SCOTTISH LAW COMMISSION

VOL 4: Part III – Financial Provision on Divorce and Declarator of Nullity

MEMORANDUM No: 22 (cont'd.)

FAMILY LAW

ALIMENT AND FINANCIAL PROVISION

31 March 1976

PART III

FINANCIAL PROVISION ON DIVORCE AND DECLARATOR OF NULLITY

A. General

3.1. Introductory. In Part II of this Memorandum, we were concerned with rights and obligations of aliment between the parties to an existing legal relationship. In this Part we turn to the financial provision which should be made for a former spouse on the dissolution of a marriage by divorce. We have suggested earlier that, if separation actions are retained in our law, the court might have broadly the same powers as a court hearing an action of divorce.[1] So the discussion in this Part is relevant also to the lesser remedy, subject to the special considerations which we discuss in paragraphs 3.117 to 3.119. We also deal in this Part with financial provision on declarator of nullity of marriage.[2] We do not, however, discuss financial provision on the dissolution of marriage on presumed death, as the somewhat special problems which arise have been covered in our Report on Presumption of Death.[3] In a sense, the phrase "financial provision on divorce" is too narrow since it tends to connote only cash payments. In this Part, we deal also with transfers of property on divorce and are concerned with the whole question of the adjustment of the patrimonial position of the parties on divorce. The expression "financial provision" is, however, familiar and we shall continue to use it in a wide sense - in particular as including, where the context so requires, provision by way of transfer of property.

Purpose of financial provision on divorce.

3.2. Various views may be taken as to the purpose of financial provision on divorce.

(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

---

[1] Para. 2.196. above.

[2] Paras. 3.120. and 3.121.

[3] (1974) Scot. Law Com. No.34.

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 provision 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 the 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 may become less important.

3.3. Present law. Scots law does not prescribe any objective at which the court should aim in awarding financial provision on divorce. Except in the case of divorce for incurable insanity, only the pursuer can apply (which introduces the fault principle at the outset) but, in dealing with the application, the court is simply empowered to make:

> "such order, if any, as it thinks fit, having 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".[4]

Nor does any clear objective emerge from the recommendations of the Mackintosh Committee and the Morton Commission which inspired the present rules although both assumed that only the innocent spouse should be entitled to financial provision on divorce,[5] and the latter body expressed the view, in relation to English law, that the purpose of financial provision for a wife on divorce was "to provide a substitute for the support to which she would have been entitled had the marriage continued and, in the public interest, to prevent her from being thrown upon the community for support."[6] The Scottish cases do not furnish any clear statement of purpose either, although it is clear that conduct is not regarded as irrelevant.[7]

---

[4] Succession (Scotland) Act 1964, s.26(2).

[5] See Report of the Mackintosh Committee on the Law of Succession in Scotland (1950) Cmd. 8144, pp. 20-21; Report of Royal Commission on Marriage and Divorce (1956) Cmd. 9678 paras. 499-500, 553-559, summarised in Clive and Wilson, op. cit. pp. 540-541.

[6] Cmd. 9678 para. 476. See also paras. 499-500 for the use of the public purse argument in relation to the ex-husband's right to financial provision on divorce.

[7] Cf. Thomson v. Thomson 1966 S.L.T. (Notes) 49; Hogg v. Hogg 1967 S.L.T. (Notes) 91; Murray v. Murray 1967 S.L.T. (Notes) 103; Gray v. Gray 1968 S.C. 185.

3.4. Comparative survey: English law does contain a statement of objectives. It is the duty of the court,

> "to have regard to all the circumstances of the case - including [certain specified matters such as the means and needs of the parties and the duration of the marriage] and so to exercise [its] powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other"[8]

(our italics). The phrase "having regard to their conduct" limits the words "just to do so",[9] and this rule would seem to require the court to place a young woman who marries a millionaire and who is deserted by him three weeks later in the financial position in which she would have been if the marriage had not broken down, even if she is not pregnant and has not interrupted her career. If she has been entirely innocent there is no ground for saying that "having regard to their conduct" this result would be unjust. Yet it seems an absurd result.[10] No doubt the courts would avoid it, but they could do so only by ignoring the statutory objective. Even in less extreme cases the principle enshrined in section 25(1) may be regarded as "objectionable and outmoded" and as:

> "based on an out-dated concept of marriage and the role of women in society: it is no longer true that a respectable woman can have no gainful occupation and must depend on support for her husband or father."[11]

Where the parties have small means the objective of preserving the financial status quo becomes unrealistic. In such cases -

> "it will rarely, if ever, be 'practicable' to place the parties in the financial position in which they would have been if the marriage had not broken down."[12]

---

[8] Matrimonial Causes Act 1973, s.25(1). It may, of course, be impossible to say what the parties' financial position would have been if the marriage had not broken down. Cf. Lombardi v. Lombardi [1973] 3 All E.R. 625 (where the husband's increase in fortune after the breakdown of the marriage was due largely to the assistance of the other woman).

[9] Cf. H v H [1975] 1 All E.R. 367 per Sir George Baker P. at 371 ("justice must be done in all cases and not only in those in which conduct is relevant. That is a matter of construction.")

[10] Cf. Krystman v. Krystman [1973] 3 All E.R. 247.

[11] Cretney, "The Maintenance Quagmire" (1970) 33 M.L.R. 662 at p. 666.

[12] Report of the Finer Committee on One-Parent Families, Cmnd 5629, 1974, para. 4.59.

In America, the Uniform Marriage and Divorce Act, approved by the United States National Conference on Uniform State Laws in 1970, and now in force in several states of the U.S.A., makes it clear that punishment for fault is not the objective of financial provision on divorce: in apportioning property and awarding maintenance on divorce, the court is specifically directed to proceed "without regard to marital misconduct."[13] The Act contains no express positive statement of objectives but its provisions seem to imply that the objectives are seen as (a) an equitable distribution of property and (b) (subsidiarily) provision of support for an ex-spouse who is unable to support himself. In relation to support, the approach seems to be to recognise, but strictly limit, a continuing alimentary relationship after divorce. Thus, section 308 of the Uniform Act provides that the court is to grant a maintenance order for either spouse:

> "only if it finds that the spouse seeking maintenance
>
> (1) lacks sufficient property ,... to provide for his reasonable needs; and
>
> (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian [should] not be required to seek employment outside the home".

Similarly, in Australia, the Federal Family Law Act of 1975 recognises, but limits, a continuing obligation of maintenance after divorce. Section 72 provides that:

> "A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so if, and only if, that other party is unable to support herself or himself adequately, whether by reason of having the care or control of a child of the marriage who has not attained the age of 18 years, or by reason of age or physical or mental incapacity for appropriate gainful employment or for any other adequate reason having regard to any relevant matter referred to in sub-section 75(2)."

The factors to be taken into account by the court under sub-section 75(2) in deciding what constitutes adequate support do not include conduct.

3.5. Before 1975 the French law on financial provision on divorce placed great emphasis on fault. Only the spouse obtaining the divorce could obtain an award of an alimentary allowance after divorce and the court was expressly empowered (by a law of 1941) to award damages against the guilty spouse for the material or moral prejudice caused by the dissolution of the marriage.[14] The law of 11 July 1975, reforming the divorce

---

[13] Uniform Marriage and Divorce Act Ss. 307 and 308 as amended in 1973.

[14] Code civil art. 301 (before 1975).

law, distinguishes between two situations. First, there is the case where divorce is granted on the ground of a breakdown of married life, without the consent of the defender. In this situation, the underlying notion is that there should be no prejudice to an innocent spouse divorced against his or her will. Accordingly the law provides that the pursuer remains bound to support the divorced spouse, support taking the form of an alimentary allowance which is modifiable in the light of the needs and resources of the parties and which ceases on the remarriage or "cohabitation" of the recipient.[15] The alimentary allowance can be wholly or partly replaced, if the pursuer's means are sufficient, by a capital sum, but this is seen as a commutation of payments intended for support and if it proves insufficient for this purpose the recipient can ask for it to be supplemented by an alimentary allowance.[16] Second, there is the case of divorce on the ground of fault or mutual consent. In this situation the new law provides that divorce puts an end to the duty of support, but that one spouse can be ordered to pay to the other a "compensatory payment" designed to make good, so far as possible, any disparity which the breakdown of the marriage causes in the respective living conditions of the spouses.[17] The compensatory payment is fixed in accordance with the needs of the payee and the resources of the payer, taking account of the situation at the time of the divorce and its likely evolution in the foreseeable future.[18] The compensatory payment is not seen as being alimentary in purpose and is not variable, even on an unforeseen change of circumstances, unless failure to vary would have consequences "of an exceptional gravity" for one of the spouses.[19] It takes the form of a capital payment when the payee's means so permit[20]. If his property is insufficient for a capital payment, the compensatory payment takes the form of a periodical allowance[21] or a secured periodical allowance[22]. The emphasis in these provisions is on the adjustment of disparities, rather than on a continuing obligation of support. There is still, however, some stress on fault. If divorce is granted on the ground of the fault of only one spouse, that spouse can still be found liable in damages for the material or moral prejudice caused to the other spouse by the dissolution of the marriage.[23] Moreover, such a "guilty" spouse has in general no

---

[15] Arts. 281-283 (new i.e. as substituted by law of 11 July 1975).

[16] Art. 285 (new).

[17] Art. 270 (new).

[18] Art 271 (new).

[19] Art. 273 (new).

[20] Art. 274 (new).

[21] Art. 275 (new).

[22] Art. 277 (new).

[23] Art. 266 (new).

right to a compensatory payment, although exceptionally he can obtain an indemnity if, taking into account the duration of the consortium and the help given to the other spouse in his profession, it would be manifestly unjust to refuse him all financial compensation on divorce.[24] Taken in its entirety the new French law is thus a mixture of support-based, adjustment-based and fault-based principles.

3.6. In West Germany, the project for a first Marriage and Family Law Reform Act concluded by the West German government on 28 March 1973 also contains carefully thought out proposals on financial provision after divorce.[25] These depart radically from the fault-based principles of the old law. At first sight they seem to emphasise the need to remedy particular injustices caused by the marriage. Thus the reshaped article 1571 of the BGB gives the divorced spouse a claim for support against the other spouse if he or she has the care or upbringing of a child of the union and, for this reason, cannot be expected to take up a gainful occupation. The reshaped article 1576 gives the divorced spouse a claim for support if inter alia he or she is resuming a training broken off because of the marriage. And the new article 1577 gives the divorced spouse a claim for support if he or she has lost the chance of acquiring pension rights through not being employed, or not being fully employed, during the marriage.[26] However, the project goes far beyond the mere remedying of disadvantages resulting from the marriage. It gives the divorced spouse a claim for support if, for example, he cannot work because of age or infirmity (§§ 1572 and 1573) or if he cannot find suitable employment (§ 1574). The principle of the new law is that a divorced spouse has a claim for support against the other if he cannot support himself.[27] Fault is irrelevant, except that article 1580 enables a claim for support to be refused if its enforcement would be grossly unjust for certain specified reasons.[28] The new law will look to the economic and social situation of the spouses, rather than to fault. Its philosophy is that the economically stronger ex-spouse has to help the economically weaker.[29] In short,

---

[24] Art. 280-1 (new).

[25] Gesetzentwurf der Bundesregierung enstes Gesetz zur Reform des Ehe-und Familienrechts (1. Ehe RG), Bundesrat Drucksache 260/73 (13/4/73).

[26] This claim arises only if the disadvantage is not made good by the proposed new rules on equalisation of pension rights.

[27] § 1570.

[28] The reasons are:-
(1) short duration of the marriage (but this does not apply if the claimant cannot work because he or she has the care or upbringing of a child of the union);
(2) crime or serious deliberate offence by claimant against other spouse or near relative of his;
(3) claimant has wantonly brought about his own need;
(4) claimant has been guilty, during the marriage, of gross and prolonged dereliction of his obligation to contribute to the support of the family.

[29] See the statement by Bundesjustizminister Jahn in the preface to the Ministry of Justice's publication of January 1974 on Reform des Ehe-und Familienrechts at p.4.

although it makes specific provision for the remedying of particular disadvantages arising from the marriage, it seems in the end of the day to recognise that an obligation of support, based on need rather than fault, survives even after the dissolution of the marriage.

