1981.

(5A) So long as an incidental order granting a partner in a civil partnership the right to occupy a family home or the right to use furnishings and plenishings therein remains in force then—

(a) section 102(1), (2), (5)(a) and (9) of the Civil Partnership Act 2004, and

(b) subject to section 15(3) of this Act, section 111 of that Act,

shall, except to the extent that the order otherwise provides, apply in relation to the order in accordance with subsection (5B).

(5B) Those provisions apply—

(a) as if that partner were a non-entitled partner and the other partner were an entitled partner within the meaning of section 101 or 106(2) of that Act as the case may require,

(b) as if the right to occupy a family home under that order were a right specified in paragraph (a) or (b) of section 101(1) of that Act, and

(c) with any other necessary modification.

(6) In subsection (2)(h) above, ‘settlement’ includes a settlement by way of a policy of assurance to which section 2 of the Married Women’s Policies of Assurance (Scotland) Act 1880 relates.

(7) Notwithstanding subsection (1) above, the Court of Session may by Act of Sederunt make rules restricting the categories of incidental order which may be made under section 8(2) of this Act before the granting of decree of divorce.

15 Rights of third parties

- (1) The court shall not make an order under section 8(2) of this Act for the transfer of property if the consent of a third party which is necessary under any obligation, enactment or rule of law has not been obtained.
- (2) The court shall not make an order under section 8(2) of this Act for the transfer of property subject to security without the consent of the creditor unless he has been given an opportunity of being heard by the court.
- (3) Neither an incidental order, nor any rights conferred by such an order, shall prejudice any rights of any third party insofar as those rights existed immediately before the making of the order.

16 Agreements on financial provision

- (1) Where the parties to a marriage or the partners in a civil partnership have entered into an agreement as to financial provision to be made on divorce or on dissolution of the civil partnership, the court may make an order setting aside or varying—
 - (a) any term of the agreement relating to a periodical allowance where the agreement expressly provides for the subsequent setting aside or variation by the court of that term; or
 - (b) the agreement or any term of it where the agreement was not fair and reasonable at the time it was entered into.
- (2) The court may make an order—
 - (a) under subsection (1)(a) above at any time after granting decree of divorce; and
 - (b) under subsection (1)(b) above, if the agreement [contains neither a term relating to pension sharing nor a term relating to pension compensation sharing, on granting decree of divorce or of dissolution of the civil partnership or within such time as the court may specify, on granting decree of divorce or of dissolution of the civil partnership; or
 - (c) under subsection (1)(b) above, if the agreement contains a term relating to pension sharing or pension compensation sharing —
 - (i) where the order sets aside the agreement or sets aside or varies the term relating to pension sharing or (as the case may be) the term relating to pension compensation sharing, on granting decree of divorce; and
 - (ii) where the order sets aside or varies any other term of the agreement, on granting decree of divorce or within such time thereafter as the court may specify on granting decree of divorce.
- (2A) In subsection (2) above, a term relating to pension sharing is a term corresponding to provision which may be made in a pension sharing order and satisfying the requirements set out in section 28(1)(f) or 48(1)(f) of the Welfare Reform and Pensions Act 1999.
- (2AA) For the purpose of subsection (2), a term relating to pension compensation sharing is a term corresponding to provision which may be made in a pension compensation sharing order and satisfying the requirements set out in section 109(g) of the Pensions Act 2008.
- (2B) Subsection (2C) applies where—
 - (a) the parties to a marriage or the partners in a civil partnership have entered into an agreement as to financial provision to be made on divorce or on dissolution of the civil partnership; and
 - (b) the agreement includes provision in respect of a person's rights or interests or benefits under an occupational pension scheme.

(2C) The Board of the Pension Protection Fund's subsequently assuming responsibility for the occupational pension scheme in accordance with Chapter 3 of Part 2 of the Pension Act 2004 or any provision in force in Northern Ireland corresponding to that Chapter shall not affect—

(a) the power of the court under subsection (1)(b) to make an order setting aside or varying the agreement or any term of it;

(b) on an appeal, the powers of the appeal court in relation to the order.

(3) Without prejudice to subsections (1) and (2) above, where the parties to a marriage or the partners in a civil partnership have entered into an agreement as to financial provision to be made on divorce or on dissolution of the civil partnership and—

(a) the estate of the person by whom any periodical allowance is payable under the agreement has, since the date when the agreement was entered into, been sequestrated, the award of sequestration has not been recalled and the person has not been discharged;

(b) an analogous remedy within the meaning of section 10(5) of the Bankruptcy (Scotland) Act 1985 has, since that date, come into force and remains in force in respect of that person's estate;

(c) that person's estate is being administered by a trustee acting under a voluntary trust deed granted since that date by the person for the benefit of his creditors generally or is subject to an analogous arrangement; or

(d) by virtue of the making of a maintenance calculation, child support maintenance has become payable by either party to the agreement with respect to a child to whom or for whose benefit periodical allowance is paid under that agreement,

the court may, on or at any time after granting decree of divorce or of dissolution of the civil partnership, make an order setting aside or varying any term of the agreement relating to the periodical allowance.

(4) Any term of an agreement purporting to exclude the right to apply for an order under subsection (1)(b) or (3) above shall be void.

