SCOTTISH LAW COMMISSION

MEMORANDUM No: 22

FAMILY LAW

ALIMENT AND FINANCIAL PROVISION

(Volume 1: Survey of Proposals)

31 March 1976

This consultative Memorandum is in two volumes, of which this is Volume 1. The Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments were submitted by 31 October 1976.

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MEMORANDUM NO. 22

ALIMENT AND FINANCIAL PROVISION

(VOLUME 1)

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SCOTTISH LAW COMMISSION

Memorandum No 22

on

Aliment and Financial Provision
(Volume 1)

INTRODUCTION

Purpose of Memorandum

0.1. This Memorandum seeks comments on a number of provisional proposals for reform of the law of Scotland relating to aliment, financial provision on divorce, and certain closely linked matters.[1] It covers an important branch of law raising fundamental issues about the place of marriage and family relationships in our society. For the benefit of those mainly interested in the broad issues rather than more technical problems, we have tried to describe those issues briefly and simply in this, the first of our two-volume Memorandum. The volume ends with a full summary of our provisional proposals which we set out for comment and criticism.[2]

0.2. In the absence of an adequate modern commentary on much of the field covered by this Memorandum, we have felt bound to set out in Volume 2 the existing law in some detail; and we also describe there its particular defects; we include, where appropriate, a survey of solutions adopted in other countries; and we canvass the arguments affecting the specific proposals summarised in this Volume. Many who work in this field will wish to refer to Volume 2, and we have tried to link the two volumes together by appropriate cross-references.

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1 The Memorandum is issued in pursuance of Item 14 of our Second Programme of Law Reform, the Reform of Family Law - (1968) Scot. Law Com. No.8.

2 See page 30 below.

Scope of Memorandum

0.3. The Memorandum deals with three main topics:

(a) the obligation of aliment (see paragraphs 1.1 to 1.18 below, and Part II in Volume 2);

(b) financial provision on divorce or annulment of marriage (see paragraphs 1.19 to 1.39 below, and Part III in volume 2);
and

(c) aliment on death of a liable relative (see paragraphs 1.41 to 1.44 below, and Part IV in volume 2).

We also deal with the relationship between the private law on these topics and the public law on such matters as supplementary benefit (Part V in volume 2). The first topic concerns the family law obligation of aliment - "the maintenance or support which certain persons are legally entitled to claim from others on account of their connection with them by kinship or marriage".[3] Alimentary obligations exist between parties to a subsisting relationship, most often husband and wife, or parent and child; but different problems arise when the relationship of a married couple is ended by divorce or death, which explains why these topics are separately treated in Parts III and IV.

0.4. Judicial separation presents difficult problems largely because it is a hybrid remedy. Factually the marriage has broken down and the court is being asked to regulate the breakdown. Legally, however, the marriage subsists and the court is being asked to regulate certain aspects of a subsisting matrimonial relationship. This hybrid quality compels us to consider the remedy along with financial provision on divorce in Part III and also in dealing with aliment in Part II.

0.5. In this Memorandum, we deal with the financial consequences of decrees of divorce, separation, declarator of nullity of marriage and adherence. We do not, however, deal

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[3] Encyclopaedia of the Laws of Scotland, voce "Aliment" Vol.1, p.287.

here with the grounds upon which these remedies are granted. We have already made recommendations as to divorce reform[4] and there is currently a Bill before Parliament which broadly would give effect to these proposals.[5] We shall deal in another Memorandum with the question whether separation and adherence actions should be retained or abolished. While the reforms which we suggest are, we believe, desirable whatever the grounds for these matrimonial remedies, those reforms, or something like them, will become essential if the grounds of divorce are reformed on the lines suggested in recent years. We also leave aside "family" or "community" property; this will form the subject of a future Memorandum. Again, we believe that the reforms suggested in this Memorandum are desirable whatever changes may be made in property law. In any event, in most Scottish divorce cases, the parties have little property and, for that reason alone, changes in property law will not provide a complete answer to the financial problems arising on divorce.

0.6. The collection, and the enforcement by diligence or civil imprisonment, of awards of aliment and of financial provision on divorce, present extremely difficult problems which have long given cause for concern. This subject has been under consideration by one of our working parties as part of a comprehensive review of the whole law of diligence. But in view of the urgency of reform of collection and diligence in the domain of aliment and financial provision on divorce, we shall publish a consultative Memorandum on that topic in advance of the more comprehensive review.

The United Kingdom and international context

0.7. This Memorandum seeks among other things to perform for Scotland a task which has already been performed for England and Wales. In 1969 the Law Commission published a Report on

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4 Divorce: The Grounds Considered (1967) Cmnd. 3256.

5 Divorce (Scotland) (No. 2) Bill 1975 [Bill 23] introduced by Mr Iain MacCormick, M.P. and ordered to be printed on 17 December 1975.

Financial Provision in Matrimonial Proceedings,[6] which has since resulted in legislation extending and rationalising the powers of the English courts on divorce, nullity or judicial separation to order financial provision for either spouse and for the children.[7] In 1973 the Law Commission published a Working Paper on Matrimonial Proceedings in Magistrates' Courts[8] which was concerned very largely with questions of maintenance for spouses and children. We have found those publications invaluable.[9]

0.8. It must be stressed, however, that in Scotland our approach to the law of aliment differs, in some respects quite fundamentally, from the approach of English law to maintenance. In England, the approach to maintenance is remedy-based: it "reflects a tendency to think not in terms of general rights, but of particular remedies available in particular courts, and sometimes under particular statutes."[10] Under this remedy-based approach, the important question has usually been: what powers to award maintenance should be given to the courts? One range of particular powers therefore could be, and was, conferred by particular statutes on the courts dealing with divorce, and a different set of particular powers was conferred by particular statutes on the magistrates' courts.[11] By contrast, in Scotland as in other European countries, the traditional approach has been unitary, based on the right to receive aliment and the correlative obligation to pay or provide it. Since Scots law attaches rights and obligations to persons rather than powers to courts, the English problems of 'dual jurisdiction' do not

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[6](1969) Law Com. No. 25. This followed on the Law Commission's Published Working Paper No. 9 on Matrimonial and Related Proceedings - Financial Relief (25 April, 1967).

[7]Matrimonial Proceedings and Property Act 1970 and the consolidating Matrimonial Causes Act 1973.

[8](1973) Working Paper No. 53.

[9]We have also derived considerable benefit from the Report of the Finer Committee on One-Parent Families, (1974) Cmnd.5629 (2 vols.).

[10]Olive M Stone, article in Parental Custody and Matrimonial Maintenance: a symposium (1966) British Institute of International and Comparative Law, at p.31.

[11]This "dual jurisdiction" was much criticised by the Finer Report (see note 9 above).

arise: the substantive law of aliment is the same in the Court of Session and the sheriff court.

0.9. In Scotland, there is a developed law governing the alimentary rights and obligations between husband and wife, parent and child, grandparent and grandchild. Apart from being right-based, this differs from English law in several respects, of which three examples may be noted. First, most of these alimentary obligations can be reciprocal so that in Scotland, unlike England, a parent can in later life raise an action for aliment against his adult children. Second, there are in Scotland, unlike England, reciprocal rights and obligations between grandparents and grandchildren. Third, unlike England, alimentary rights and obligations may endure throughout the alimentary dependant's life and not merely until some arbitrary age specified by statute. Accordingly, unlike the position in England, youths receiving advanced education and adults in later life can sue their parents for aliment in their own right.

0.10. In dealing with the alimentary obligation, therefore, we have gone beyond what has been done so far by the English Law Commission and in many respects we have derived little assistance from English law. We have, however, derived assistance from the laws of various countries (including for example, France, Germany and Italy), in many of which the law on the obligations of aliment has developed on lines similar to those of Scots law, and also from international conventions such as the recent Council of Europe Convention on the Legal Status of Children Born Out of Wedlock.[12]

The need for reform

0.11. If the grounds of divorce are changed so as to introduce a non-fault ground, such as five years' separation, then changes in the law on financial provision on divorce will be imperative. Under the present law, except in the case of divorce for incurable insanity, only the pursuer can apply for financial provision on divorce.[13] The defender has no right to apply. Clearly

[12] European Treaty Series No.85. The Convention was signed on behalf of the United Kingdom on 15 October 1975 but has not yet been ratified: (1975) Cmnd. 6358.

[13] Succession (Scotland) Act 1964, s.26.

this will have to be changed if the defender may be, say, an innocent wife whose husband has left her, after twenty years of marriage, with young children, no career and no property. Changes in the law on aliment between spouses will also be necessary, especially where the spouses are living apart by agreement as a preliminary to obtaining divorce by consent.