3.7. Our proposals: The above survey shows that in the recent reformulations of financial provision on divorce in several countries the trend has been away from a fault-based approach. Except in France, where the stress is rather on the adjustment of disparities, the tendency has been to recognise a continuing obligation of support even after divorce but to try to limit this to cases of necessity. Little sympathy is shown for the self-sufficient former wife tempted to live on an allowance from her ex-husband for the rest of her days. But special provision is made for the spouse left with children to look after and for the older spouse. We find ourselves in agreement with the general trend of these developments but it seems to us that there is potential tension and inconsistency between emphasising support on the one hand and a fair deal for the child-minding or elderly spouse on the other. Our preliminary view is that 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. (Proposition 64). Thus, financial provision could be used to provide support for the spouse who has to look after the children of the marriage and for the older spouse who has interrupted, or never taken up, a career because of the marriage. It could also be used to adjust the spouses' rights in property acquired during the marriage, in so far as this is not catered for by matrimonial property law. But on this view, it could 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. If there is no question of child custody, a man who has worked throughout his marriage, but who happens to

become unemployed just before, or just after, the divorce, should on this view have no claim for support against his wife, however wealthy she may be. Similar considerations should apply if the sex roles are reversed. Two situations may be contrasted by way of further illustration. A woman who married at a time when, or in a milieu where, married women were not expected to be employed and who is now divorced thirty years later at the age of 55 should have a claim for financial provision against her former husband if their respective financial situations make this appropriate. Her lack of self-sufficiency is attributable to the marriage. But a young woman who continues her career and who is divorced, childless, a few years after her marriage should have no claim to financial provision. She has suffered no disadvantage as a result of the marriage. Moreover, the position with regard to financial provision should not change if she happens to become disabled a year after the divorce. Our preliminary view, in brief, is that financial provision on divorce should be concerned with the equitable winding up of a terminated relationship. We recognise, however, that this is not a matter which everyone would wish to approach in the same way. The law on financial provision must reflect widespread feelings of what is right and proper, and it may be that many people would consider it right and proper that former spouses should be bound to support each other in case of need, even if the need is not the direct or indirect result of the marriage. We would welcome views on this question.

B. Powers of the court

Present law

3.8. At present, the court can make with regard to an application for financial provision on divorce, on any ground other than incurable insanity, "such order, if any, as it thinks fit."[30] This seemingly unrestricted power is, however, limited in practice by the fact that (leaving aside variation and anti-avoidance provisions) the pursuer can apply only "for an order for the payment to him by the defender or, in the event of the defender predeceasing him, by the defender's executor, of

---

[30] Succession (Scotland) Act 1964, s.26(2).

a capital sum or a periodical allowance or both."[31] The statutory provisions do not specifically allow the pursuer to ask the court to order security to be provided for the payment of a periodical allowance or capital sum, or to order transfers of property, or to order payments to be made to a third party for the benefit of a spouse. In the case of divorce for incurable insanity the court has power to

> "make such order, if any, as having regard to the respective means of the parties it shall think fit, for the payment by either party to the marriage to which the action relates, or out of any estate belonging to him or held for his behoof, or, in the event of his predeceasing the other party to the said marriage, by his executors, of a capital sum or an annual or periodical allowance to or for the behoof of the other party to the marriage or of any children of the marriage."[32]

This provision does not authorise orders for the transfer of property, but it does make it clear that payment can be made to, or for the benefit of, either party. The most recent Divorce (Scotland) Bill contained a provision on roughly similar lines.[33]

3.9. Comparative survey: In England, the court has power (in addition to powers in relation to periodical payments, lump sum payments and payments to or for children) to make the following orders:-

(a) "an order that either party to the marriage shall secure to the other to the satisfaction of the court such periodical payments, for such term, as may be .... specified";[34]

(b) "an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion";[35]

---

[31] Ibid., s.26(1)(a).

[32] Divorce (Scotland) Act 1964, s.7.

[33] Divorce (Scotland) (No 2) Bill (1975-76) [Bill 23] introduced by Mr Iain MacCormick M.P. and ordered to be printed 17 December 1975.

[34] Matrimonial Causes Act 1973, s.23(1)(b).

[35] Ibid. s.24(1)(a), subject to the age restrictions re. children in s.29 Cf. Hunter v. Hunter [1973] 3 All E.R. 362 (wife given half share in equity of matrimonial home - "the case illustrates how, even in a situation where money is scarce, the power to transfer and distribute property ... can be of great assistance"); Hector v. Hector [1973] 3 All E.R.1070 (house belonging to husband and wife in equal shares transferred to wife alone).

(c) "an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them."[36]

3.10. In Australia, the Federal Family Law Act 1975 contains an even more comprehensive range of powers, many of which were found also in earlier Australian legislation. Section 78 gives the court power to declare the title or rights, if any, that a party has in respect of property (the order being binding on the parties to the marriage but not on third parties) and section 79(1) gives the court power to make "such order as it thinks fit altering the interests of the parties in the property, including an order requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage, such settlement or transfer of property as the court determines." Then section 80 gives the court a battery of general powers: it provides that the court "may do any or all of the following:-

(a) order payment of a lump sum, whether in one amount or in instalments;

(b) order payment of a weekly, monthly, yearly or other periodic sum;

(c) order that payment of any sum ordered to be paid be wholly or partly secured in such manner as the court directs;

(d) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the one performance of an order;

(e) appoint or remove trustees;

(f) order that payments be made direct to a party to the marriage, to a trustee to be appointed or into court or to a public authority for the benefit of a party to the marriage;

(g) order that payment of maintenance in respect of a child be made to such person or public authority as the court specifies;

(h) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for life or during joint lives or until further order;

(i) impose terms and conditions;

(j) make an order by consent;

---

[36] Ibid s.24(1)(b).

(k) make any other order (whether or not of the same nature as those mentioned in the preceding paragraphs of this section) which it thinks it is necessary to make to do justice; and

(l) subject to this Act, make an order under this Part ["Maintenance and Property"] at any time before or after the making of a decree under another Part [e.g. Part V on "Dissolution and Nullity of Marriage"].

3.11. The Uniform Marriage and Divorce Act of the United States contains no such extensive list of powers. It simply directs the court to "equitably apportion" property between the spouses[37] and empowers the court to grant "a maintenance order."[38]. It does, however, contain two further powers of some interest. First, it enables the court to order that maintenance payments be made to the clerk of court (or other suitable court official) "as trustee for remittance to the person entitled to receive the payments."[39] If the payer falls into arrears then, after due notice, the clerk of court certifies the amount of arrears to the prosecuting attorney who "shall promptly initiate contempt proceedings against the obligator."[40] This provision, it will be noticed, is not designed merely to provide a machinery for collection. It has teeth. It is modelled on provisions in force in several states and "is intended to make use of the state's remedy of civil contempt as an effective device for the enforcement of support and maintenance."[41] Second, the Act empowers the court to order the person obliged to pay maintenance "to make an assignment of a part of his periodic earnings or trust income to the person entitled to receive the payments."[42] The employer or trustee is then bound to withhold the amount specified in the assignment and transmit it to the person specified in the order (under deduction of a small sum as reimbursement for costs). This provision is modelled on similar provisions in Wisconsin and California[43]. Like the previous one, it is an interesting attempt to fuse decree and diligence.

3.12. Compared with these provisions from the English-speaking world the powers given to the court by the new West German family law reform project seem relatively limited. A monthly periodical allowance is the normal type of financial

---

[37] §307, as amended in 1973 so as to provide alternative versions for separate property and community property states.

[38] §308 as amended in 1973.

[39] §311(a).

[40] §311(d).

[41] See Commissioners' Note to §311.

[42] §312.

[43] See Commissioners' Note to §312.

provision on divorce, but the claimant can seek a capital sum instead if there is good reason for this and if it would not unfairly burden the other spouse.[44] The spouse paying periodical allowance has to provide security on demand unless he would be unfairly burdened by doing so: the amount for which security is to be provided will not normally exceed two years' periodical allowance.[45] In France, the law of 11 July 1975 gives the court power, on divorce on the ground of fault or mutual consent, to decide whether a "compensatory payment" out of capital should take the form of

(1) a sum of money, payable at once or in three annual instalments,

(2) the transfer of moveable or immoveable property in liferent,

(3) the transfer of revenue producing assets to a third party charged with paying the income to the payee spouse.[46]

The court can also order security to be provided for the payment of a periodical allowance, or a capital sum in instalments,[47] and can make the divorce conditional on the effective transfer of capital or provision of security.[48]

Only one set of rules, whatever ground of divorce

3.13. The powers which we propose the court should have to deal with financial provision on divorce, are sufficiently wide to render any distinction between divorce on the ground of incurable insanity and divorce on other grounds unnecessary. They are also sufficiently wide to apply to any new "breakdown" grounds which may be introduced. They are not, however, meant to be contingent on the introduction of such grounds. In suggesting that there should be only one set of rules whatever the grounds of divorce, we do not wish to pre-judge the question whether divorce on, say, a five year separation ground could be refused if it would cause grave financial hardship to the defender. That question belongs more properly to a discussion of the grounds of divorce.

---

[44] Entwurf eines Ersten Gesetzes zur Reform des Ehe-und Familienrechts (1. Ehe RG) (28 Marz 1973) §1585(2).

[45] Ibid. §1585a.

[46] Code civil, art. 275 (new).

[47] Art. 277 (new).

[48] Art. 275 (new).

3.14. We discuss in the following paragraphs,[49] after considering whether there should be power to order financial provision for children on divorce, the following powers:-

(a) to order the payment of a periodical allowance or capital sum;

(b) to order the transfer of property or interests in property (including tenancies);

(c) to regulate the use or occupation of property;

(d) to order security to be provided;

(e) to grant declarator of property rights;

(f) to counter avoidance transactions;

(g) to vary marriage settlements;

(h) to make orders under the above powers subject to terms and conditions;

(i) to make orders (such as orders remitting to a conveyancer, or directing the clerk of court to execute deeds) incidental to the effective exercise of the above powers; and

(j) to vary and recall certain orders.

Financial provision for children on divorce

3.15. As we have seen,[50] the court granting decree of divorce on the ground of incurable insanity has power under the present law to order payment by either party to the marriage, or his executors, of a capital sum or an annual or periodical allowance "to or for the behoof of ... any children of the marriage."[51] There is no such power when the divorce is on grounds other than incurable insanity. The English and Australian divorce courts have, as noted above, powers to order transfers of property or settlements for the benefit of children.[52]

---

[49] Paras. 3.19. et seq.

[50] Para. 3.8. above.

[51] Divorce (Scotland) Act 1964, s.7.

[52] Paras. 3.9. and 3.10. above.

Although in France, as in Scotland, the general rule is that divorce does not affect the alimentary relationship between parent and child,[53] the law of 11 July 1975 enables an award of aliment for a child to be replaced, in whole or in part, by the transfer of property in usufruct, by an annuity charged on income producing assets, or by the purchase of an indexed annuity from an accredited organisation[54]. It will be seen that these powers are really directed to providing a secured aliment for the child rather than an outright transfer of capital.

3.16. In favour of powers to order payments or transfers of capital to or for the benefit of children, it can be argued that divorce represents the breaking up of a family, not just a marriage. The children are the real victims. If anything can be done to ease their future by means of a financial provision then the courts should have adequate powers to do it. Against such powers it can be argued that the legal link between parent and child is not broken by divorce.[55] The child retains his alimentary and succession rights against his parents. Why should the child of divorcing parents obtain a capital sum or a transfer of shares or an interest in a trust fund, when the child of an unbroken family, or of a de facto broken family, or of parents who have not married each other, has no such opportunity? In considering the English and Australian examples, it must be remembered that the child has no independent right to aliment in those systems. The object of financial provision on divorce should be to adjust the patrimonial positions of the parties to the marriage, not to make accelerated capital provision for children.

3.17. The English Law Commission did not intend that the court's powers:

> "should be exercised so as to transfer property to children (as opposed to settling it for their benefit) except as an alternative to a lump sum payment where this

---

[53] Code civil, art. 286 (new).

[54] Art. 294 (new).

[55] Cf. article 286 (new) of the French Code Civil.

> would be an appropriate way of providing for the maintenance, education or advancement of the children. There may be circumstances in which a transfer of securities would be more advantageous and businesslike than a payment in cash. In general, however, if children are to benefit from property adjustments that should be by means of a settlement, not an out-and-out transfer."[56]

Even with regard to settlements on children on divorce a certain amount of caution has been recognised as necessary. In Chamberlain v. Chamberlain[57] the lower court had awarded maintenance to the children of the marriage and had ordered that the house which the parties held in joint names should be settled on the wife for life and should then go to the children in equal shares absolutely. The house was the parties' only asset and both were in financial difficulties. The Court of Appeal thought that this was wrong.