(5) In this section, 'agreement' means an agreement entered into before or after the commencement of this Act.

17 Financial provision on declarator of nullity of marriage

(1) Subject to the following provisions of this section, the provisions of this Act shall apply to actions for declarator of nullity of marriage or of a civil partnership as they apply to actions for divorce or for dissolution of a civil partnership; and in this Act, unless the context otherwise requires, 'action for divorce' includes an action for declarator of nullity of marriage and 'action for dissolution of a civil partnership' includes an action for declarator of nullity of a civil partnership and, in relation to such an action, 'decree', 'divorce' and 'dissolution of a civil partnership' shall be construed accordingly.

(2) In an action for declarator of nullity of marriage or of nullity of a civil partnership, it shall be competent for either party to claim interim aliment under section 6(1) of this Act notwithstanding that he denies the existence of the marriage or civil partnership.

(3) Any rule of law by virtue of which either party to an action for declarator of nullity of marriage may require restitution of property upon the granting of such declarator shall cease to have effect.

18 Orders relating to avoidance transactions

(1) Where a claim has been made (whether before or after the commencement of this Act), being—

- (a) an action for aliment,
- (b) a claim for an order for financial provision, or
- (c) an application for variation or recall of a decree in such an action or of an order for financial provision,

the person making the claim may, not later than one year from the date of the disposal of the claim, apply to the court for an order—

- (i) setting aside or varying any transfer of, or transaction involving, property effected by the other person not more than 5 years before the date of the making of the claim; or
- (ii) interdicting the other person from effecting any such transfer or transaction.

(2) Subject to subsection (3) below, on an application under subsection (1) above for an order the court may, if it is satisfied that the transfer or transaction had the effect of, or is likely to have the effect of, defeating in whole or in part any claim referred to in subsection (1) above, make the order applied for or such other order as it thinks fit.

(3) An order under subsection (2) above shall not prejudice any rights of a third party in or to the property where that third party—

- (a) has in good faith acquired the property or any of it or any rights in relation to it for value; or
- (b) derives title to such property or rights from any person who has done so. (4)

Where the court makes an order under subsection (2) above, it may include in the order such terms and conditions as it thinks fit and may make any ancillary order which it considers expedient to ensure that the order is effective.

...

20 Provision of details of resources

In an action—

- (a) for aliment;
- (b) which includes a claim for an order for financial provision; or
- (c) which includes a claim for interim aliment,

the court may order either party to provide details of his resources or those relating to a child or incapax on whose behalf he is acting.

...

22 Expenses of action

The expenses incurred by a person in pursuing or defending—

- (a) an action for aliment brought —
 - (i) by either party to the marriage or
 - (ii) by either party in a civil partnership,on his own behalf against the other party;
- (b) an action for divorce, separation (whether of the parties to a marriage or the civil partners in a civil partnership), declarator of marriage or declarator of nullity of marriage;

(bb) an action for dissolution of a civil partnership, declarator that a civil partnership exists or declarator of nullity of a civil partnership,

(c) an application made after the commencement of this Act for variation or recall of a decree of aliment or an order for financial provision in an action brought before or after the commencement of this Act,

shall not be regarded as necessities for which the other party to the marriage or the other partner in a civil partnership is liable.

APPENDIX 3

Family Law (Scotland) Act 2006, section 28

28 Financial provision where cohabitation ends otherwise than by death

(1) Subsection (2) applies where cohabitants cease to cohabit otherwise than by reason of the death of one (or both) of them.

(2) On the application of a cohabitant (the “applicant”), the appropriate court may, after having regard to the matters mentioned in subsection (3)—

(a) make an order requiring the other cohabitant (the “defender”) to pay a capital sum of an amount specified in the order to the applicant;

(b) make an order requiring the defender to pay such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents;

(c) make such interim order as it thinks fit.

(3) Those matters 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 has suffered economic disadvantage in the interests of—

(i) the defender; or

(ii) any relevant child.

(4) In considering whether to make an order under subsection (2)(a), the appropriate court shall have regard to the matters mentioned in subsections (5) and (6).

(5) The first matter is 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—

(a) the applicant; or

(b) any relevant child.

(6) The second matter is the extent to which any economic disadvantage suffered by the applicant in the interests of—

(a) the defender; or

(b) any relevant child,

is offset by any economic advantage the applicant has derived from contributions made by the defender.

(7) In making an order under paragraph (a) or (b) of subsection (2), the appropriate court may specify that the amount shall be payable—

(a) on such date as may be specified;

(b) in instalments.

(8) Any application under this section shall be made not later than one year after the day on which the cohabitants cease to cohabit.

(9) In this section -

“appropriate court” means—(a) where the cohabitants are a man and a woman, the court which would have jurisdiction to hear an action of divorce in relation to them if they were married to each other; (b) where the cohabitants are of the same sex, the court which would have jurisdiction to hear an action for the dissolution of the civil partnership if they were civil partners of each other;

“child” means a person under 16 years of age;

“contributions” includes 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— (a) capital (b) income; and (c) earning capacity; and

“economic disadvantage” shall be construed accordingly.

(10) For the purposes of this section, a child is “relevant” if the child is—

- (a) a child of whom the cohabitants are the parents;
- (b) a child who is or was accepted by the cohabitants as a child of the family.