0.12. Even in the absence of changes in the grounds of divorce, there is a need for reform of the law of aliment and financial provision. There is, in particular, a need to enlarge the powers of the court to effect substantial justice on divorce, especially in relation to the tenancy, ownership or possession of the matrimonial home but also in other property matters. Moreover, the common law of aliment was developed in social conditions very different from those prevailing today and its rules, even where they are clear and consistent, which is not always the case,[14] are sometimes out of touch with modern conditions.[15] On to the common law rules, concerned primarily with the right and correlative obligation of aliment, have been engrafted in piecemeal fashion various statutory remedy-based provisions on the English pattern giving particular courts discretionary powers to make certain limited orders in particular types of proceedings.[16] This trend has so adversely affected the unitary coherence of our private law of aliment that it is no longer possible to state the law in a clear, rational or intelligible form. The two sets of provisions belong to quite different series and cannot be welded together to form a coherent code. Further, the relationship between the two sets of provisions has not been properly worked out, so that unresolved problems have arisen. To this unsatisfactory mixture of rights and remedies has been successively added a series of public law rights and remedies - relating to the poor law,[17], national assistance,[18] and supplementary benefit,[19] in that historical

[14] See for example paras. 2.136, 2.160 and 2.171

[15] See for example para. 2.116.

[16] See for example paras. 2.38; 2.57; 2.120; 2.137; 2.171.

[17] See, in particular, the Poor Law (Scotland) Act 1845 ss.17. and 22, now repealed.

[18] National Assistance Act 1948, ss. 43 and 44, now repealed.

[19] Ministry of Social Security Act 1966, ss. 22-24. This Act may be cited as the Supplementary Benefit Act 1975 but in this Memorandum we have continued to use the original short title.

sequence. Again, the relationships have not been fully worked out and unresolved problems have arisen.[20] In short, the existing law calls for an updating, to bring it into touch with modern conditions and needs a thorough technical overhaul, to fill gaps, resolve problems and remove injustices, anomalies and inconsistencies.

Acknowledgment

0.13 We wish to acknowledge our special indebtedness to Dr E.M.Clive of the Department of Scots Law in the University of Edinburgh, who carried out the great bulk of the fundamental research on which this Memorandum is based and helped us enormously in its preparation. The research represents an original and important contribution to Scottish family law.

[20] See Part V in volume 2.

PART I

SURVEY OF PROVISIONAL PROPOSALS

ALIMENT
(Part II in Volume 2).

A. Do we need private law obligations of aliment?

1.1. It can be argued that the relief of need has become very largely a public law task undertaken mainly by the Supplementary Benefits Commission of the Department of Health and Social Security. Most persons in need will look to the State for income support rather than to relatives liable under Scottish private law. The Supplementary Benefits Commission provides a more secure, regular and satisfactory source of income than many, and perhaps most, alimentary debtors whose payments are often irregular and intermittent. Moreover, the Commission may find it easier than many dependants to trace missing alimentary defaulters.

1.2. We think, however, that the obligation of aliment should be retained in our law: first, there are cases where this obligation is valuable and readily enforceable. Second, the number of aliment actions in the ordinary sheriff courts is not negligible: the annual average for the six years 1969-1974 was 812. In addition, aliment for children and interim aliment for wives is awarded in several thousand divorce actions every year. Third, the cost to the taxpayer of abolishing the obligation might be substantial. (The Finer Committee on One-Parent Families, while critical of many aspects of the private law on aliment, did not suggest its complete abolition.) Fourth, arguably the case for abolition concentrates too much on pathological situations of family breakdown and ignores the normal situation. Most men and women do support their families. Doubtless they would continue to do so if the legal obligation were removed. But an obligation of aliment is the sort of obligation which they would expect to find recognised and expressed in the law. In Proposition 1 (para. 2.9. in Volume 2), therefore, we suggest that the private law obligations of aliment should continue.

B. The parties to the alimentary relationship

1.3. Scots law recognises that reciprocal alimentary obligations may exist between a person and one or more members of his family. "Family" here means not merely "the nuclear

family" of husband, wife and (legitimate or adopted) children. It also includes the extended family e.g. grandparents and their grandchildren, and even remoter ascendants and descendants in the direct line; but not brothers, sisters, cousins or other "collaterals". To put the matter another way, most people belong to two families during their lives: a first family or 'family of origin' in which they are brought up, and a second family or 'family of marriage' in which they rear their own children. In Scots law, a person normally has alimentary obligations to his second family but he may also in later life incur alimentary obligations in certain circumstances to his first family i.e. his own parents. In this, Scots law resembles many European systems. But it differs from English private law and from the statutory codes enabling central government to recover the cost of supplementary benefit from liable relatives, or enabling local authorities to recover the cost of supporting children in care; these focus on the nuclear family or the second family.

1.4. Our first task therefore is to decide on which members of the family should have a legal duty of support. We deal with this at paragraphs 2.10 to 2.66 in Volume 2, and invite comments on twelve provisional conclusions (Propositions 2 to 13). Some of these appear relatively uncontroversial, such as the proposal that the obligations between husband and wife should be fully reciprocal (Proposition 3) and that the obligation between parent and illegitimate child should be the same as between parent and legitimate child (Proposition 6). Others appear more controversial: in particular, Proposition 8 raises the question whether reciprocal obligations of aliment between grandparents and grandchildren should be retained in our law (paragraph 2.36), and Proposition 13 invites comments on the question whether a man or woman should by law have an obligation to aliment ~~a step-~~ child whom he has accepted into the family and supported as a member of the family for not less than (say) five years (paragraph 2.66). At present, the courts can order a person to aliment a step-child accepted into the family only if the point arises in a divorce action. In place of this remedy-based solution we suggest that ~~such a~~ AN "ACCEPTED" child should have a right to aliment after five years. Other solutions and arguments are discussed at paragraphs 2.52 to 2.66. We doubt whether the

mere existence of a blood link alone would be widely regarded as justifying the creation of an alimentary obligation. Consequently, our general approach has been to look for some other justification - for instance, that the person in question has himself or herself assumed an actual or possible liability; or that he (or she) may b bound in all fairness to pay or provide aliment to another, such a an aged parent who has supported him at an early stage in life.

1.5. Having decided on the relatives bound to pay or provide aliment, the law requires, among other things, to rank those relative in a certain order or "hierarchy" of liability. This and related topics are discussed at paragraphs 2.67 to 2.88. Under the presen law, the order is usually said to be: (1) children and remoter descendants; (2) father; (3) mother; (4) paternal grandfather; (5) paternal grandmother; (6) paternal great-grandfather and the paternal ascendants in their order; and (7) maternal grandfather ar so on. This traditional formulation has to be expanded and qualified to take account of a spouse (who comes first in the hierarchy and of illegitimate and adoptive relationships. (See paragraph 2.6 On the assumption that our proposals in Propositions 2 to 13 for reducing the numbers of liable relatives are accepted, we suggest at Proposition 14 (paragraph 2.74) that they should be liable to aliment the person in question in the following order: (1) spouse; (2) children; (3) father and mother; and (4) a ~~step-parent~~ PERSON who has accepted the child into the family and is liable under Proposition 13. In principle, the liability of the father and mother towards their children should, we think, be equal but subject to modification in the light of their resources: (Proposition 16 and paragraph 2.76). These are the more important of the problems connected with the extended family of liable relatives. We also advance a few somewhat technical proposals on allocation of liability and rights of relief between relatives in the same tier, or different tiers, of the family hierarchy of liability, and as to the requirements for passing on liability to remoter relatives e.g. where a prior relative cannot afford aliment or goes abroad (Propositions 15 to 19; paragraphs 2.76 to 2.87). It may be noted that, just as the law ranks alimentary obligants within the family in a hierarchy of liability, so it may require to rank competing claims of alimentary dependants in an order of priority. This problem is dealt with at paragraphs 2.88 to 2.90 and Proposition 18.

C. Conditions of liability

1.6. The mere fact of relationship is not enough to give rise to an obligation of aliment. A husband, for example, is not legally bound to aliment his wife unless she needs aliment and he can afford it. Marriage alone does not make him liable. To put the matter another way, an alimentary obligation depends not only on relationship and proximity in the hierarchy of liability but also on other conditions of which the two most important are need on the part of the alimentary claimant and "superfluity of resources" on the part of the person from whom aliment is claimed. These conditions apply to all alimentary relationships with greater or less force, but in some cases there are conditions which, since they have nothing to do with the economic needs and resources of the parties, may be called non-patrimonial conditions.[1] In paragraphs 2.95 to 2.134 in Volume 2, we examine all these conditions of liability.