> "The effect of that order on husband, wife and children can be summarised as follows. The husband lost his one capital asset, his interest in the house. The wife in a sense lost her capital asset, because her share of the house, which had been in her absolute ownership subject to a trust for sale, became a life interest only, and the capital asset would ultimately become the property of the three children in equal shares .... There are no circumstances in this case to suggest that any of these children had special circumstances that required them to make demands on their parents after the conclusion of their full-time education. The capital asset, the house, was acquired by the work and by the resources of their parents, and, provided their parents meet their responsibilities to their children as long as their children are dependent, this seems to me an asset that should revert then to the parents."[58]

3.18. We invite views. Our tentative view is that 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. (Proposition 65) We have raised for consideration (in para. 2.195. above) the question whether courts dealing with claims for aliment should be given power to award lump sums.

---

[56] Law Com. No 25 (1969) para. 70.

[57] [1974] 1 All E.R. 33.

[58] Per Scarman L.J. at pp. 37-38, with the concurrence of Davies L.J. and Orr L.J.

Monetary orders

3.19. We have no doubt that the court should continue to have power to award a periodical allowance or capital sum or both on divorce. We think that the power should be exercisable against, and in favour of, either the pursuer or defender. This will be necessary if the grounds of divorce are reformed on the lines of recent Divorce (Scotland) Bills but would, we think, be desirable even under the present law. It is not always the more guilty party who is the defender. The pursuer may be technically innocent of a matrimonial offence, yet mainly responsible for the breakdown of the marriage. Both parties may be guilty of a matrimonial offence, in which case, the present law often encourages cross-actions. Moreover, if our preliminary view as to the purpose of financial provision is right, then it follows that either spouse should be able to apply. Normally, financial provision on divorce will take the form of payments or transfers to the claimant spouse himself. Nevertheless, there may be circumstances, such as the mental illness or other incapacity of the defender, where it is desirable for payments to be made to a third party, such as a trustee or judicial factor, for the benefit of the spouse. It may also be desirable, to deal with the case of the incapax payer, to make it clear that payments can be ordered to be made not only by the spouse personally but also out of money or property belonging to him or held for him. The formula used in the present law on divorce for incurable insanity represents a good precedent and we suggest that 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. (Proposition 66).

Property transfer orders

3.20. The proposed power: Under the existing law of Scotland, in divorce actions the courts are only empowered to make orders for payment of money, and do not have power to order transfers of specific items of property from one spouse to the other. We consider that such a power is required. It will often be appropriate that the courts should resolve a dispute between the spouses as to which spouse should have specific items of property. Orders for payment of capital sums give the payer the advantage of choosing what property should be realised to satisfy the order, and this advantage may sometimes be unfair to the other spouse. It may often be more convenient for investments to be transferred than that they should be realised to enable a capital sum to be paid. In any event, if it be accepted that the court should retain its existing discretionary powers to award capital sums, it is in principle but a short step to the conferment of discretionary powers to order the transfer of property. The crucial problem in practice is usually the matrimonial home, especially in times of housing shortage. The power would be particularly useful in relation to the matrimonial home, whether it is owned or leased by one spouse or both. If the house is owned by both spouses in common ownership, an order for the transfer of one spouse's interest could have advantages over capital sum payments. We therefore suggest that 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. (Proposition 67(a)).

At Appendix D below,[58A] we illustrate (by reference to reported cases) how the English courts have used the similar power conferred on them, which they have welcomed. At paragraphs 3.21 to 3.50 below, we illustrate the scope and nature of the power proposed above and consider such modifications of the power as may be required in relation to particular types of property. Before

[58A] See page 353.

turning to this, we consider the preliminary question of the relationship of such a power to any revision of family property law.

3.21. Property transfer orders (cont'd.); relationship with family property law: A power to transfer property on divorce would not necessarily be inconsistent with a system of community of property. Even under the most complete community of property system, there would inevitably be some people who fell outside its scope, if only because their property regime was governed by a foreign law but more particularly if there was provision for "contracting out". In the case of those under a community system, there should, it is true, be less need of discretionary powers to order a transfer of property on divorce. The law itself would achieve a fair and just division of the spouse's assets in a large proportion of cases. But discretionary judicial powers to adjust property rights would sometimes still be required. Even under the present law, many spouses opt for a form of limited community property by taking the title to their home, often their main asset, in joint names. That does not make it less appropriate for the court to have power to order a transfer of one spouse's share to the other. The position would be similar under a community of property system. The court would start from a different base. It might even have a different objective (equality rather than a more flexible or discretionary justice). But powers to make property transfer orders would be useful. In any event, fundamental reform of family property law is not likely to be achieved in the immediate future and there seems therefore to be a strong case for conferring on the courts a power to order transfers of property on divorce at any rate until such times as possible reforms to family property law in Scotland can be examined.

3.22. Property transfer orders (cont'd.);scope and nature of proposed power: The main constraint on the court's use of the power would be that the transferor spouse must not only own the specific item of property or have a beneficial interest in it, but that the property or interest must be capable of alienation by him or persons such as trustees

holding it for him. This means that the interests of third parties will be protected. Thus, the court will not have power to order the transfer of those tenancies of land or houses which cannot be assigned without the consent of the landlord. In such a case the transferee spouse must obtain the landlord's consent to the assignation of the tenancy. Nor will the court have power to transfer shares in a private company, because the articles of association prohibit such transfers without the consent of the directors. In all these cases the transferee spouse would require to obtain the appropriate consent. Again, third parties having an interest in goods on hire-purchase must give their consent before a transfer order can be made. In the absence of a specific statutory enabling provision, the court would not have power to make a transfer order as between the spouses assigning an alimentary liferent under a trust deed, or a pension which is declared by law or trust deed to be alimentary or not assignable. We revert to these problems below. The court would not, and should not, have power, in any circumstances, to order the transfer of social security benefits: these are invariably declared by statute to be inalienable.[59] It is envisaged that the court would be able in appropriate cases to order property to be conveyed to trustees for the benefit of the transferee spouse.[60] The court would also be able to transfer between spouses the fee of property burdened by a liferent.[61] To avoid the risk that property transactions might require to be reduced if a decree of divorce is recalled, it is envisaged that a property transfer order, and any conveyance executed in pursuance of the order, would not take effect until the expiry of the days for reclaiming or, if a reclaiming motion had been made, the period for an appeal, as the case may be.[62]

---

[59] E.g. Family Allowances Act 1965, s.10; Ministry of Social Security Act 1966, s.20; Family Income Supplements Act 1970, s.9; Social Security Act 1975, ss. 61 and 87; Social Security Pensions Act 1975, s.48; Child Benefit Act 1975, s.12.

[60] E.g. where the transferee spouse is suffering from mental or other disability; cf. Divorce (Scotland) Act 1938, s.2 (financial provision on divorce for incurable insanity).

[61] For this reason, among others, we refer in Proposition 67(a) to "interests in property".

[62] Cf. Matrimonial Causes Act 1973, s.24(3)(which provides that a property adjustment order cannot take effect before a decree nisi is made absolute).

3.23. Property transfer orders (cont'd.); tenancies of the matrimonial home and other dwellings: The question whether in divorce actions the courts should have power to order the transfer of tenancies, particularly local authority tenancies, is of very great importance in Scotland. It has been estimated that the housing stock in Scotland in December 1974 (the latest time for which figures are available) was subdivided into the categories shown in the following Table:

TABLE

DWELLING HOUSES IN SCOTLAND, BY TENURE AND LANDLORD (1974)

Tenancies			%	%
Local authority tenancies	882,000		47.2	
Scottish Special Housing Association tenancies	80,000		4.3	
New Town Development Corporation tenancies	41,000		2.2	
Total public sector tenancies		1,003,000		53.7
Private landlord tenancies		252,000		13.5
Total tenancies		1,255,000		67.2
Owner-occupied houses		613,000		32.8
Total dwellings		1,868,000		100%

[SOURCE: Scottish Development Department]

It will be seen that about two-thirds of the dwellings were tenant-occupied and that four-fifths of these were in the public housing sector. (By contrast in England, only some 45% of families live in rented accommodation and of these only about 62% live in public sector dwellings[63]). We leave aside the technical question whether a lease is strictly a form of "property" in Scots law;[64] the important point at this stage

[63] Todd and Jones, Matrimonial Property (1972), page 9: Office of Population Censuses and Surveys; HMSO.

[64] See the remarks of Lord Kilbrandon in Dorchester Studios (Glasgow) Limited v. Stone and Anor 1975 S.L.T. 153 at p.156: " ... the old view that the lease, unlike the feu contract, does not convey a right of property, wears today an air of unreality". Contrast the cases cited in footnote 79 at para. 3.25. below.

is that the court must have power to transfer tenancies in divorce actions. In the following paragraphs, we discuss the problems presented by the different kinds of rented accommodation.

3.24. With regard to tenancies to which the Rent (Scotland) Act 1971 applies, there is an unimplemented recommendation of the Morton Report of 1956 that the court should have power, on divorce, to make:

> "an order substituting the applicant as tenant if the tenancy of the matrimonial home is in the name of the other spouse and is [of] a dwelling-house to which the Rent Restriction Acts apply (or as sole tenant if there is a joint tenancy)."[65]

This cross-border recommendation has been implemented, in England but not in Scotland, by section 7 of the Matrimonial Homes Act 1967. That section also provides that the court can direct that both spouses shall be jointly and severally liable to discharge or perform any of the accrued liabilities or obligations in respect of the dwelling house (thus making, for example, a wife liable, along with her husband for arrears of rent accrued during her husband's tenancy.) The landlord has a right to be heard.[66] The Law Commission has recently proposed an extension of this power.[67] We think that the Morton Commission's recommendation should be implemented in Scotland. The Commission restricted its recommendation to Rent Act tenancies on the ground that (a) it would be undesirable to interfere with the rights of the landlord in other tenancies; and (b) in any event, it would not be possible to afford the transferee effective protection in other urban tenancies in which the tenant has no security of tenure because the landlord can always give notice to quit.[68] The (English) Law Commission provisionally agreed with this view, in relation to private tenancies.[69] Our own provisional view is that 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)

---

[65] Cmd. 9674 (1956) para. 697.

[66] Matrimonial Homes Act 1967, s. 7(6).

[67] See para. 3.25 below, footnote 77.

[68] Cmd. 9678 (1956) para. 690; Rent Act tenancies are broadly speaking tenancies of dwelling houses of which the rateable value did not exceed £200 on 23 March 1965 or, in the case of houses appearing at a later date on the valuation roll, on that date: Rent (Scotland) Act 1971, ss. 1(1) and 6(3).

[69] Published Working Paper No 42 on Family Property Law (1971) para. 1.19.

if the landlord consents, private tenancies falling outside that Act. (Proposition 67(b)). It might be argued that if the landlord agrees to a transfer, he can always remove the tenant on the termination of the lease and grant a new tenancy to the other spouse. The lease might, however, have some time to run and in any event there might be landlords who would be prepared to play a relatively passive role, as by simply consenting to a transfer, but who would not be prepared to play a more active role in removing their tenant.

3.25. As the Table in para. 3.23. shows, local authority tenancies are numerically by far the most important single category of rented accommodation in Scotland. Normally they are 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 local authority. They are excepted from the operation of the Rent (Scotland) Act 1971,[70] so that the tenant has no legal security of tenure.[71] At any rate until recently, the normal practice in allocating tenancies is, we understand, that the husband is the tenant, but some local authorities are prepared to grant joint tenancies to a married couple.[72] Where the husband is the tenant and the marriage breaks down, it is the general practice of most local authorities to refuse to transfer a tenancy to the wife unless and until

[70] Rent (Scotland) Act 1971, s.5. The Report of the Morris Committee on Housing and Social Work; a joint approach (1975; HMSO), which dealt with the links between the district council housing department and the regional council social work department, recommended at para. 8.38 that security of tenure should be extended to local authority tenancies. The Finer Report made the same recommendation: Cmnd.5629 (1974) paras. 6.44 and 6.87-6.90.

[71] Section 149(1) of the Housing (Scotland) Act 1966 as read with the Local Government (Scotland) Act 1973 enacts that "the general management" of houses provided by a local authority (viz. islands or district council) "shall be vested in and exercised by the local authority". It has been held that "management" includes the power to terminate the tenancy by the appropriate notice in writing: Mags. of Edinburgh v. McEwan (1949) 65 Sh. Ct. Rep. 34, following Shelley and Anor. v. London C.C. [1948] 2 All E.R. 898 (H.L.) on analogous English legislation. Since the Rent Acts do not apply, the tenancy of council homes can be terminated by either party giving to the other the appropriate notice in writing. If the tenant refuses to leave, the local authority may bring an action of ejection and in such an action need not state any reasons: see e.g. Glasgow Corporation v. Bruce 1942 S.L.T. 67; Mags. of Edinburgh v. McEwan, supra; Lanark C.C. v. Walker (1960) 76 Sh. Ct. Rep. 174.

[72] The Morris Committee recommended an extension of this practice. Op. cit. para. 8.40(b) but the Finer Committee said that more flexible transfer arrangements would safeguard a deserted or divorced wife better than would a "joint tenancy"; op. cit., para. 6.50.

she has obtained a decree of divorce or separation (and sometimes an award of custody) on the ground that a premature transfer might prejudice a reconciliation.[73] The local authority usually requires the wife to pay her husband's rent arrears before transferring the tenancy to her.[74] Both the Finer Committee on One-Parent Families[75] and the Morris Committee on links between housing and social work[76] recommended a more flexible approach to transfers of local authority tenancies on marriage breakdown, while fully recognising the difficulty of the situation. In the context of English law, the Law Commission has suggested that in divorce proceedings the court should have the same power to order the transfer of local authority and other public sector tenancies as it has to order the transfer of protected or statutory tenancies under the Rent Acts.[77] This view has been endorsed by the Finer Report.[78] The English divorce courts have in fact anticipated implementation of these recommendations by construing their power to order the transfer of "property" on divorce as extending to tenancies, including local authority tenancies, in cases where the lease does not prohibit "assignments" (i.e. assignations).[79] In exercising this power, the English courts have been conscious of the need to avoid a clash with the local housing authority:

> "... the court would at any rate hesitate a very long time before it would make an order transferring property which the local authority might perfectly properly and consistently with its duty prevent from being fruitful."[80]

They will however exercise their power where the local authority is prepared to follow and respect the court's decision.

---

73 Morris Report, op. cit., at para. 8.40(b); see also Finer Report, op. cit. para. 6.80.

74 This practice was strongly criticised by the Finer Report at para. 6.111.

75 Cmnd. 5629, 1974, paras. 6.80-6.84.

76 Op. cit. para. 8.40(b).

77 Working Paper No.42 on Family Property Law (1971) para. 1.20.

78 Cmnd. 5629, 1974, para. 6.88.

79 Thompson v. Thompson [1975] 2 All E.R. 208(C.A.); Hale v. Hale [1975] 2 All E.R. 1090 (C.A.).

80 Hale v. Hale supra, per Megaw L.J. at p. 1093.

3.26. Since the local authority remains, and must remain, master of the situation for as long as "council house" tenants do not have security of tenure, it seems to us that the court should have power to assign a local authority tenancy on divorce only 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 what will presumably be the common case where the local authority is reluctant to intervene in a situation of marital breakdown but is happy to follow the lead of the court, this would enable it to indicate that it would have no objection to a transfer should the court see fit to order one. In the less common case where the local authority had objections to a transfer, our proposal would avoid undesirable conflicts between the court and the local authority. In practice, the results would almost always be the same as under the proposals of the English Law Commission and the Finer Committee (which merely concede the local authority a right to be heard). Our proposals would, however, be more realistic and safer, and would moreover be equally suitable if local authority tenants were given security of tenure.

3.27. Similar considerations apply to other tenancies of dwellings such as Scottish Special Housing Association and New Town Development Corporation tenancies falling outside the Rent (Scotland) Act. We think the same solution should apply - power to order a transfer, if the landlord consents. This would enable the courts and the respective housing authorities or landlords to co-operate in finding a solution but would not prevent the latter from developing their own policies or interfere with their own assessments of priorities. To sum up, we suggest that 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. (Proposition 67 (c)). We would not expect that a housing authority would or should be inhibited by this power from transferring the tenancy in advance of a court order if the authority thought it right to do so.

Even if (as we suggest in Proposition 67(f) at paragraph 3.35 below) the court had power to make interim transfer orders in the course of a divorce action, there could well be situations in which delay in effecting a transfer created serious difficulties for one or other of the spouses.

3.28. Tenancies of subjects other than dwellings: It is arguable that the same policy should apply to leases of subjects other than dwellings alone. Where assignation of the lease by the tenant is prohibited by law or the lease, the landlord must be protected by making his consent necessary, but, as between the parties, the court should arguably have power to order a transfer. Since rural or agricultural leases of ordinary duration are deemed at common law to involve personal choice (delectus personae) by the landlord, the tenancy is not assignable at common law,[81] and, in any event, the lease itself normally prohibits assignation by the tenant.

3.29. Property transfer orders (cont'd): tenancies of agricultural holdings: If one applies this test to agricultural holdings, which attract legislation mainly designed to promote good farming, the court would not normally be able to transfer the holding. In the majority of cases, it is the husband who is the tenant and has the training, knowledge and experience required to work the holding properly. The wife is unlikely to have these advantages. It is difficult for tenant farmers to find new farms and, on loss of his farm, the husband would not only lose the source of his livelihood but also his ability to pay periodical allowance for the wife and aliment for the children. We have considered whether the analogy of succession law should be followed. Where the tenant of an agricultural holding dies intestate, and his successor as tenant is "a near relative", defined by statute to include his or her surviving spouse[82] the landlord may serve a notice to quit on one or more of certain grounds, one of which is:

---

[81] Paton and Cameron, Landlord and Tenant (1967) pp 150-1.

[82] Agriculture (Miscellaneous Provisions) (Scotland) Act 1968, s.18(7): "'near relative' .... means a surviving spouse, son or daughter, or adopted son or daughter ..."

" ... that the near relative has neither sufficient training in agriculture nor sufficient experience in the farming of land to enable him to farm the holding ... with reasonable efficiency ..."[83]

Where the surviving spouse (or other near relative) serves a counter-notice, the Scottish Land Court must be satisfied as to the matter and give its consent if the notice to quit is to be effective.[84] It would be possible mutatis mutandis to allow the Court of Session, possibly after remit to the Land Court, to override the landlord's withholding of consent, but we doubt whether this departure from the normal rule suggested at Proposition 67(a) would be justified.

3.30. Property transfer orders (cont'd.): tenancies of crofts: Under crofting tenure, the crofter pays a land rent only. The buildings include the dwelling house and other permanent improvements which will have been provided by the crofter or his predecessors and for which he is entitled to compensation at the waygo. The normal rules of intestate succession apply, so that a spouse or other member of the crofter's family may succeed to the croft on his death.[85] The crofter cannot assign his croft without the consent in writing of the Crofters Commission who must give the landlord an opportunity to be heard before deciding whether to give or withhold consent.[86] In considering any application for consent to assignation, the Commission must:

"take into account the family and other circumstances of the crofter and of the proposed assignee and the general interests of the township in which the croft is situated."[87]

So long as this rule remains law, it would be inappropriate to allow the Court of Session to intervene. We note, however, that

---

[83] Ibid., s.18(2)(a).

[84] Idem.

[85] Crofters (Scotland) Act 1955, s.11, set out as amended in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, Schedule 2.

[86] Crofters (Scotland) Act 1955, s.8 (as amended by the Crofters (Scotland) Act 1961, Sch. 1).

[87] Ibid., s.8(4).

recent legislative proposals would enable a crofter to assign his croft to "a member of his family" (which includes the other spouse) with the consent in writing of the landlord, which failing, of the Crofters Commission.[88] In such a case the general interests of the township would not require to be taken into account. The transfer of a crofting tenancy is, of course, a totally different matter to the transfer of an urban tenancy. The crofter would not only lose his house but would be deprived of his land from which he may derive his sustenance and the means of supporting his dependants. Often the croft house could not be transferred by itself since the house and land form an integral unit; the crofter could not be deprived of his house and be expected to work the land. Nevertheless, in some cases, the crofter's wife may be able to work the croft and it may be right for her to retain custody of the children and bring them up in the croft and in the community in which they are integrated.

3.31. Property transfer orders (cont'd.): landholder's tenure: Under landholder's tenure, the landholder pays a land rent only, and he or his predecessors in the same family will have paid for the dwelling house, other buildings and other permanent improvements. The buildings will be owned by the landlord, and the landholder cannot dispose of them separately from the land. On the landholder's death, the spouse or other members of the landholder's family may succeed to the tenancy without the landholder's consent,[89] and the landholder may seek the permission of the Land Court to assign his tenancy to a spouse or other specified member of his family if he is unable to work the holding through illness, old age or infirmity[90]: but otherwise an assignation requires the landlord's consent.[91] Again it is not easy to choose the appropriate analogy or solution.

---

[88]Crofting Reform (Scotland) Bill 1975, Schedule 2, para. 5 [Bill 14] ordered by the House of Commons to be printed 7 December 1975; cf. Crofting Reform (Scotland) Bill 1973, Schedule 1, para. 5.

[89]Succession (Scotland) Act 1964, s.16.

[90]Small Landholders (Scotland) Act 1911, s.21 (as amended).

[91]Crofters Holdings (Scotland) Act 1886, s.1(2). As to statutory small tenants, see the 1911 Act, s.32(1).

3.32. Rural leases present difficult problems and, to focus discussion, we suggest tentatively that 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. (Proposition 67(d)). Similar issues arise in relation to statutory small tenants and cottars.

3.33. Transferee-spouse's liability for rent arrears: The Finer Committee suggested that the English courts should:

> "have power, in transferring the [local authority] tenancy, to make an order making the wife liable together with her husband for all or part of any rent arrears wherever the circumstances made that seem proper".[92]

Under the Matrimonial Homes Act 1967, section 7, the English courts have a similar power on transferring Rent Act tenancies between spouses. We think that such a power might be usefully included among the Scottish courts' powers in divorce actions and suggest that 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. (Proposition 67(e)).

3.34. Interim transfers of tenancies: Should the court 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 the 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 de facto 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

---

[92] Cmnd. 5629, para. 6.88.

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.

3.35. We have considered whether it would be sufficient to enable the court to make interim orders in the course of the divorce action regulating as between the spouses the use and occupation of the matrimonial home, and, indeed, prohibiting the tenant-spouse temporarily from occupying the home. (This question is connected with possessory rights in the matrimonial home during marriage, a problem which we consider in our forthcoming Memorandum on that subject.) We suggest at paragraph 3.52. below that the court should have such powers. We doubt, however, whether such a power would be sufficient. Under our proposals, the courts could only make effective orders regulating the use and occupation of a tenancy if one of the spouses (say, the husband) has an independent right to the tenancy. If the court by interim order excludes the husband, then he may well discontinue payments of rent which would force the housing authority to terminate the lease or transfer it to the wife. A provision enabling the wife to stand in the husband's shoes and pay the rent would have the same effect as a transfer of the tenancy. We therefore suggest that 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. (Proposition 67(f)).

3.36. Property transfer orders (cont'd.); owner-occupied dwellings and other heritable property: While only about one third of families in Scotland live in owner-occupied houses, property transfer orders will, as we have seen, give the courts a particularly useful technique for adjusting the patrimonial position of the parties on divorce. The policy protecting third party rights would often be of particular importance. In most cases where the courts are requested to transfer the ownership of the matrimonial home on divorce, there will probably be an outstanding loan to a building society or other lender secured over the house by a standard security or other heritable security. In practice the terms of a particular loan agreement, or the fact that the creditor holds the documents of title under a lien, will often make it necessary or highly desirable to obtain the creditor's consent to a transfer of the security subjects.[93] Thus many building society loan agreements give the society the right to require that the loan be repaid on any change in the ownership of the house in question, and accordingly the court will often require to know whether the society will insist upon a sale if a transfer is ordered. Even if a transfer of the debtor's interest without the creditor's consent were permitted, it would, we think, be desirable to give the creditor an opportunity to be heard. A transfer by a husband to his wife of a house burdened with a standard security, for example, would not diminish the heritable creditor's rights in security or contractual rights against the husband, but it might affect the husband's willingness to make repayments. Why, the husband might ask, should he pay off a loan in order to disburden his ex-wife's property? Unless the wife had both the means and the right to

---

[93] A Practice Direction of the English High Court, dated 27 January 1971 (see [1971] 1 All E.R.896), points out the desirability of giving mortgagees the opportunity, before any order is made, to decide whether to consent to a transfer, and it directs registrars to ensure that mortgagees are not prejudiced by an order without having notice of the application and an opportunity to be heard.

redeem a heritable security,[94] the effect would be to place the house at risk of sale, and to subject the creditor to some inconvenience at least. For these reasons (if for no other) creditors should have a right to be heard before any order is made for the transfer of their security subjects. In many cases, no doubt, a transfer order would be incompatible with the security or undesirable. This, however, is not an argument against giving the court the power to make one.