1.7. In passing, it may be observed that the emphasis on needs and resources is consonant with the modern approach to aliment and in particular with the well documented change in the role of women in marriage, employment and society. Since the husband is no longer invariably the breadwinner, his liability must increasingly depend on the circumstances of the particular marriage rather than the mere fact of married status.

The needs of the alimentary dependant *etc.*

1.8. First, we look at the way in which the courts have assessed needs in determining liability (and quantum). As a general rule, no obligation to aliment arises unless the alimentary dependant is in need: a person who can support herself or himself at the appropriate level or standard of living has no right to aliment from a relative. "The appropriate level" is not fixed by reference to bare subsistence but varies slightly according to the alimentary relationship which is in question. The general rule "no right to aliment without need" has a different emphasis in different situations. As one might expect, in actions for aliment by adult children against parents, or by aged parents against children or between grandchildren and grandparents (which are nowadays very unusual) the rule has been accepted at face value. On the other hand, in actions by wives against husbands the courts have taken such a very flexible view of "need" that in many cases it is doubtful whether it has been regarded as a condition of liability at all. It is as if a wife is entitled

[1] The word "patrimonial" is used in Scots law and continental legal systems to denote what pertains to a person's "patrimony" viz. the totality of his assets and liabilities, in so far as they can be assessed in money.

to be alimented by her husband merely because she is married to him. It may be more realistic to say that the wife's need, or lack of it, has been taken into account as a factor relevant to the quantification of aliment. Certainly, there have been many cases in which wives have obtained awards of aliment although an objective bystander would not have said that they were "in need", in any ordinary sense of the word. The need of the alimentary claimant is a condition of the right to aliment in most of the legal systems which we have examined; and in Proposition 20 (paragraph 2.94) we suggest that it should continue to be a condition of liability in Scots law.

1.9. In assessing the dependant's needs and the obligant's resources for the purpose of determining liability (or quantum), the court will require to consider a number of factors, some of which present problems which we consider at paragraphs 2.95 to 2.134. As regards the alimentary dependant's needs, we consider whether her (or his) earning capacity (i.e. the ability or otherwise to take up gainful employment) should preclude her from claiming aliment; the relevance of social security benefits or charitable aid received by her; how far recourse should be had to her capital for her support in lieu of claiming aliment; the extent to which the reasonable expenses of an appropriate education (including higher or further education or after-school training) are alimentary needs; whether, in assessing a dependant's needs, the courts should be bound by the statutory formula for assessing entitlement to supplementary benefit; and finally whether or how far a wife's expenses of litigation should be treated as alimentary needs for the provision of which her husband is liable. As regards the alimentary obligant's resources, we consider such matters as his (or her) earning capacity (e.g. what he could earn if he was employed); how far account should be taken of social security payments received by an alimentary obligant or unenforceable advantages (e.g. ex gratia allowances) available to him; to what extent he must dig into capital; how far his resources for the purpose of aliment are to be treated as diminished not only by legal obligations to support other legal dependants but by members of his household who (though not legally entitled) are in fact economically dependent on

him; and finally whether the courts should be bound by the formula used to assess the liability of relatives to pay back the cost of supplementary benefit paid to the dependants for whom they are liable.

1.10. We examine only the more difficult problems which can arise in assessing needs and resources. In advancing seven proposals (Propositions 20 to 26), our general approach has been that except where it is necessary to correct anomalies, to remedy defects, or to avoid unrealistic results, the assessment of needs and resources should be left to the discretion of the courts whether they are dealing with an action by a dependant for future aliment, or with an action for reimbursement by a third party for aliment provided to the dependant in the past.

1.11. Non-patrimonial conditions of liability: The right and correlative obligation of aliment depend not only on the economic situation of the spouses but also on certain non-patrimonial conditions. First, as between husband and wife, one spouse is not entitled to aliment unless she is either willing to adhere to (i.e. cohabit with) the other spouse, or has "just cause" for non-adherence. Second, as regards the right of children to be alimented by their parents, there is the question whether the child's rights should terminate when he or she attains a specified age, e.g. majority. Third, there is the question whether, in a claim by a child against his parents (or vice versa), the conduct of the claimant should affect his right to aliment. We discuss these important problems at paragraphs 2.120 to 2.134 and advance tentative proposals in Propositions 27, 28 and 29. In Proposition 29, we suggest that the conduct of the parties should not be taken into account in determining entitlement to aliment though it should be relevant in quantifying the amount of aliment payable (Proposition 48).

D. The measure of support

1.12. Once it is established that an alimentary obligation exists, the next question which arises is, how much has to be provided as aliment, whether in money, or in money's worth by way of support in the home? Consideration of the measure

of support raises such questions as the following: is the alimentary obligant fulfilling his obligation if he provides support at bare subsistence level - just enough to keep the alimentary creditor alive? Or must he provide aliment at a level which is in some way "suitable" in the circumstances: for example enough to keep the dependant at the style of living to which she (or he) has been accustomed?

1.13. Surprisingly Scots law is neither clear nor consistent as to the measure of support to be provided by an alimentary obligant. We explain these problems and examine solutions in foreign legal systems at paragraphs 2.135 to 2.148 and at Proposition 30 we propose simply that the yardstick or measure should be "such support as is reasonable in the circumstances".

E. Methods of fulfilling alimentary obligations

1.14. In the vast majority of families, alimentary obligations are fulfilled by providing support in the family home, - aliment in kind rather than in cash. Therefore, if a husband for example has been adequately fulfilling his alimentary obligation in this way, he will not be liable to reimburse shopkeepers and tradesmen for goods and services supplied to his wife and dependent children for their aliment. What happens, however, where the alimentary dependant (for example, a student or apprentice) wishes a monetary allowance but the alimentary obligant would find it cheaper and easier to give support in his home - aliment in money's worth rather than in money? This question is discussed in paragraphs 2.149 to 2.156 in Volume 2.

1.15. Considerations of respect for the alimentary dependant's liberty lead us to the view that the alimentary obligant should be obliged to pay aliment in money with certain exceptions: see Proposition 31 (at paragraph 2.156). A similar approach is adopted in France and West Germany.

F. Agreements to aliment

1.16. At paragraphs 2.157 to 2.162 in Volume 2, we review the law relating to agreements as to aliment. Although there have been suggestions in various cases that the courts have powers to vary agreements, the law is unclear and unsatisfactory and we suggest that an express statutory power of variation should be conceded to the courts. (Proposition 32).

G and H: Remedies and Procedure

1.17. There is little point in reforming the law on alimentary rights if it is not possible to enforce those rights as effectively and cheaply as possible because of defects or gaps in the remedies which the courts may grant or in the practice and procedure of the courts. We therefore end our examination of aliment with a discussion of these matters (paragraphs 2.163 to 2.225) and raise for comment 31 provisional proposals (Propositions 33 to 63).

1.18. These specific and detailed matters are technical, do not lend themselves to easy summary and on the whole do not raise broad issues of social policy. Those interested will no doubt wish to refer to the above-mentioned paragraphs in Volume 2 for discussion of the specific proposals and we should be grateful for their views.

FINANCIAL PROVISION ON DIVORCE, ETC.
(Part III in Volume 2).

1.19. Part II of our Memorandum concerns the rights and obligations of aliment between the parties to an existing legal relationship. In Part III, we consider the financial provision which should be made for a former spouse by the other spouse on the dissolution of their marriage by divorce. Given that the Court of Session grants over seven thousand divorces every year, the problems raised are of considerable importance. In Part III, we advance for comment and criticism 40 specific proposals (Propositions 64 to 95). Our main aim is to widen, increase and improve the powers of the court to achieve justice as between the parties by adjusting their economic position on divorce; and, indeed, to ascertain what opinions people in Scotland hold as to the meaning of "justice" in this context.

1.20. We draw attention to three main issues on which we should be grateful for comments:

(a) what statutory objective (if any) should the court seek to achieve in awarding financial provision on divorce?
(b) what types of orders should the court be able to make on divorce?
(c) what factors (if any) should the court be specifically directed by statute to take into account in making such orders, (for example, should the conduct of the parties be relevant)?