3.37. Two further points may be noted. First, the type of property transfer order so far discussed is an order directing one of the spouses to transfer property to the other. The order is not itself a conveyance but merely imposes a personal obligation, akin to the duty created by missives of sale, on one of the parties to make a conveyance. In order to save the expense of a conveyance, there may be a case for enabling the court to make a self-executing order, akin to a decree of adjudication in implement of sale, vesting heritable property (including, where appropriate, heritable securities and other heritable subjects capable of registration in the Register of Sasines) in the transferee spouse. A vesting order would not become operative till after the period for reclaiming or appeal. It would be "a decree of court conferring a right to land or to a heritable security" within the meaning of section 5(3) of the Conveyancing (Scotland) Act 1924 and accordingly upon extract could be recorded direct in the Register of Sasines. Alternatively, it could be used as a link in title on resale of the property. The summons or application would require to describe the property and the links in title from the person last infeft in the requisite detail to enable the court to pronounce a decree which can be recorded in the Register of Sasines. On the other hand, it may lead to confusion to mix

---

[94] The provisions of the Conveyancing and Feudal Reform Act 1970, section 18 and Sch. 3 para. 11, as originally enacted, gave the proprietor the right to redeem a security. But those provisions were amended by the Redemption of Standard Securities (Scotland) Act 1971, section 1, and the matter is now governed by individual agreements. Most building society agreements do not allow the proprietor to redeem the security at his own option.

judicial procedure with conveyancing in the manner suggested, and for this reason a vesting order might be rarely used. We invite views on this matter.

3.38. Second, it is not clear whether a transfer of the ownership of heritable property by or under a court decree on divorce would, in the absence of express statutory provision, be treated as "a conveyance for valuable consideration" for the purpose of section 5 of the Land Tenure Reform (Scotland) Act 1974. If it were so treated, then any feu-duty or other heritable money burdens would cease to be exigible in respect of the property,[95] and the transferor-spouse would require to compensate the superior for the loss of the feuduty or other burden in accordance with the Act.[96] We doubt whether the Act would apply to such a transfer[97] but the question should not be left in any doubt even though the problem will become of decreasing importance as feuduties are redeemed. In considering the various solutions, the general policy of disburdening land from money-burdens quickly must be weighed against the need to minimise the problems of those unfortunate enough to be involved in divorce actions. What is needed is a simple scheme and to focus discussion, we suggest the following rules:

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[98] would be discharged by the transferor-spouse. (Proposition 67(g)). The transferee-spouse would, of

---

[95] 1974 Act, s.5(3).

[96] Ibid., s.5(4).

[97] The Law Commission pointed out that the Inland Revenue "treat a lump sum payment made under an order of the court as being made for valuable consideration on the basis that it is the compounding of future maintenance liability" Law Com. No 25, para. 76. But the argument would not necessarily apply to financial provision on divorce given the objectives which we have suggested at para. 3.7. above.

[98] Conveyancing (Scotland) Act 1874, s.5(2).

course, have the right to redeem the feuduty at the next term day.[99]

3.39. Property transfer orders (cont'd.): goods on hire-purchase and other consumer credit agreements: In the case of moveable property, the most important question likely to arise in practice is the transferability of rights in relation to goods (such as the household furniture) which are subject to a hire-purchase, credit sale or conditional sale agreement, or, in due course, a regulated agreement under the Consumer Credit Act 1974.[100] If the husband alone is the purchaser under a hire-purchase contract and if he deserts his family, the wife will often wish to take over his rights. Under the present law, there is no way in which she can do so (although she may be able to persuade the creditor to bring to an end the agreement with the defaulting husband and enter into a new agreement with her). Clearly there would be the gravest objections to the transfer of rights and obligations under a hire-purchase agreement without the consent of the creditor. But it might be advantageous to enable the court to compel a transfer of such rights and obligations on divorce if the party requesting the transfer had obtained the creditor's consent. Under Proposition 67(a) (para. 3.20. above), this would be possible.

3.40. Property transfer orders (cont'd): investments and other business interests: The general power proposed in Proposition 67(a) at paragraph 3.20 above would enable the court to order the transfer of freely transferable investments such as Stock Exchange securities but not for example interests in a partnership which involve delectus personae and are not transferable. Between these two extremes, there are forms of incorporeal moveable property whose assignability is restricted by the need to obtain consents but which might possibly be subject to the property transfer orders which we propose. The most important example is shares in private companies which may represent the bulk of the family fortune.

---

[99] 1974 Act, s.4.

[100] The Act will come into operation on an appointed day. It should be noted that even the matrimonial home can be moveable property as where the parties live in a caravan or mobile home which is not affixed to the ground. Such property would be transferable under our proposals in the same way as other moveable property, viz. subject to the consent of interested third parties.

Such shares are unlikely to be capable of easy realisation to provide funds and their transfer might often be the only practicable means, short of a disposal of the business on terms approximating to a forced sale, for a husband to make provision for his wife. On the other hand, the transfer could only be achieved with the approval of (a) the directors, who normally have the right under the articles of association to refuse to register a transfer without assigning any reason, and probably (b) the other shareholders, who in many cases will have a right of pre-emption over shares proposed to be transferred. It would not be appropriate to compel a transfer over the objection of the directors and shareholders.

3.41. We think, however, that the court might be given a power to activate the transfer provisions of the articles of association of a private company. The articles normally (although not universally) provide (first) that any member of the company wishing to transfer his shares must offer them to the directors or other shareholders for purchase at a price to be agreed or failing agreement fixed by the auditor of the company or an independent accountant; and (second) that, only in so far as purchasers are not found for the shares offered at the price so fixed, is the shareholder free to transfer his shares to a third party, usually but not necessarily subject to the approval of the directors. Such an order would compel the shareholder to test the marketability of his holding and would thereby clarify the extent to which the funds could be made available as provision for the other spouse on divorce. Since the transferee-spouse cannot activate the transfer provisions in the articles of association, the only other expedient open to the court would be an order awarding a capital sum which compelled the liable spouse to attempt to transfer or realise his holding. This expedient appears too indirect and we therefore suggest that the court should have power in an appropriate case to make an order that a spouse owning shares in a private company must seek the consents required by the articles of association to the transfer of those shares to the other spouse. (Proposition 67(h)).

3.42. Property transfer orders (cont'd.) alimentary liferents: Since an alimentary liferent (or other alimentary allowance under a trust deed) is not assignable by the liferenter (or beneficiary), except as to arrears and except insofar as each instalment is in excess of a reasonable alimentary provision,[101] the court would not have power to order an assignation between spouses under the power proposed at paragraph 3.20 above, though it would be transferable if contained in a marriage contract provision taking effect on death under existing law, and under our proposals.[102] Trust provisions establishing protected alimentary liferents are less frequent today than they were even in the recent past but, where they exist, they may be of great importance to the persons concerned. The purpose of these liferents varies: they may have been created primarily to keep property within the trustee's family, even in the event of the bankruptcy of the beneficiary. They may have been created merely to protect the beneficiary from himself. Where the latter was the truster's dominating purpose, the case is strong for conceding to the court the power to transfer the right to receive the periodical payments as they become due. Where the truster's main purpose was to keep property, or the income from property, within the family, the case for the power is evidently weaker. In either case such a power would render marginally less attractive the creation of alimentary provisions. To enable the Commission, however, to receive advice on this matter, we put forward the proposition that alimentary liferents should be transferable by order of the court on divorce although not otherwise transferable by the liferenter (Proposition 67(i)).

3.43. Property transfer orders (cont'd.) - personal and survivors' pensions: Pension rights often constitute the most important part of the average wage or salary earner's capital assets, and the question arises whether pension rights should be dealt with in divorce settlements, and if so, how. There are two separate problems to be considered:

---

[101] Wilson and Duncan, Trusts, Trustees and Executors (1975) p. 96.

[102] See para. 3.61. below.

(a) whether provision should be made to enable the courts to make an order preventing, so far as just or practical, a spouse (usually a wife) from losing the chance of acquiring rights to a survivor's (usually a widow's) pension; and

(b) whether the personal pension of the spouse (usually a husband) should be assignable in part on or after divorce.

Both problems arise in part from the desire to achieve a just distribution of the spouses' respective assets on divorce; but they also form part of the far wider problem of achieving an adequate income for either spouse, and in this respect the payment of a pension may provide the most secure basis for continuation of periodical allowance on the retirement or death of the payer.

3.44. The English Law Commission, which examined the first and more serious of these problems, remarked:

> "There is no doubt that one matter on which there is strong public feeling is the loss of a potential widow's pension that a wife may suffer if she is divorced by or divorces her husband. She may have been married for 20 years or more during which the husband had been a member of a superannuation scheme under which the wife, if she survives him, would be entitled to a pension or a lump sum, or, if not entitled, would be the likely recipient of benefits either at the discretion of the trustees or as the result of a nomination by the husband. On the dissolution of the marriage her prospective rights or expectations are normally destroyed, since she can no longer become his widow."[103]

In the event, however, the Commission felt unable to suggest a complete solution.[104]

3.45. There are broadly four possible approaches to this problem. First, the law could require pension schemes to give a divorced wife a right to the widow's pension which would be contingently payable if the member had left the scheme or retired at the date of the divorce, unless alternative arrangements were agreed by the parties concerned. This is the approach adopted in the Netherlands in relation to widows' pensions provided by

---

[103] Law Commission Working Paper No 9, Matrimonial and Related Proceedings - Financial Relief, (1967) para. 182 (see Appendix 2 to Law Com. 25, infra.)

[104] Report on Financial Provision in Matrimonial Proceedings, Law Com. No 25, (1969) paras. 112-114.

occupational pension schemes[105]. There are difficulties in this approach[106] but, in any event, it is a matter for pension law reform rather than financial provision on divorce, and lies beyond the scope of this memorandum.

3.46. Second, the court could be empowered, or required, to refuse a divorce if it would result in grave financial hardship to an innocent spouse divorced against his or her will. A provision of this kind is found in English law,[107] where it has been used to protect the older wife from loss of pension rights[108] and has featured in recent Scottish divorce bills[109]. This, however, is a matter for divorce law reform rather than financial provision on divorce as such, and also lies beyond the scope of this Memorandum.

3.47. Third, the court could be empowered to make an increased award of financial provision on divorce to compensate for the loss of pension rights. This is possible under the present law and we suggest below[110] that one of the factors to which the court should have regard in awarding financial provision on divorce should be the parties' pension rights. The potential value of such an arrangement would often be severely limited by the husband's lack of means. But we understand that there have been cases (unreported) affecting occupational pension rights in England and Wales where as part of the financial settlement on divorce a husband has allocated part of his

---

[105] See Equal status for men and women in occupational pension schemes: notes on the submission of evidence, issued by the Occupational Pensions Board, April 1975, Annex 3, para. 19.

[106] See Law Com. No 25, Appendix 2, paras. 190-191. Note, however, that the state retirement pension scheme enables divorced wives to take advantage of their ex-husband's contributions (Social Security Act 1975).

[107] Matrimonial Causes Act 1973, s.5.

[108] See e.g. Parker v. Parker [1972] Fam. 116; Julian v. Julian [1972] 116 Sol. Jo. 763; Cf. Reiterbund v. Reiterbund [1975] 1 All E.R. 280 (no grave financial hardship because loss of widow's pension would be more than offset by supplementary benefit.)

[109] See e.g. clause 1(5) of the Divorce (Scotland) Bill (No.2) 1975 [Bill 23] introduced by Mr Iain MacCormick and ordered to be printed 17 December 1975.

[110] See head (b) of the Proposition in para. 3.72. below.

personal pension to provide a pension for his former wife on his death, where a scheme's rules have already provided for part of the widow's pension to go to a former wife at the request of the member, and this has been arranged, or where a lump sum provided by the scheme on retirement has been used in part to secure a pension for the former wife.

3.48. Fourth, the court could be empowered to make orders directly affecting pension rights - for example, an order directing the trustees of an occupational pension scheme to give a proportion of the widow's pension to the divorced wife, or to allocate part of the personal pension to provide a pension on the member's death. We understand that a power of this type has been introduced in Norway.

3.49. It cannot be said that, on divorce, the wife "loses" the chance of a share in her husband's personal pension in the same way as she "loses" the chance of a widow's pension. Nevertheless, it is necessary to consider whether the personal pension of a spouse would be covered by the power to transfer any "property" which the spouse can alienate. Many pension schemes in the public services provide that assignations of pensions, or agreements to assign pensions, are void,[111] while others provide that such assignations are void unless made "for the benefit of the family" of the pensioner[112] or to "a relative"[113] or the like. Occupational pension schemes in the private sector have similar prohibitions against assignation. Such prohibitions are a requirement of approval of an occupational pension scheme for

---

[111] E.g. Naval Marine Pay and Pensions Act 1865, s.4; Merchant Shipping Act 1970, s.11; Army Act 1955, s.203; Air Force Act 1955, s.203; National Health Service (Superannuation) (Scotland) Regulations 1961, reg. 53 (S.I. 1961/1388; 1961 II, p.2697); Teachers Superannuation (Scotland) Regulations 1969, reg. 75 (S.I. 1969/77; 1969 I, p.133); Local Government Superannuation (Scotland) Regulations 1974, reg. L13 (S.I. 1974/812); Superannuation Act 1972, s.5(1) and Sch. 3, para. 9.

[112] E.g. Police Pensions Act 1948, S.7(1).

[113] E.g. Firemen's Pension Scheme Order 1971, Appendix 2 article 61(5) (S.I. 1971/145; 1971 I, p.320). By article 8(1), "relative" includes wife.

tax purposes[114], and, under the Social Security Act 1973, it is one of the requirements as to "preservation of benefit" on change of employment that schemes must contain rules preventing the assignation of preserved benefits and must not generally enable such benefits to be surrendered[115]. However, assignation or surrender of part of an employee's personal pension in order to provide a pension for a widow or dependant is permitted by both the Finance Act 1970 and the Social Security Act 1973.[116] As in the case of some alimentary liferents, the rationale underlying the prohibition of assignation of pensions is to protect the pensioner from the consequences of his own foolishness or fecklessness. It remains doubtful, however, whether personal pensions in both the public and private sectors would be affected by the powers of the court to order property transfer orders; while they may be considered the "property" of the spouse, the limited circumstances in which assignation is permissible seem to point to there being no general power for the spouse to alienate this property. In England and Wales, where similar problems could arise under section 24(1) of the Matrimonial Causes Act 1973, the question has not been settled in any reported decisions.

3.50. The Occupational Pensions Board, who have, under the Social Security Act 1973, a duty to advise Government in relation to occupational pension schemes, are currently considering these problems as they affect occupational pensions, as part of a wider study of the question of equality of status for men and women in occupational pension schemes. This question was referred to them by the Secretary of State for Social Services in February 1975[117] and the Board expect to report to the Secretary of State in the near

---

[114]Finance Act 1970, Schedule 5, para. 7.

[115]Social Security Act 1973, Schedule 16, para. 15.

[116]1970 Act, Sch. 5, Part I, para. 5(3); 1973 Act, Sch. 16, para. 15(2) and (3)(a).

[117]Parl. Deb. (H.C.), O.R., vol. 886, col. 330-1, 18 February 1975.

future. We are fortunate to have been able to consult the Board who inform us that the evidence submitted to them has shown how the traditional division of functions in the home has meant that women more frequently than men have had a broken pattern of employment. This has rendered them much less able than men to become members of a pension scheme and to qualify for adequate pensions in their own right. Women have therefore depended for support in old age largely on provision made in their husband's pension scheme, when they are statistically likely to survive their husbands. The loss of rights to a survivor's pension on divorce, therefore, is not only suffered predominantly by women but is also more likely to cause financial difficulty for women. Nonetheless, any solutions that the Board recommend would apply equally to either spouse. It would seem premature for us to comment in greater detail on these problems in advance of the Board's report. We therefore invite views, but make no specific proposals at this stage.

Power to regulate the use or occupation of property

3.51. There may be cases in which the court is not asked to, or does not wish to, order a transfer of property but in which it would be desirable to regulate the use or occupation of property belonging to one or both of the spouses. 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. The English courts have interpreted their powers under section 24 of the Matrimonial Causes Act 1973 as being wide enough to bring about this kind of result indirectly.[118] In relation to English law, the Law Commission has proposed[119] and the Finer Committee on One-Parent Families has recommended,[120] that the courts' powers to order financial provision should include power to deal

---

[118] E.g. by using their powers to vary settlements, Allen v. Allen [1974] 3 All E.R. 385; or by reducing the amount of maintenance if the husband undertakes to allow the wife to remain in occupation of the home, Vaughan v. Vaughan [1953] 1 Q.B. 762 per Denning L.J. at p. 769.

[119] Working Paper No 42 (1971) para. 1.18.

[120] Cmnd. 5629, para. 6.44.

directly with rights of occupation in the former matrimonial home. It is arguable that the power should not be limited to the matrimonial home, but should extend at least to the furniture and perhaps even to any property of the spouses.

3.52. In our forthcoming Memorandum on adherence and the matrimonial home (to be published shortly), we shall examine the problem of orders regulating the use and possession of property during marriage and before the stage when a divorce action is raised. We hope to examine some of the problems more fully in that Memorandum. In the meantime, we suggest that 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. (Proposition 68).

Power to order security to be provided

3.53. The power to make property transfer orders suggested in Proposition 67(a) at paragraph 3.20. above might conceivably be used to order a redeemable transfer of property in security of payment in the future of financial provision. We consider, however, that a separate express power to order a redeemable transfer of property in security would avoid any doubts on the matter. The order is not really the same as a property transfer order: it is an order to provide assets from the capital or income of which payments specified in the order can be made, and it is not an absolute transfer since the reversionary interest in the fund remains with the paying spouse. The main advantages of such orders are that the payer could not dissipate the secured fund, which would remain available to the payee despite the payer's insolvency or bankruptcy until the order terminated. The situation on divorce is different from that obtaining during the marriage.[121] There is no continuing relationship, and there is not the same argument, especially if the court's powers to award financial provision are used to redress an imbalance or injustice arising from the marriage, that a man's dependants should follow his fortunes. It may be that a power to order security to be provided would not be widely used. In comparatively

[121] See paras. 2.193. and 2.195 above.

few divorce cases will there be assets available for the provision of adequate security, especially if a capital sum is also awarded. This however, is not a strong argument against conferring the power for those few cases where it could be used with advantage.

3.54. It is of interest to note the way in which the power to order security is used by the English courts. The person against whom the order is made is required to transfer property, such as a house or shares, to trustees and to execute a deed of security. The terms of the deed will vary with the circumstances but may provide, for example, that so long as the debtor-spouse pays the periodical allowance, the income of the property held in security will be paid to him, and that if he fails to pay, the trustees will make the appropriate payments out of the income, failing which the capital, of the property. The trust property or what is left of it, will revert to the payer on the termination of the periodical allowance.[122] The English Law Commission noted that, before 1969, secured payments were "rarely, if ever, awarded unless the husband [had] free investments in addition to the home and its contents and the like" but thought "that the courts should be more ready ... to award secured provision" and saw "no reason why in suitable cases the home should not be used to secure payments to the wife."[123] We give below two examples of the use by the English courts of their powers under earlier legislation.

> Example 1:
>
> The husband's savings certificates and savings bonds were held by his bank as security for an overdraft. His house was already charged for around twice its value. He owned furniture and a motor-launch and two life policies but the court thought he "clearly should not be made to sell his furniture", that the amount he might receive on selling his motor-launch was "hardly worth troubling about" and that it would be unreasonable to require him to surrender his policies. His only remaining assets were 5,200 shares in a company, unrealisable and producing no income, but potentially valuable if the company's fortunes improved. These

---

[122] See generally, Passingham, Law and Practice in Matrimonial Causes (2nd ed. 1974) p. 112; Jackson, Matrimonial Finance and Taxation (2nd ed., 1975) pp. 115-124.

[123] Law Com. No 25 (1969) para. 11.

shares he was ordered to charge to secure to the wife £100 a year with the proviso that the £100 was to be paid only out of the income of the shares or of any investments from time to time representing them.[124]

Example 2:

The husband owned a guest-house which was run by the wife and which was her only means of support. He had no other assets. There was reason to fear that he would sell it and emigrate to America. The court ordered that there should be a provision, secured on the house, to the amount of £52 per annum in addition to unsecured maintenance of £104 per annum.[125]

The above examples relate to security for payment of a periodical allowance.

3.55. The English courts formerly had power to "secure lump sums".[126] The Law Commission saw no need for the retention of this power, in view of the extended powers to order settlements which they recommended,[127] and it now exists only in the case of lump sums payable by instalments.[128] Where, however, a capital sum is payable at a future date it may be useful to order security to be provided for it.[129] Thus, in one Australian case, a husband was ordered to secure the payment of a capital sum on his death by making it a charge on the amount payable on his death under an insurance scheme from which his wife would have benefited but for the divorce.[130] It seems unnecessary to limit the power to periodical allowances, and we suggest that the court should have power on divorce to order security to be provided for the payment of a periodical allowance or capital sum or both. (Proposition 69)

---

[124] Barker v. Barker [1952] P.184.

[125] Aggett v. Aggett [1962] 1 All E.R. 190.

[126] Matrimonial Causes Act 1965, s.16.

[127] Law Com. No. 25 para. 6, note 11.

[128] Matrimonial Causes Act 1973, s.23(3)(c). See e.g. Cumbers v. Cumbers [1975] 1 All E.R. 1 (husband ordered to pay wife lump sum of £500 in instalments, charged on his house, but the charge not to be available or enforced except on further application to the court).

[129] Hector v. Hector [1973] 3 All E.R. 1070, summarised in Appendix D.

[130] Hart v. Hart [1968] 3 N.S.W.R. 43.

Power to grant declarator of property rights

3.56. There seems to be no clear authority that the court may competently grant declarators concerning proprietary rights in divorce actions.[131] Such a provision might be useful but could present problems which we have not identified. In order to focus attention on the topic, we suggest that 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. (Proposition 70).

Anti-avoidance powers and inhibition on the dependence

3.57. Before 1964, when legal rights were exigible from a guilty spouse's property on divorce, it was the practice for husbands to divest themselves of their property so that they had none on which legal rights could operate at the date of the decree of divorce.[132] The Succession (Scotland) Act 1964 not only enabled the court to award capital sums or periodical allowance on divorce but, by section 27(1), gives the pursuer a right to apply within a time limit of one year from the disposal of the application for financial provision (or for its later variation), for an order,

> "(a) reducing or varying any settlement or disposition of property belonging to the defender made by him in favour of any third party at any time after the date occurring three years before the making of the application ... or
>
> (b) interdicting the defender from making any such settlement or disposition, or transferring out of the jurisdiction of the court, or otherwise dealing with, any property belonging to the defender."

The court can make an order, on an application under these provisions, if it is shown to its satisfaction that the transaction in question is "primarily for the purpose of defeating, wholly or partly" the pursuer's claims for financial provision:[133] but the order will not prejudice the rights of third parties who acquired property in good faith from the defender for value or their successors in title.[134] Generally speaking, the pursuer cannot inhibit or arrest on the dependence of an action for

---

[131] Cf. Ellison v. Ellison (1901) 4 F.257 (combined action of divorce, accounting and payment described as inconvenient, novel and unprecedented: competency conceded by defender).

[132] The foundation of this practice was Scott v. Scott 1930 S.C.903.

[133] S.27(2).

[134] S.27(3).

aliment[135] or a divorce action concluding for a capital sum or a periodical allowance[136] unless he relevantly avers some special ground as that the defender is verging on insolvency, or is furth of Scotland, or may disappear, or is depleting his assets to defeat the pursuer's claim. It seems that the courts are slow to find that such special circumstances exist.[137]

3.58. It is almost impossible for the pursuer to prove that a transaction is being effected "primarily for the purpose of defeating" the pursuer's claim. One might have expected, therefore, that interim interdict would be rarely applied for or granted. Paradoxically, the reverse is true: the words are invariably ignored simply because they embody an impossible requirement. The practice of granting interim interdict as a routine matter is open to serious criticism. Since breach of interdict is punishable as contempt of court, it ought arguably to be granted sparingly, as an ultimate remedy when all else fails. It is difficult to see how the court can satisfactorily deal with a breach of an interdict against avoidance transactions. A small fine or admonition does not help the dependants and, being ineffective, may bring the law into disrepute. A heavy fine reduces the debtor-spouse's ability to pay. Imprisonment has the same effect and also increases the unhappiness of the parties (except a vindictive claimant) and the children.[138]

3.59. The only safeguards for the claimant other than interim interdict are inhibition or arrestment on the dependence which ought arguably to be available in the absence of special circumstances. This raises several problems. First, a warrant for

---

[135] Macgregor v. Macgregor (1836) 14 S.707 (adherence and aliment); Symington v. Symington (1875) 3 R. 205 (separation and aliment); Millar v. Millar (1907 15 S.L.T. 205 (adherence and aliment; arrestment on dependence recalled on substantial caution being found for interim aliment pendente lite); Beton v. Beton 1961 S.L.T. (Notes) 19 (adherence and aliment; inhibitions recalled).

[136] Gillanders v. Gillanders 1966 S.C.54 120 (divorce and financial provision; arrestment on dependence recalled in absence of special circumstances); Brash v. Brash 1966 S.C.56 (same); cf. Ellison v. Ellison (1901) 4F.257 (action for divorce and for accounting and payment of legal and conventional provisions: arrestment on dependence recalled because no special circumstances); cf. Stuart v. Stuart 1926 S.L.T. 31.