1.21. The purpose of financial provision on divorce. Scots law does not prescribe any objective at which the court should aim in awarding financial provision. As we indicate at paragraph 3.2, the purpose of financial provision can be seen in various ways:

(a) It may be seen as a penalty for fault. If a spouse commits a matrimonial offence and breaks up the matrimonial home, then, on this view, he or she should pay damages under another name. The damages may well include reparation for the loss of alimentary rights and succession rights. The objection to this view is that, even under the present divorce law, the "fault" of the defender may not be the real cause of the marital breakdown. Responsibility for the failure of a marriage is often extremely difficult to ascertain. Moreover, to

focus on fault is to foster unproductive and vindictive disputes.

(b) It may be seen as a continuation of the obligation of support which existed during the marriage. The objection to this view ("the support view") is that the main object of divorce is, arguably, to terminate the broken marriage and, so far as possible, to end the financial and other relations between the parties

(c) It may be seen as a transitional measure, designed to smooth the path from married status, with its concomitant right to aliment, to self-sufficient single status (a status which in fact will often terminate with remarriage.)

(d) It may be seen as a way of relieving the public purse. If a woman requires support after divorce, then let her former husband pay rather than the taxpayers at large. Again it may be objected that the whole point of divorce is to sever the relationship of husband and wife. The parties become strangers to each other in the eyes of the law, and the desire to spare the public purse is arguably not a sufficient reason for requiring a man to support an impoverished stranger.

(e) Financial provisiom on divorce may be seen as a technique for remedying certain injustices. Even if the relationship of husband and wife is being severed, it has existed in the past and its effect may have been to prejudice one party to the benefit of the other. One spouse, for example, may be left with the children to look after so that, even if aliment for the children is provided in full, his or her employment opportunities are limited. Or one spouse may have given up employment opportunities in the past to look after children so that, even if the children are now self-sufficient, he or she has lost seniority, experience and prospects of career advancement. In some cases, one spouse, by giving up work to look after the house and children, may have lost the chance to acquire property while the other spouse, earning an ever-increasing salary or wage or being increasingly successful in business, has been able to accumulate some capital during the marriage. In so far as this imbalance is not remedied by matrimonial property law, it may be adjusted by financial provision on divorce. On this view ("the adjustment view") responsibility for the break-up of the marriage is irrelevant.

1.22. In recent or proposed legislation in England, the U.S.A., Australia, France and West Germany, the trend has been away from a fault-based approach, and to recognise a continuing obligation of support after divorce limited to cases of necessity, except in France

where the emphasis is on the adjustment of disparities; see volume 2, paragraphs 3.4 to 3.7. We agree with this trend. In our view, the objective of the courts in determining financial provision on divorce should be "to adjust equitably the economic advantages and disadvantages arising from the marriage". (Proposition 64; paragraph 3.7). Thus, financial provision would be awarded to an ex-wife who has to look after the children of the marriage and for the older wife who has interrupted, or never taken up, a career because of the marriage. It could also be used to adjust the spouses' property rights, in particular property acquired during the marriage. But on this view, it would not be used to provide support for a spouse unburdened by children and unprejudiced by the marriage, who is, for some reason unconnected with the marriage, incapable of self-support. The old, the infirm and the unemployed are, on this view, the responsibility of society as a whole and not of a former spouse alone. We would welcome views on this important subject.

Powers of the court to order financial provision on divorce.

1.23. At present, the court can make an order that one spouse should make cash payments to the other in the form of capital sums or periodical allowances. It can also make orders varying marriage settlements, and orders to counter transactions designed to avoid cash payments. In paragraphs 3.8 to 3.67 of Volume 2, we suggest that the court should also have power on divorce:

(i) to order the transfer as between spouses of property of all kinds (including for example the matrimonial home) if the property is freely transferable;

(ii) to regulate the use or occupation of the matrimonial home and perhaps other property;

(iii) to order security to be provided for payment of capital sums or periodical allowances; and

(iv) to grant certain other types of order such as declarators of existing property rights; supplementary orders to make the other powers effective (e.g. by remits to conveyancers to prepare transfers of property, or ordering a party to deliver title deeds); and to vary or recall orders.

We think that these powers are necessary and believe that they will be generally welcomed.

Property transfer orders

1.24. In most divorce cases in Scotland, one or both of the spouses will have a right to the tenancy or ownership of the matrimonial home and to its furniture and fittings. If the home is owned, it will often be subject to a building society loan. There may well be a family car which, together with some of the furniture, may be subject to a hire-purchase agreement. Often the husband (and less frequently the wife) will have accrued rights or expectations to a pension, perhaps under an occupational pension scheme. The scheme may provide that the wife will obtain a widow's pension if she survives as his widow (i.e. is not divorced at his death).

1.25 Under the present law of Scotland, the courts are only empowered to make orders for payment of money, and do not have power to order the transfer of specific items of property from one spouse to the other. We think that the courts should be given such a power (see Propositions 67(a) to 67(i)).

1.26. The matrimonial home: The most pressing problem in practice is the question of who should have the matrimonial home, particularly in times of housing shortage. In Scotland, two thirds of the dwellings are tenant-occupied (1,255,000 or 67.2% of the total housing stock) and of these about four-fifths are in the public housing sector (1,003,000 or 53.7% of the total housing stock): see paragraph 3.23 in Volume 2. "Council house" tenancies are thus of great importance but the court has no power to order a transfer. Normally the lease is on a fortnightly or monthly basis. The conditions of let usually provide that the tenancy may not be assigned without the written consent of the landlord, the local housing authority. For so long as council house tenants do not have security of tenure, the local authority will always be able to terminate the short term lease on giving the required notice in writing so the authority (and not the court) will be, and must remain, masters of the situation. But we think that the court should have power to assign a local authority tenancy on divorce where the local authority as landlord consents. The local

authority would have the right to be heard as well as to give its consent in writing. In the common case where the local authority is reluctant to intervene in a situation of marital breakdown and is happy to follow the lead of the court, this will enable it to indicate that it would have no objection to a transfer of the tenancy between the spouses. In the less common case, where the local authority objected to the transfer, no undesirable conflict would arise between the court and the authority. We would not expect that the authority would or should be inhibited by the court's powers from transferring the tenancy in advance of a court order if the authority thought it right to do so.

1.27. Tenancies of property other than dwellings: It is suggested in paragraph 3.28 that the same policy should apply to tenancies of property other than dwellings and, at paragraphs 3.29 to 3.32, we consider the special problems presented by tenancies of agricultural holdings and crofts and landholders' tenancies (see Proposition 67(d)).

1.28. We also suggest that the court should be able to make an order rendering the transferee-spouse liable, along with the transferor-spouse, for rent arrears accrued at the date of divorce (para. 3.33; Proposition 67(e)).

1.29. Interim transfer of tenancies: At paragraph 3.34, we consider the question whether:

> "the court should have power to make an interim order transferring a public sector tenancy (or perhaps other tenancies) pending disposal of the divorce action. The problem is entwined with the problem of the custody of the children. If one parent has the tenancy of the family home and the other parent cannot give adequate accommodation to the children, the first parent will often be awarded custody of the children. The period between raising of a divorce action and the granting of decree is very often crucial for the determination of 'permanent' custody. If the children are in the actual custody of one spouse during this period (whether under an interim custody order pending disposal of the action or not), then a situation is created which weighs heavily in favour of

> that spouse in the final dispute about custody at the time of the proof. Moreover, since local authorities will sometimes give the tenancy of a council house to the parent who has legal custody, the other spouse may be tempted to contest custody in order to keep the council house. One has therefore a vicious circle: at the interim stage, an award of custody follows the tenancy of the matrimonial home; at the stage of final decree, an award of final custody follows the award of interim custody and the local housing authority's decision as to the tenancy of the matrimonial home follows the award of custody."

To remove these difficulties, we suggest that the court should be able to make orders transferring tenancies pending disposal of the divorce action (paragraph 3.35 and Proposition 67(f)).

1.30. Owner-occupied houses: About one-third of dwellings in Scotland are owner-occupied. At paragraphs 3.36 to 3.38 we argue that the court should have power to transfer the matrimonial home and other heritable property owned by a spouse (Proposition 67(f)). Where the property is subject to a building society loan agreement and a standard security (or other heritable ~~creditor~~ security), the society should have an opportunity to be heard before any order is made for the transfer of the secured property. Otherwise, there is a risk that the loan will be called up under the loan agreement; or the transferor-spouse might cease to make payments and thus subject the heritable creditor to inconvenience at the least. It is for consideration whether the court should be able to make a self-executing vesting order, in lieu of an order requiring that a conveyance be made (paragraph 3.37).

1.31. Miscellaneous property: The special problems presented by goods on hire purchase and other credit agreements, investments and other business interests (see Proposition 67(h)); alimentary liferents (see Proposition 67(i)), and personal and survivors' pensions are considered at paragraphs 3.39 to 3.50. It would, however, be premature for us to comment on the last-mentioned topic in advance of the report of the Occupational Pensions Board who are considering these problems as part of a wider study on equality of status for men and women in occupational pensions schemes.