[137] See, for example, Gillanders v. Gillanders, supra; Brash v. Brash, supra.

[138] Arguably section 27 of the 1964 Act is technically defective since it not only gives power to grant a remedy but by that very fact obliquely makes an avoidance transaction a kind of civil wrong.

inhibition or arrestment in security of an existing debt is normally granted as a matter of course in the signeted summons (though it is also competent to apply subsequently for letters of arrestment or inhibition).[139] The onus then shifts to the defender to apply for recall or restriction of the diligence.[140] Claims in divorce actions, however, are for contingent debts and it is for consideration whether the warrant should be granted on application to the court, and whether the application should be intimated so that the other spouse has an opportunity to object. If such an application is intimated, there is a risk that the respondent in the application may uplift his attachable funds before the warrant is granted.[141] Although it is less easy to dispose of heritable property, intimation of an application for warrant to inhibit could also be self-defeating. The second main problem concerns the scope of the warrant. A warrant to inhibit enables the grantee of the warrant to register the inhibition in the personal registers (the Register of Inhibitions). The initial warrant and the registration following thereon affect all heritable property owned by the debtor: it is not competent to restrict the warrant in the first instance to particular items of property, although it may be restricted on a subsequent application to the court.[1] It is for consideration whether some method could be devised for restricting the inhibition in the first instance to (say) the matrimonial home, or the specific items of heritable property referred to in an application for a transfer order. This would innovate on current practice in registration of inhibitions and would have to be carefully considered from that standpoint and from the standpoint of conveyancing practice. Likewise, a warrant to arrest is in general terms and, at any rate if applications for leave to arrest on the dependence were to be introduced, there might be a case for enabling the court to grant warrant restricted to specific funds. There is however a greater risk that an intimated application would be self-defeating.[2] As regards interim interdict under section 27 of the 1964 Act, we note that the time limits appear

---

[139] See now Personal Diligence Act 1838, s.17.

[140] Personal Diligence (Scotland) Act 1838, ss.20 and 21 (arrestments); Titles to Land (Consolidation) (Scotland) Act 1868, s.158 (inhibitions).

[141] It was to avoid self-defeating procedure that precepts of arrestments are allowed to be inserted in a summons before service on the defender: Graham Stewart, Diligence (1898) p.17.

[1] Titles to Land (Consolidation) (Scotland) Act 1868, s.158.

[2] We would not envisage that the present immunity of wages, salaries, pensions and other earnings from arrestment in security should be changed; see Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, section 1.

unduly complicated and restrictive.

3.60. In order to focus discussion on these difficult problems, we suggest that in an action of divorce in which application is made for (i) an order for payment of a capital sum, or the provision of security or (possibly) (ii) an award of periodical allowance or aliment, it should be competent to obtain warrant to inhibi or arrest on the dependence 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. (Proposition 71). We also suggest that 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. (Proposition 72). Doubts have been expressed as to whether the term "reducing" in the present provisions is appropriate in relation to dispositions and transactions not effected in writing. It appears that "reducing" has a technical sense in this context, which leaves an unfortunate gap in the court's powers. We suggest that it should be made clear 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. (Proposition 73).

---

[3] Johnstone v. Johnstone 1967 S.C. 145. The Law Commission recommended abolition of similar time limits in English law: see Law Com. No 25 paras. 97-98, and Matrimonial Causes Act 1973, s.37.

[4] See now, however, MacLean v. MacLean, First Division, November 7, 1975, [1976] 1 Current Law 618.

Power to vary marriage settlements

3.61. Under the present law, the court has power, on granting decree of divorce on any ground other than incurable insanity, to make an order varying the terms of any settlement made in contemplation of or during the marriage, so far as taking effect on or after the termination of the marriage.[5] The most recent Divorce (Scotland) Bills made no alteration in this power.[6] We think that the courts should continue to have this power and we make no suggestions for any change in the law on this matter.

Power to make orders subject to terms and conditions

3.62. For the avoidance of doubt, we think it should be made clear by statute that the court can impose terms and conditions in exercising any of the above powers. (Proposition 74). The simplest example would be an order for a periodical allowance ceasing after a certain time or on the occurrence of a certain event. Other examples would be a transfer of the matrimonial home to the wife with an award of a capital sum to the husband secured on the house and payable on, say, the sale of the house or the wife's death;[7] or a transfer of an interest in the matrimonial home subject to a condition that it should not be sold prior to a certain event, such as the completion of a child's full-time education or without the consent of the court.[8]

Power to make supplementary orders

3.63. The English divorce courts have ancillary powers which increase the effectiveness of orders to transfer property or provide security. A court making such an order may direct that the matter be referred to one of the conveyancing counsel of the court for him to settle a proper instrument, and it may defer the grant of the decree of divorce until the instrument has been executed.[9] If a party still refuses to sign the court can order the deed to be signed for him by a person nominated by the court

---

[5]Succession (Scotland) Act 1964, s.26(1). "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".

[6]Divorce (Scotland)(No.2) Bill 1975-76 introduced by Mr Iain MacCormick M.P. and ordered to be printed 17 December 1975.

[7]Cf. Hector v. Hector [1973] 3 All E.R. 1070.

[8]Chamberlain v. Chamberlain [1974] 1 All E.R. 33.

[9]Matrimonial Causes Act 1973, s.30.

for that purpose.[10] Such powers would not be a novelty in the Court of Session which can already in appropriate cases remit to a conveyancer to prepare deeds[11], defer the grant of a divorce decree until satisfactory arrangements are made for the care and upbringing of children[12], and, in the exercise of its nobile officium, authorise the clerk of court to execute deeds on behalf of an obligant who refuses to sign.[13] It will be for consideration by the competent authorities whether the powers of the Lord Ordinary to remit to a conveyancer and to authorise the clerk of court to execute deeds should be included in an Act of Sederunt or statute. The important point is that 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 effective. (Proposition 75). We have given three examples of such powers but there may be others, such as power to order documents to be produced, which would prove equally necessary. It is for this reason that we suggest that the court should be given a general power to make orders incidental to the effective exercise of its powers to deal with financial provision and property on divorce.

Power to vary or recall orders

3.64. Under the present law an order for a periodical allowance (but not an order for a capital sum) "may, on application by or on behalf of either party to the marriage (or his or her executor) on a change of circumstance, be varied or recalled by a subsequent order."[14] Variation is more important on a "support" model of financial provision than it is on an "equitable adjustment" model, but even on the latter view there

---

[10] Judicature Act 1925, s.47.

[11] See e.g. Erskine v. Glendinning (1871) 9 M. 656.

[12] Matrimonial Proceedings (Children) Act 1958, s.8.

[13] See Whyte v. Whyte 1913,2 S.L.T. 85; Wallace's Curator Bonis v. Wallace 1924 S.C. 212; Pennell's Tr. 1928 S.C. 605; Lennox 1950 S.C. 546; Mackay v. Campbell 1966 S.C. 237; 1967 S.C. (H.L.) 53; Boag 1967 S.C. 322.

[14] Succession (Scotland) Act 1964, s.26(4).

is a case for a power to vary. The court may not have been able to make a suitable adjustment of the financial position on divorce because of the poverty of the person from whom financial provision is claimed. If his circumstances improve later, the court should be able to do then what it would have liked to do earlier. Conversely, changes in the payer's means may make it impossible for him to continue to comply with an order for financial provision made at the time of divorce. Or the original order may have been made on an erroneous basis.[15] Or changes in the value of money may have made the original order inappropriate. The objective would not, on the "equitable adjustment" view, be to keep "support" appropriate to means and needs but rather to ensure that what was intended as an equitable adjustment does not become inequitable, or less equitable than it could be, with the passage of time. With regard to the scope of the court's powers, there are conflicting policy considerations. On the one hand, the court should have the widest powers so that it can do justice between the parties so far as possible. On the other hand, it is desirable that the financial adjustment on divorce should be final so far as possible, so that the parties can plan their new lives on a firm basis.

3.65. Variation: Comparative survey of other laws: English law gives the court power to vary orders for periodical payments, (including secured periodical payments) and orders for payment of a lump sum by instalments.[16] The court has no power, except in relation to judicial separation, to vary orders for the transfer or settlement of property[17], and it has no power on an application for variation of a periodical allowance for a spouse, to make a property adjustment order or an order for payment of a lump sum.[18] The Australian Family Law Act 1975 recognises frankly the desirability of finality with regard to financial provision on divorce. The court is directed "as far as practicable" to "make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them."[19] Nevertheless the court is empowered to vary maintenance orders. But it is not to make an order "increasing or decreasing an amount ordered to be paid by an order unless it is satisfied -

---

[15] Cf. Dickinson v. Dickinson 1952 S.C. 27; Galloway v. Galloway 1973 S.L.T. (Notes) 84.

[16] Matrimonial Causes Act 1973 s.31(2).

[17] Ibid. s.31(2) and (4).

[18] Ibid. s.31(5).

[19] Section 81 (Duty of court to end financial relations).

(a) that, since the order was made or last varied -

(i) the circumstances of a person for whose benefit the order was made have so changed;

(ii) the circumstances of the person liable to make payments under the order have so changed; or

(iii) in the case of an order that is binding on a legal personal representative, the circumstances of the estate are such

as to justify its so doing;

(b) that, since the order was made, or last varied, the cost of living has changed to such an extent as to justify its so doing; or

(c) that material facts were withheld from the court that made the order or from a court that varied the order or material evidence previously given before such a court was false."[20]

In France, a "compensatory payment" made on divorce on the ground of fault or mutual consent is not, as we have seen,[21] variable unless failure to vary would have exceptionally grave consequences for one of the parties.[22]

3.66. We think that the court should have power to vary or recall (a) an order for a periodical allowance (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 for other sufficient reason. (Proposition 76).

It might at first sight appear desirable to confer a power to vary an order for payment of a capital sum or transfer of property if (a) the court, because of a party's inadequate means, had felt itself unable to make as large an award as it thought just at the time; and (b) the party in question had subsequently acquired sufficient means to enable belated justice to be done. In this situation, however, our proposals in Propositions 87 and 88 would enable a late application to be made

---

[20] S.62(2). With regard to the cost of living the court is to have regard to any changes that have occurred in the Official Consumer Price Index (S.62(4)). It is not, however, to have regard to a change in the cost of living unless at least 12 months have elapsed since the order was made or was last varied having regard to a change in the cost of living (s.62(5)).

[21] See para. 3.5. above.

[22] Code civil, art. 273 (new).

for a capital sum or transfer of property,[22A] so that a power of variation would be unnecessary. We have referred above, in relation to aliment, to the question of automatic variation in the light of changes in the cost of living.[23] We have even more doubts as to whether this would be wise or appropriate in relation to periodical allowance after divorce, which may not be intended as support, but again we invite views.

3.67. In England, the courts have power to back-date a variation of periodical allowance[24] and to order repayments of amounts overpaid (for example, in ignorance of the payee's remarriage or in ignorance of the fact that a variation downwards could have been applied for).[25] These seem to us to be useful powers[26] and we invite views as to whether the court dealing with an application for variation of an order for a periodical allowance should be given power to back-date a variation and order repayment of amounts overpaid. (Proposition 79).

[22A] See paras. 3.98 and 3.99 below.

[23] Para. 2.218.

[24] Cf. Macdonald v. Macdonald [1964] P.1; Law Com. No. 25 paras. 92 and 93; Passingham, Law and Practice in Matrimonial Causes (2nd ed. 1974) p. 163.

[25] Matrimonial Causes Act 1973, ss. 33 and 38; Law Com. No 25 paras. 92 and 93; Passingham, loc. cit. supra.

[26] See Law Com. 25 para. 92 - "it happens not infrequently that, on a change in the circumstances, the party liable to pay ceases to do so or reduces the payments but dispenses with the formality of applying to the court relying on the other's acquiescence - a reliance which may later prove misplaced." See also our Proposition 57 in para. 2.217. above.

Section C

Factors to be taken into account by court

3.68. Present law. 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."[1]

3.69. Comparative survey. There is a much more elaborate list of factors in English law, where the court is directed

> "to have regard to all the circumstances of the case[2] including the following matters, that is to say -
>
> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable
>
> (c) the standard of living enjoyed by the family before the breakdown of marriage;
>
> (d) the age of each party to the marriage and the duration of the marriage;
>
> (e) any physical or mental disability of either of the parties to the marriage;
>
> (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;[3]
>
> (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring

The court is then directed, having considered the above factors, so to exercise its powers

> "as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if

---

[1] Succession (Scotland) Act 1964, s.26 (2) and (4).

[2] Including, possibly, remarriage if this is not just a matter of speculation: H v. H. [1975] 1 All E.R. 367.