Power to regulate the use or occupation of property

1.32. There may be cases in which the court is not asked to order a transfer of property but in which it would be desirable to

regulate the use or occupation of property. A wife, for example, may be content that the matrimonial home should continue to stand in the joint names of herself and her husband on condition that she is guaranteed the use of it until her children leave home. There may also be a case for conceding to the courts power to make an interim order excluding a spouse from the matrimonial home for a limited period pending disposal of the action, especially in the light of the recent Report of the Select Committee on Violence in Marriage.[1] We invite comments on the suggestion that the court should be given such powers in divorce actions (Proposition 68 at paragraph 3.52).

C. Factors to be taken into account by the courts in awarding financial provision on divorce.

1.33. At present the court dealing with financial provision on divorce is directed simply to have regard to:

> "the respective means of the parties to the marriage and to all the circumstances of the case, including any settlement or other arrangements made for financial provision for any children of the marriage".

In other legal systems a much more elaborate list of factors is enacted and at paragraphs 3.49 to 3.51 we describe in detail the approach to this problem adopted in England, the U.S.A., Australia and France. Clearly the factors to be taken into account will be affected by the view which the law takes as to the objective of financial provision. The factors relevant on an "adjustment" and a "support" approach[2] would not, however, necessarily be the same. The factors which we suggest as relevant are set out in Proposition 78 (paragraph 3.72). In addition, two other possible factors merit special attention.

1.34. Relevance of marital misconduct: The first of these factors is whether the court should take into account the conduct of the parties and to what effect? There are many possible approaches to this problem and in paragraph 3.73 we confine the discussion to three broad approaches (1) that conduct should be disregarded; (2) that conduct should be relevant only in extreme and unusual case; and (3) that it should be taken into account in the ordinary case. We doubt whether public opinion in Scotland would

[1] (1974-75) H.C. 553-i.

[2] See para. 1.21. above for an explanation of the rationale of these approaches.

think it just if the courts were to disregard conduct totally in determining entitlement or quantum. A young woman who "marries for money", who contributes nothing to the success of the marriage, who cynically indulges in misconduct to induce the husband to sue for divorce, and who then impudently claims financial provision, should not be able to profit from her conduct. Again, if the impecunious husband of a wealthy woman deserts her in middle age for a younger and more attractive woman and then claims a capital sum or property, it may seem unfair that his disloyalty should be ignored by the court. Moreover, to disregard conduct in such cases seems inconsistent with the objective which we have suggested as the purpose of financial provision, namely to adjust equitably the advantages and disadvantages arising from the marriage.

1.35. The second approach, that conduct should be relevant only in extreme and unusual cases, is reflected in England in the rule (stemming from judicial interpretation of the relevant statute) that conduct is relevant only where it is of:

> "a gross and obvious nature, so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice".

An important motive underlying this test is that marital misconduct would then become relevant only in a small minority or residue of cases. The reason is associated with the new English law of divorce, a main object of which was to eliminate or reduce the bitterness involved in a purely fault-based law of divorce. For if misconduct is to be frequently relevant to financial provision, then bitterness would come in by the back door. The rule is based on the assumption that, in the great majority of cases, responsibility for the breakdown of the marriage is shared by both spouses. The justification for the test is not so much equitable considerations as the practical need to prevent judicial post mortems on dead marriages. This policy is in turn associated with the view that, under the new English divorce law, "divorce carries no stigma but only sympathy": it is to be regarded as "a misfortune befalling both spouses" rather than as a punishment of a guilty spouse for a matrimonial offence. Other formulae could be devised to restrict the relevance of conduct to extreme cases. We shall be particularly interested to receive views on the questions raised in Proposition 79 (paragraph 3.76).

1.36. Relevance of need to support second wife and new family: Where a marriage breaks down and the husband sets up house with another woman by whom he has children, it frequently happens that he is unable to support his legal family and his new household. Under the existing law, if his wife raises an action of aliment for herself and the children of the marriage, the court will have regard to his legal obligations, such as his obligation to aliment his illegitimate children, but not to responsibilities unrecognised by law, such as the actual responsibility which he may have assumed to support a woman and her children living in the household with him. A similar problem can arise after divorce with the added complication that the divorced husband can marry his paramour and thus convert his actual responsibility into a legal obligation. There is no reported authority on this question in Scots law, apart from judicial statements to the effect that the first wife comes first. As the Finer Committee pointed out, the effect of supplementary benefit will often be an important consideration in such cases. The law on supplementary benefit looks first to the ex-husband's requirements for the support of his new household, so that even if benefit is being paid to his old family, no attempt will be made to recover from him unless he has a sufficient surplus of resources after meeting the needs of his new family.

1.37. In paragraphs 3.78 and 3.79, we briefly consider the solutions adopted in England, Australia and West Germany. It seems doubtful whether any of these systems has resolved the conflict between the old family's claims and those of the new family. The West German solution inter alia prefers the first wife's claims (i) where she has been left with children to bring up, or (ii) where her marriage had subsisted for a long time. In these cases, it can be argued that the second wife must take the husband as she finds him - with all his existing obligations. Nevertheless, we suspect that, however strong sympathy may be for the first wife in such cases, it will often be unrealistic or futile to place her claims above those of a second wife. At paragraphs 3.80-3.81, we therefore conclude as did the Finer Committee on One-Parent Families that there is no adequate solution to be found within the confines of private law

to the problem of making one limited income support the two families. In many cases, therefore, the question is simply "which family should be supported by the state?" And in many cases the most practical and realistic answer will be to let the husband support his new family, with whom he is sharing his day-to-day life, and to let the state support his old family which it will do more readily and satisfactorily than the unwilling husband. At present the Scottish courts feel bound to give preference to the first family even where they know that to do so is unrealistic. We think that this is unfortunate and in Proposition 80, therefore, we propose that, in assessing the liability of a husband to support his first wife, the courts should be free to take account, in appropriate cases, of the actual responsibilities which he has assumed to the members of his second family whether or not they are legally entitled to be alimented by him.

D. Events subsequent to order

1.38. In paragraphs 3.82 to 3.95, we discuss the effect of the death, remarriage, cohabitation (with a third party) or bankruptcy of an ex-spouse after an order for financial provision on divorce. Our proposals on these topics are set out in Propositions 81 to 85. Problems of the ranking of the claims of an alimentary dependant on the debtor's bankruptcy will be dealt with in the forthcoming Report on Bankruptcy.

E. and F. Procedure and agreements on financial provision

1.39. In paragraphs 3.97 to 3.103, we deal with certain procedural questions arising in divorce actions, and, in paragraphs 3.104 to 3.117, with agreements on financial provision. These are largely technical matters and we summarise certain suggested reforms at Propositions 81 to 95.

G. Financial provision in Separation and Nullity

1.40. In a forthcoming Memorandum on judicial separation we raise the question whether it should be retained in our law or abolished. In Propositions 96 and 97, we suggest that the courts should have powers to award financial provision (apart from aliment) in separation actions. This proposal may be controversial and depends on whether judicial separation should be treated as a lesser form of divorce or not. Less controversial is the question whether on

the annulment of a marriage or purported marriage, the courts should have power to award financial provision:- Proposition 98 (paragraphs 3.121-3.122).

ALIMENT ON DEATH OF LIABLE RELATIVE
(Part IV in Volume 2)

1.41. In Parts II and III, we are primarily concerned with support obligations between living persons. In those Parts, however, we also consider two other situations:

(a) where on the death of an alimentary debtor, his obligation of aliment devolves upon a subsidiarily liable relative;
and

(b) where on the death of an ex-spouse liable under a decree awarding financial provision to the other party to the former marriage, financial provision becomes exigible from the estate of the deceased.

To complete our study of the private law obligation of support, we consider briefly in Part IV the rights conceded to an alimentary creditor, on the death of the liable relative, to claim aliment from the estate of the deceased, or from his trustees or executors, or from the beneficiaries to whom the estate has been distributed. (This has the technical name, aliment jure representationis).

1.42. Our approach to the law of aliment on death is affected by the fact that its reform cannot be considered separately from the "legal rights" which become exigible from the moveable estate of a parent or spouse on his or her death. As we show in Part IV, aliment on death fulfils the function of a safety net underlying the law of legal rights. It enables provision to be made out of a deceased person's estate in a case where he (or she) has defeated his family's claims to legal rights, by investing in heritable property and leaving it to others, or by alienating the bulk of his moveable property during his life.

1.43. Broadly speaking, there are three alternative approaches to reform.

(1) If it becomes clear, upon consultation, that rights to aliment on death are no longer claimed in practice, or that there is a widespread consensus that such a right should no longer be available to alimentary creditors, and that the law of legal rights provides sufficient protection for the wife or children of a deceased spouse, then rights to aliment on death

could be abolished by statute.

(2) Alternatively, it would be legislatively possible (i) to abolish legal rights as a way of making provision for the family of a deceased person; and (ii) to reform the law of aliment on death on the lines of the family provision systems which obtain in England and other Common Law jurisdictions.

(3) As a further alternative, it would be possible to retain both aliment on death and legal rights, with such statutory modifications to either as are considered desirable.

We think that only the first alternative is open for consideration at this stage. The other two are so closely related to legal rights and family property that they can best be dealt with in the context of a full consideration of these branches of the law.

1.44. In paragraphs 4.4 to 4.18 we consider (i) the way in which the law of aliment on death developed; (ii) the uncertainties in the present law; and (iii) the question of abolition or retention. In proposition 99 we conclude that it would be desirable to retain the existing law of aliment on death (paragraph 4.18). We think, however, that it may be appropriate to abolish the closely connected right of a widow to mournings; (Proposition 100, paragraph 4.19).

RELATION BETWEEN PUBLIC AND PRIVATE LAW
(Part V in Volume 2)

1.45. In Part V in Volume 2, the last Part of our Memorandum, we examine a number of issues connected with the relationship between the public law codes on supplementary benefit and the private law on aliment and financial provision, a relationship whose importance has long been strongly emphasised, most recently by the Finer Committee on One-Parent Families. In that part we show that our proposals on private law would tend incidentally towards harmonisation with the public law, but that nothing in the Finer Committee Report would render less necessary our suggested reforms of aliment and financial provision.

SUMMARY OF PROPOSITIONS FOR CONSIDERATION

	PART II - ALIMENT	Para.*
	A. General	
1.	The private law obligations of aliment should continue.	2.9.
	B. The parties to the alimentary relationship	
2.	There should be fully reciprocal obligations of aliment between husband and wife.	2.13.
3.	It should be provided by statute that the reciprocal obligations of aliment between husband and wife exist between the parties to a polygamous marriage.	2.14.
4.	Reciprocal obligations of aliment between a parent and his or her legitimate child should continue to be recognised.	2.16.
5.	For the purposes of aliment, an adopter and his or her adopted child should (as under the existing law) stand to each other exclusively in the position of parent and legitimate child.	2.17.
6.	The alimentary obligation between parent and illegitimate child should be the same as that between parent and legitimate child.	2.18.

*The paragraphs referred to are in Volume 2 of this Memorandum.

		Para.
7.	The liability of the father of an illegitimate child for the mother's inlying expenses should extend to liability for the support of the mother for a period of, say, six weeks before and eight weeks after the birth, with the possibility of an extension of this period (but not beyond, say, four months before or one year after the birth) if the mother cannot work as a result of the pregnancy, the birth, or the need to care for the child.	2.24.
8.	There should be no alimentary obligation between (i) a grandparent and his or her grandchild or (ii) between more remote relatives in the direct line.	2.36.
9.	There should be no alimentary obligation between step-parents and step-children as such.	2.42.
10.	There should be no alimentary obligation between one person and the relatives (other than children) of his or her spouse.	2.47.
11.	There should be no alimentary obligation between brothers and sisters or between other collateral relatives.	2.48.
12.	As under the existing law, the mere fact that a man has had sexual intercourse with the mother of an illegitimate child within the period of possible conception should not render him liable to aliment the child.	2.51.
13.	Unless an obligation to aliment would be unreasonable in the circumstances of the case, a person should be liable to aliment a child, other than a child boarded out with him by a local authority, whom (a) he has accepted into his family, and (b) he has supported as a member of his family for a period of not less than five years. The obligation should be reciprocal.	2.66.

Para.

14. The members of a person's family should continue to be liable to aliment him, and, subject to the effects of an adoption order, the liability should attach to them in the following order:- (1) his spouse; (2) his children (including any ~~step-~~ children whom he has accepted into his family and who are liable under Proposition 13 above); (3) his father and mother; (4) a ~~step-parent~~ PERSON who has accepted him into the family and is liable under Proposition 13 above. — 2.74.

15. The alimentary obligation of a remoter relative should arise not only if the prior relative is unable, through lack of means, to provide support but also if, and for so long as, the alimentary creditor finds it impossible or impracticable, for any other reason, to obtain aliment from the prior relative. — 2.75.

16. The liability of alimentary obligants in the same rank of the hierarchy should in principle be equal, but subject to modification in the light of their resources. — 2.76.

17. The rights of relief of an alimentary obligant, who has paid or provided aliment, against other obligants with the same or a higher rank in the hierarchy of liability, should be left (as at present) to depend on the common law. — 2.86. and Appendix B in Volume 2.

18. The provisions of section 6 of the Conjugal Rights (Scotland) Amendment Act 1861 rendering a judicially separated husband liable only for necessaries provided to his wife should be repealed as anomalous and otiose, the situation being better regulated by the general common law rule under which an alimentary debtor is bound to reimburse a third party for necessaries paid or provided to the alimentary creditor unless the alimentary debtor has been fulfilling his alimentary obligation. — 2.87.

Para.

19. If an alimentary obligant is unable to support all those who are entitled to aliment from him, then, as between those entitled to aliment, his spouse and children (including adopted children, illegitimate children and "accepted" ~~step~~-children) should have a preferable claim to that of his parents and, within the class of spouse and children, those members living in family with the alimentary obligant should have a preferable claim to that of those members not living in family with him. 2.90.

C. Conditions of liability

Need of alimentary claimant

20. A person should be entitled to aliment only if he is unable to provide himself with such support as is reasonable in the circumstances. 2.94.

21. Lack of earning capacity should not be expressly laid down as a condition of a person's entitlement to aliment, and it is sufficient for the law to provide (a) that a person's entitlement to aliment depends on his inability to provide himself with such support as is reasonable in the circumstances (see Proposition 30); and (b) that the courts can take earning capacity into account in quantifying aliment (see Proposition 43). 2.97. and 2.198.

22. In assessing the needs of an alimentary claimant, regard should be had only to his own individual needs, but where the alimentary claimant is a child, then in assessing the child's needs, account may be taken, so far as it is reasonable to do so, of the needs of a person who is looking after the child and living with him in the same household. 2.108.

Para.

23. Where a person entitled to aliment incurs expenses in raising or defending consistorial or other litigation, the expenses should not be treated as necessaries for the provision of which the alimentary obligant is liable. 2.110.

But the expenses of a spouse entitled to aliment from the other spouse should (as under the present law) be treated as necessaries if the spouses are living together and have no contrary interest in the subject matter of the litigation.

Resources of alimentary obligant

24. A person should be liable to provide aliment only if he has a superfluity of resources after providing for his own reasonable needs and those of any relative having a prior claim to aliment. There should be no difference in this respect between the obligation to aliment an illegitimate child and any other alimentary obligations. 2.111

25. In assessing the needs of an alimentary obligant, the courts should have a discretion to take into account the requirements of members of his household who are <u>in fact</u> dependent on him even if they have no <u>legal</u> right to aliment from him. 2.116

26. As in the present law, the courts should have a power but not a duty to follow the supplementary benefits formula in deciding whether an alimentary debtor has a superfluity of resources. 2.117

Non-patrimonial conditions of liability

27. It should no longer be a condition of entitlement to aliment as between spouses that the claimant is willing to adhere or has reasonable cause for non-adherence. 2.125

28. As under existing law, there should be no prescribed age on the attainment of which a child ceases to be entitled to claim aliment from a parent with a superfluity of means. The same rule should apply to legitimate and illegitimate children. 2.131.

Para.

29. If it is accepted that there should be a flexible measure of support ("such support as is reasonable in the circumstances" - see Proposition 30) and if the courts can take conduct into account in quantifying aliment (see Proposition 48), then the conduct of the parties should not be taken into account in ascertaining entitlement to aliment. 2.134.

D. Measure of support

30. The obligation to aliment should be an obligation to provide such support as is reasonable in the circumstances. 2.148.

E. Methods of fulfilling alimentary obligations

31. In the event of dispute as to the method of fulfilling the alimentary obligation, aliment should be provided by means of a monetary allowance: an offer to provide support in the home should be a defence to an action for aliment only where (a) the aliment is being claimed for a minor unmarried child and the alimentary obligant is entitled to custody of the child; or (b) the alimentary obligant is a parent (or remoter ascendant) of the dependant and the court is satisfied that the offer is reasonable in all the circumstances of the case. 2.156.

F. Agreements as to aliment

32. The courts should be given express power to vary, on a material change of circumstances, provisions for aliment in separation agreements or alimentary agreements. 2.162.

G. Remedies

Aliment for pursuer

33. The distinction between actions for interim aliment and actions for permanent aliment between husband and wife should be abolished: it should be competent for a spouse who is entitled to aliment to raise an action for aliment, whether the action would be characterised by the present law as an action for permanent aliment or an action for interim aliment. 2.166.

		Para.
34.	If actions of separation and actions of adherence are retained in our law, then section 5 of the Sheriff Courts (Scotland) Act 1907 should be amended to allow such actions to be raised in the sheriff court even if not accompanied by a crave for aliment.	2.167.

Aliment for children

35.	Statutory provisions dealing with aliment for children should use the term "aliment" and not the term "maintenance" as some of them do at present.	2.173.
36.	The present common law rules and scattered statutory provisions on the award of aliment for children should be replaced by a general provision that any person entitled to, or claiming, the custody of a child, should be entitled to conclude for aliment for the child from anyone who is bound to provide such aliment.	2.174.
37.	In relation to future aliment, the custodier's claim should be regarded as being made on behalf of the child and should be preferred to any other claims for aliment made by or on behalf of the child.	2.175.

Interim aliment pending disposal

38.	Is the law on interim aliment pending disposal of an action satisfactory?	2.176.

Miscellaneous restrictions on the availability of remedies.

39.	A spouse should be able to obtain and enforce a decree for aliment for himself or herself, and any children entitled to aliment from the other spouse, notwithstanding that the spouses are cohabiting. An offer by the defender to provide support in kind in the home should not be a defence to such an action if in fact it was the lack of adequate support which rendered the action necessary.	2.182.

		Para.
40.	Where in any proceedings in any court, aliment for a child has been awarded to a parent or other person entitled to custody or awarded custody, the child should, after the termination of the period for which aliment was awarded but not later than attaining a prescribed age, say majority, be able to intervene by minute in the action to claim a continuation of aliment.	2.185.
41.	There should be no difference in the age limits on awards of aliment for legitimate and illegitimate children: the previous Proposition should apply to both categories alike.	2.185.
42.	As in the present law, there should be no time limits on the raising of actions of affiliation and aliment.	2.186.
43.	Section 3 of the Illegitimate Children (Scotland) Act 1930 should be replaced by a more general provision, applying to all children, which would enable an action (or application) for aliment for a child to be raised or made while the child is in the womb. The action, however, should not be disposed of till after the birth.	2.189.
44.	The courts should be given power to backdate awards of aliment (i.e. to award aliment for a period which has already elapsed).	2.192.
45.	It is for consideration whether the courts dealing with claims for aliment should be given powers to award lump sums, to order security to be provided, or to counteract avoidance transactions.	2.195.
46.	A court hearing an action of separation should have the same range of powers (except that the power to award aliment would take the place of the power to award a periodical allowance) as a court hearing an action of divorce.	2.196.

Para.

47. It should be competent to combine conclusions for custody and aliment with conclusions for any consistorial decree so that the courts are not debarred from making orders as to custody and as to aliment (whether for children, or pursuer or defender) on refusing decree in a consistorial action. 2.197

Quantification of aliment

48. In quantifying the amount of aliment which is payable the court should have regard to the whole circumstances of the case including, subject to Propositions 22 to 25 above, the needs and resources of the parties and, in particular, their earning capacities; provided however, that a party's misconduct should be regarded as a relevant factor only if in the particular circumstances of the case it would be clearly inequitable to leave it out of account. 2.198.

49. As in the present law, there should be no general maximum limits on the amount of aliment which can be awarded. 2.199.

Miscellaneous problems concerning alimentary actions

50. Actions for aliment alone or for affiliation and aliment should be competent in the sheriff's small debt court if the amount claimed for each alimentary creditor does not exceed an appropriate prescribed weekly or other periodic sum. The amount of the prescribed sum should be variable by statutory instrument. Where, however, the relationship in question is denied by the defender then (in a case where the sheriff has jurisdiction to entertain the action, e.g. a declarator of paternity in an action of affiliation and aliment) the case should be remitted to the sheriff's ordinary roll. In other contested cases where the sheriff does not have jurisdiction to determine the action, e.g. the legitimacy of a child, the proceedings should be sisted to enable the appropriate action to be brought in the Court of Session. 2.203.

		Para.
51.	If a claim for aliment is undisputed, the court should not have a discretion ex proprio motu to award a lesser sum than the amount claimed (it being incontrovertible that, in undisputed claims, the court should never have power to award more than the amount claimed).	2.208.
52.	Should the person from whom aliment is claimed be bound to supply details of his capital and income whether he intends to defend or not?	2.209.
53.	Should there be a special procedure to enable a person from whom aliment is claimed to contest only the amount without the need to lodge defences?	2.210
54.	Is there a useful role for means questionnaires in relation to claims for aliment?	2.211.
55.	Interest should no longer run on arrears of aliment.	2.214.
56.	With a view to simplifying the way in which the present law is expressed, there should be one general statutory provision making it clear that a decree for aliment is always subject to variation or recall on a material change of circumstances.	2.216.
57.	The courts should be given powers to backdate variations of aliment and to order reimbursement of excessive amounts received after a material change of circumstances.	2.217.
58.	There should not be any provision for automatic variation of awards of aliment to take account of inflation.	2.218.
59.	It should be made clear that the courts always have power to make interim orders pending the disposal of an application for the variation of aliment payable under a court decree.	2.219.
60.	A simplification is required of the procedure for variation or recall in the sheriff court of orders for aliment or periodical allowance made by the Court of Session.	2.220.

Para.

61. The court should have power, on application, to recall, with retrospective effect, alimentary decrees; and to make interim orders pending the disposal of such an application. 2.221.

62. Events (such as offers to adhere or genuine resumptions of cohabitation) not specified as terminating events in the decree should not automatically affect the decree but should merely ground an application for variation or recall. 2.224.

63. As in the present law, there should be no maximum duration (or maximum initial duration) of decrees for aliment. 2.225.

PART III - FINANCIAL PROVISION ON DIVORCE AND DECLARATOR OF NULLITY

A. General

64. Financial provision on divorce should not be based on the principle that there is a continuing alimentary relationship between the parties. Rather, its purpose should be to adjust equitably the economic advantages and disadvantages arising from the marriage, in so far as this adjustment is not made by other branches of the law. 3.7.

B. Powers of the court

65. Financial provision for children on divorce should continue to be dealt with by means of their continuing right to aliment, as it is at present in the case of divorce on any ground other than incurable insanity. 3.18.

		Para.
66.	On divorce (on any ground) the court should have power to order the payment by either party to the marriage (whether pursuer or defender) or out of any money or estate belonging to him or held for his benefit or, in the event of his predeceasing the other party to the marriage, by his executors, of a capital sum or a periodical allowance, or both, to or for the benefit of the other party to the marriage.	3.19.
67(a).	The court should have power on divorce to order that there shall be transferred by one spouse, or out of his estate, to, or for the benefit of, the other spouse, property which: (i) belongs to the transferor-spouse including any property held for his benefit; and (ii) is capable of alienation by the transferor-spouse or, as the case may be, by a party holding the property for his benefit.	3.20.
67(b).	The court's powers to order transfers of property on divorce should extend to: (i) private tenancies falling under the Rent (Scotland) Act 1971 and (ii) if the landlord consents, private tenancies falling outside that Act.	3.24.
67(c).	The court's powers to order transfers of property on divorce should extend to public sector tenancies, such as local authority, Scottish Special Housing Association and New Town Development Corporation tenancies, but only if the landlord consents to the transfer.	3.27.
67(d).	The Court of Session's power to order the transfer of property on divorce should be exercisable in relation to the tenancy of an agricultural holding or a landholder's tenancy if the landlord consents; and a crofting tenancy, if the appropriate consents have been obtained.	3.32.

		Para.
67(e).	On ordering the transfer of a tenancy on divorce, the court should have power to make an order rendering the transferee-spouse liable, jointly and severally with the transferor-spouse, for the whole or part of any rent arrears accrued at the time of the divorce.	3.33.
67(f).	The court's power to make orders (with the landlord's consent if an assignation of the tenancy is prohibited) transferring the tenancy of (i) a local housing authority dwelling; (ii) a dwelling to which the Rent (Scotland) Act applies; and (iii) possibly other dwellings, should be exercisable by way of interim order during the course of the divorce action. The landlord should have an opportunity of being heard.	3.35.
67(g).	On a conveyance of heritable property by or under a court decree on divorce, (i) there should be no compulsory redemption of feuduty or other ground burdens; (ii) the transferor-spouse would be liable to the transferee spouse for the feuduty or other money payments accrued as at the date of vesting under the decree; and (iii) the statutory duty to give the superior notice of change of ownership would be discharged by the transferor-spouse.	3.38.
67(h).	The court should have power to make an order that a spouse owning shares in a private company should seek the consents required by the articles of association to the transfer of those shares to the other spouse.	3.41.
67(i).	Alimentary liferents should be transferable by order of the court on divorce though not otherwise transferable by the liferenter.	3.42.
68.	The court should have power in a divorce action to make orders (including interim orders pending disposal of the action) regulating the use or occupation of property belonging to one or both of the spouses.	3.52.

		Para.
69.	The court should have power on divorce to order security to be provided for the payment of a periodical sum or capital allowance or both.	3.55.
70.	It should be made clear, by statute or act of sederunt, that the court has power in an action of divorce, to grant a declarator concerning the property rights of the spouses and any other relevant patrimonial matters.	3.56.
71.	In an action of divorce in which application is made for (i) an order awarding a capital sum, or the transfer of heritable property, or the provision of security, or (possibly) (ii) an award of periodical allowance or aliment, it should be competent to obtain warrant to arrest, or to inhibit alienation of heritable property, on the dependence of the action notwithstanding the absence of special circumstances. The statutory immunity of pensions, wages and other earnings from arrestment on the dependence should continue. It is for consideration (a) whether the procedure for obtaining the warrant should be by motion intimated to the other spouse; and (b) whether it should be competent to obtain a warrant for inhibition restricted to specific heritable property or a warrant for arrestment restricted to funds specified in the warrant.	3.59.
72.	The court should have power to set aside, vary, or interdict transactions if satisfied that they, whenever made, were or are intended to defeat a claim for financial provision (including a transfer of property) on divorce. It is for consideration whether there should be a presumption that a settlement or disposition of property was so intended if it was made within three years before an application for financial provision and in fact had the effect of defeating a claim for financial provision.	3.59.
73.	It should be made clear by statute that the court's power to set aside avoidance transactions may be exercised by decrees of reduction, decrees for payment of money, decrees ordering the transfer of property, or otherwise as may be appropriate.	3.60.
74.	It should be made clear by statute that the court can impose terms and conditions in exercising any	3.62

Para.

of the above powers.

75. The court should have, and should be clearly seen to have, adequate incidental powers (including power to remit to a conveyancer, defer decree of divorce, or direct the clerk of court to execute deeds) to make the exercise of its principal powers on divorce effective. 3.63.

76. The court should have power to vary or recall (a) an order for a periodical allowance on divorce (as at present) and (b) an order regulating the use or occupation of property. Other orders for financial provision on divorce should not be subject to variation or recall unless made on an erroneous basis, because of the withholding of material facts from the court or other sufficient reasons. 3.66.

77. The court dealing with an application for variation of a periodical allowance should be given power to back-date a variation and order repayment of amounts overpaid. 3.67.

C. Factors to be taken into account by the court

78. The court dealing with financial provision on divorce should be directed to have regard to all relevant factors including, in particular:- 3.72.

(a) the property of the spouses at the time of divorce;

(b) the possible loss by a spouse of pension rights;

(c) the extent to which a spouse has been directly or indirectly prejudiced in his or her career or employment, or prospects of employment, by the marriage;

(d) the rights and obligations of a spouse in relation to the aliment, custody or upbringing of children of the marriage (including any ~~step~~-children accepted into the family during the marriage); and

Para.

(e) the ability of a spouse to make the financial provision claimed by the other spouse.

79. (a) Should the court regard the conduct of a spouse as a relevant factor in awarding financial provision on divorce? (b) If so, should the conduct of a spouse be relevant in the ordinary case or only in unusual and extreme cases (for example, where the spouse has by his or her conduct substantially contributed to the breakdown of the marriage in circumstances where the other spouse has not substantially contributed to the breakdown)? 3.76.

80. In assessing the ability to pay of the spouse who is being asked to make a financial provision on divorce, the court should have an unfettered discretion to take into account the requirements of members of his new household, whether or not they are legally entitled to be alimented by him. 3.81.

D. Events subsequent to order

81. It should be made clear by statute (a) that the court's powers to make, and to vary, an order for financial provision are exercisable after the death of the payer; (b) that an application for variation is competent on the death of the payer even if there is no other change of circumstances; and (c) that the variation may take the form of an order against the payer's executors even if no reference has been made to them in any earlier proceedings. 3.85.

82. It should be made clear that unless otherwise stated in the decree, an order for payment of a financial provision on divorce is binding on the payer's executors after his death. 3.86.

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83. Although the remarriage of the payee should normally terminate an order for payment of a periodical allowance, the court should have power, in exceptional cases and if satisfied that injustice would otherwise result, to order that the allowance is to continue or revive after remarriage. The court's power should be exercisable either on making (or varying) the original order or on an application by the payee for revival of the order after remarriage. 3.90.

84. No provision should be made for the suspension or termination of a periodical allowance on the payee's cohabitation with another person as man and wife. 3.91.

85. A transfer of property between the parties to a former marriage should not be immune from challenge at common law as a gratuitous alienation by reason only of the fact that the transfer was made by or under an order of the court on divorce; but the Bankruptcy Act 1621 (under which alienations to "conjunct and confident persons" are presumed in certain circumstances to be gratuitously made by an insolvent) should not apply to property transfers under such an order. 3.94.

E. Procedural questions

86. Either the pursuer or the defender should be able to apply for an order for financial provision on divorce. 3.97.

87. Applications for a financial provision (of any kind) on divorce should in principle be competent at any time after the commencement of the action of divorce, but rules of court might require the leave of the court to be obtained if the application is presented outwith certain time limits. 3.98.

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88. The court's powers in relation to financial provision (including property transfers) on divorce should in general be exercisable on or after granting decree of divorce but its powers 3.99.

(a) to grant declarator of property rights,
(b) to counteract avoidance, and
(c) to make orders incidental to the effective exercise of its main powers

should be exercisable at any time after the commencement of the action of divorce.

F. Agreements

89. It should continue to be possible for the parties to a marriage to enter into agreements relating to financial provision on divorce. 3.110.

90. It should continue to be possible for a spouse to renounce his or her right to apply to the court for financial provision on divorce. 3.111.

91. There should continue to be no requirement that agreements on financial provision should be referred to the court for approval. 3.112.

92. The court should be given powers to vary the terms of an agreement on financial provision on divorce but these powers should be exercisable only if the agreement expressly so provides. 3.113.

93. The court should be given power to reduce or set aside agreements on financial provision on divorce which are altogether unfair and unconscionable. 3.114.

94. For the avoidance of doubt it should be provided that in so far as an order for financial provision is made, on the request of the parties, in terms of a joint minute, the joint minute should thereafter be regarded as merged in, or superseded by, the court's decree and should cease to have contractual effect. 3.115.

Para.

95. For the avoidance of doubt it should be declared by statute that section 25 of the Succession (Scotland) Act 1964 abrogated the old common law rule whereby a person in whose favour a decree of divorce was granted could claim provisions under his marriage contract trust as if the other spouse had died. 3.116.

G. Separation and nullity

96. The court granting a decree of divorce to a spouse who has already been judicially separated, should have power to vary or recall orders for financial provision made in connection with the judicial separation, but so far as not varied or recalled, such orders should continue to have effect after the divorce, any order for aliment being deemed thereafter to be an order for periodical allowance after divorce. 3.117.

97. On a genuine resumption of cohabitation between spouses who have been judicially separated, the court should have power to make such orders as it thinks fit to vary or recall any orders for financial provision made in connection with the judicial separation. 3.118.

98. A court granting a decree of declarator of nullity of marriage should have the same powers in relation to financial provision as a court granting a decree of divorce. 3.121.

PART IV - ALIMENT ON DEATH OF DECEASED RELATIVE

99. It would be desirable to retain the existing law allowing claims for aliment out of the estate of a deceased person or from his trustees or executors, or from the beneficiaries to whom his estate has been distributed to the extent of their enrichment. 4.18.

100. The widow's right to mournings out of her deceased husband's estate (and any similar rights enjoyed by other relatives) should be abolished. 4.19.