[3] Cf. Cumbers v. Cumbers [1975] 1 All E.R.1 (application to very short marriage) H. v. H. [1975] 1 All E.R. 367 (application to claim by wife who left husband - "if the job is left unfinished you do not earn as much).

> "if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."[4]

With regard to the words underlined, the courts have taken the view that, in order to further the general policy of the new non-fault law on divorce, regard should be had to misconduct only where it is "both obvious and gross".[5]

3.70. In the United States of America, the Uniform Marriage and Divorce Act, adopted in a few states, first of all limits the circumstances in which a maintenance order may be made to those where the claimant cannot support himself or is the custodian of a child.[6] So these factors are of permanent importance. It then goes on to provide that a maintenance order, if made,

> "shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including
>
> (1) the financial resources of the party seeking maintenance ... his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
>
> (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
>
> (3) the standard of living established during the marriage;
>
> (4) the duration of marriage;
>
> (5) the age and the physical and emotional (sic) condition of the spouse seeking maintenance; and
>
> (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance."[7]

---

[4] Matrimonial Causes Act 1973, s.25(1)

[5] Wachtel v. Wachtel [1973] Fam. 72, C.A.; Trippas v. Trippas [1973] Fam. 134, C.A.; Harnett v. Harnett [1973] Fam. 156. Griffiths v. Griffiths [1974] 1 All E.R. 932 ; Cuzner v. Underdown [1974] 2 All E.R. 351; Jones v. Jones [1975] 2 All E.R. 12.

[6] See para. 3.4. above.

[7] S.308 as amended in 1973.

In Australia, the Family Law Act of 1975 is like the above Uniform Act in that it begins by limiting the right to maintenance after divorce to cases where the claimant is unable to support himself or has the custody, care or control of a child.[8] It goes on to provide that in making and quantifying etc. maintenance orders, the court is to take into account only the following matters:-

"(a) the age and state of health of each of the parties;
(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;
(c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years;
(d) the financial needs and obligations of each of the parties;
(e) the responsibilities of either party to support any other person;
(f) the eligibility of either party for a pension, allowance or benefit under [statutory schemes] or under any superannuation fund or scheme, or the rate of any such pension, allowance or benefit being paid to either party;
(g) ... a standard of living [of the parties] that in all the circumstances is reasonable.
(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain adequate income.
(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;
(k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;
(l) the need to protect the position of a woman who wishes only to continue her role as a wife and mother;
(m) if the party whose maintenance is under consideration is cohabiting with another person - the financial circumstances of the cohabitation;
(n) the terms of any order made or proposed to be made ... in relation to the property of the parties; and
(o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account." [9]

Under the last head, the court can presumably take misconduct into acc

3.71. In France, the court must assess the needs and resources of the spouses in order to fix the amount of a "compensatory payment" on divorce on the ground of fault and mutual consent. The court is directed by law to consider, in particular:-

[8] S.72 quoted at para. 3.4. above.

[9] S.75.

(a) the age and health of the spouses;

(b) the time which they have devoted, or will have to devote, to the education of the children;

(c) their professional qualifications;

(d) their availability for new employment;

(e) their existing and foreseeable rights;

(f) their possible loss of pension rights; and

(g) their means, capital or revenue, after the liquidation of the matrimonial regime.[10]

Conduct does not feature in the list but, as we have seen,[11] it nevertheless plays a most important role. The spouse whose fault is the sole ground of divorce, forfeits all right to a compensatory payment, with the proviso that he or she may be granted an indemnity if, in view of the duration of the marriage and collaboration in the spouse's profession, it would seem manifestly unjust to deny all financial provision after divorce.[12]

3.72. Our proposals: Clearly, the factors to be taken into account by the court in awarding financial provision on divorce will be affected by the view which the law takes as to the objective of such provision. Indeed, if that objective is clearly enough described by statute and if the court is given sufficient powers, it is possibly unnecessary to list in a statute the relevant factors which the court must take into account. Such a list, nevertheless, may provide a useful guide and may serve to emphasise the policy of the law. We have described in detail in paragraphs 3.69 to 3.71 the approach adopted in England, the USA, Australia and France for the benefit of, among others, those who may disagree with our provisional view of the purpose of financial provision on divorce. For our part, we consider that the court should be directed to have regard to all relevant factors but that the factors which would be particularly relevant on an "adjustment" and a "support" approach would not necessarily be the same. If, for example, the purpose of financial provisison is to adjust equitably the profits and losses of marriage, then it is not clear why, for example, a spouse

[10] Code civil, art. 272 (new).

[11] Para. 3.5 above.

[12] Code civil, art. 280-1 (new).

claiming financial provision should lose because he or she is self-supporting. Relevant questions would be: Is he less self-supporting than he would have been but for the marriage? Has the other spouse gained at his expense? We invite views on the proposition that the court dealing with financial provision on divorce should be directed to have regard to all relevant factors including, in particular:-

(a) the property of the spouses at the time of the 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 prosepcts of employment, by the marriage;

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

(e) the ability of a spouse to make the financial provision claimed by the other spouse. (Proposition 78).

In addition, we suggest below two further factors which might be specified.[13] If as we have indicated,[14] it is an important objective of financial provision to adjust equitably the economic advantages and disadvantages arising from the marriage, then the first two factors listed above - property and pensions - might be restricted to property acquired during the marriage and the actual or prospective pension entitlement of the spouses so far as arising from employment or arrangements subsisting during the marriage. On this approach, the court would require to know the value of the spouses' property at the time of the marriage and the time of the divorce and then deduct the former from the latter. Pre-marital property would then only be relevant under other heads, e.g. in assessing the ability of a spouse to make financial provision. This approach might require that the parties make an inventory of pre-marital property at the time of the marriage. But such a requirement would be unrealistic, as is shown by experience in countries having systems of community of acquests: inventories are not made either because most couples believe that their marriage will be for life or because of the embarrassment it involves.

---

[13] Propositions 79 (para. 3.76) and 80 (para. 3.81).

[14] At para. 3.7 above.

3.73. Relevance of marital misconduct. The list of relevant factors in Proposition 78 does not specifically include or exclude a reference to the conduct of the spouses as part of "all the circumstances of the case". There are a number of different approaches to the problem of conduct, and the choice of approach must take account of the pattern of the law of divorce, - whether based on fault, or breakdown, or both. First, it could be provided by statute that the conduct of the parties should be disregarded, as in the American solution described at paragraph 3.70 above. We doubt, however, whether public opinion in Scotland would 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 little or 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 misconduct. Such a result seems inconsistent with the objective which we have suggested (at paragraph 3.7.) as the purpose of financial provision, namely to adjust equitably the advantages and disadvantages arising from the marriage.

3.74. If it is accepted that conduct must sometimes be relevant, what test of relevance should be adopted? Some help may be derived from the experience in England where, as we saw in paragraph 3.69 the court must seek "to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been" if the marriage had not broken down etc. This raised the question whether conduct was relevant only in extreme and unusual cases (what may be termed the second approach) or whether it was relevant in the ordinary case (the third approach). The decision in Wachtel v. Wachtel[15] is generally taken as establishing the second approach as the correct one. Conduct

---

[15] [1973] Fam. 72 C.A.; see also Trippas v. Trippas [1973] Fam. 134, C.A.; Harnett v. Harnett [1973] Fam. 156 but this view is not uniformly accepted: see Rogers v. Rogers [1974] 2 All E.R. 361, 363.

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."[16]

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 the 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 decision is based on the assumption that, in the great majority of cases, responsibility for the breakdown of marriage is shared by both spouses. "In most cases both parties are to blame - or, as we would prefer to say, - both parties have contributed to the breakdown".[17] On this view:

> "the party concerned must be plainly seen to have wilfully persisted in conduct, or a course of conduct, calculated to destroy the marriage in circumstances in which the other party is substantially blameless. I think there will be very few cases in which these conditions will be satisfied."[18]

Thus, the justification for the "gross and obvious" test is not so much equitable considerations as the need to prevent judicial post mortems on dead marriages. This policy in turn is 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.[19] It will be seen that the "gross and obvious" formula depends on practical rather than equitable considerations. Other formulae could be devised to restrict the relevance of conduct to more or less extraordinary or extreme cases. Some may think that only

[16] Wachtel v. Wachtel, supra, per Lord Denning M.R. at p.90:' "gross" describes the conduct; "obvious" describes the clarity or certainty with which it is seen to be gross', Harnett v. Harnett, supra, per Bagnall J. at p.165.

[17] Wachtel v. Wachtel, supra, at p.90.

[18] Harnett v. Harnett, supra, per Bagnall J. at p.165.

[19] Wachtel v. Wachtel, supra, at pp. 89-90.

marital misconduct having a direct financial consequence should be taken into account. At all events, we think think that a general formula would be preferable to a list of particular types of extreme misconduct: such a list could never be exhaustive.[20]

3.75. We would draw attention to three further points. First, the unsettled future pattern of divorce law may make it difficult for those persons whom we consult to submit observations, but such persons may wish to have regard to the existing law and to the pattern of divorce suggested in recent Bills. Even without divorce reform, it would not be right to have regard in financial matters only to the conduct relied on as the ground of divorce. Thus where a deserting husband who has contributed most to the marriage breakdown divorces his wife for one uncharacteristic act of adultery, or where a technically "innocent" husband, who has committed conduct justifying non-adherence but not divorce, obtains decree against his wife for her adultery, then it may well be equitable to give financial provision to the wife although she is the defender. Second, whatever test of relevant conduct is selected, the conduct should not be weighed in too fine scales. Nor should contribution towards (or blame for) breakdown be apportioned as between the parties on a percentage basis (like contributory negligence in reparation actions). Third, assuming conduct is relevant, the question arises of its effect on the determination of financial provision. We think that the payee's misconduct, if relevant, should operate to reduce his or her claim, but it is less clear whether the liability of the payer spouse, as determined on the basis of financial factors, should be increased because of his or her misconduct. That would be tantamount to awarding damages under another name. Perhaps , guidelines as to the effect of admitting conduct as relevant can be left to be developed by judicial decision.

---

[20] Cf. the specification in the new German family law reform project which includes the cases (a) where the claimant has been guilty of a serious criminal offence against the other spouse or a near relative of his and (b) where the claimant has been guilty during the marriage of prolonged neglect of his obligation to contribute to the maintenance of the family. Entwurf eines Ersten Gesetzes zur Reform des Ehe-und Familienrechts. (1 Ehe RG) 1974 new S 1580. This proposition has been much criticised.

3.76. To focus discussion, we invite views on the following questions: (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)? (Proposition 79).
We have made a similar suggestion (at paragraph 2.198 above) in relation to the quantification of aliment.

3.77. Relevance of need to support second wife and new family. We have considered (at paragraph 2.116 above), in relation to aliment, the problem which arises when a man claims that he cannot afford to aliment his wife and children because of the requirements of his new 'de facto family'. We have seen that, under the existing law, 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 responsibility which he may have assumed to support a paramour and her children.[21] A similar problem can arise after divorce, but in this case there is the added complication that the divorced husband may marry his paramour and thus convert his "moral obligation" into a legal obligation.[22] There is no reported authority on this question in Scots law, apart from dicta to the effect that the first wife comes first.[23] In practice, the effect of supplementary benefit will often be an important consideration in such cases.[24] 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

---

[21] See para. 2.116 above and authorities there cited.

[22] Although the figures have to be treated with caution because of fluctuations in the divorce rate, it is clear that a substantial proportion - well over 50% - of divorced husbands remarry. See Annual Report of Registrar General for Scotland for 1972 Table Q.1.7.

[23] Galloway v. Galloway 1965 S.L.T. (Notes) 92.

[24] Cf. Henry v. Henry 1972 S.L.T. (Notes) 26.

after meeting the needs of his new family.[25]

3.78. Comparative survey. In England, section 25(1)(a) of the Matrimonial Causes Act 1973 requires the court to have regard to:

> "responsibilities including those of a husband who has remarried after the dissolution of his first marriage; his legal responsibility to maintain his new wife 'must be fully borne in mind and given the same degree of weight as his responsibility in any other financial respect.[26] The expression seems apt also to include what may be called 'moral' obligations, such as those to a mistress with whom a husband whose wife has obtained a decree of judicial separation is living."[27]

It is clear, however, that English law has found no answer to the conflict between the old family's and the new family's claims. The courts cannot ignore "the just claims of the first wife": on the other hand they have been compelled to "take into account" the husband's obligations and responsibilities to his new family and to recognise that "it is little use ordering a man to pay what is beyond his capacity, or [an amount] on which he will in every probability default."[28] In Australia, the Family Law Act 1975, as we have seen, directs the court to take into account "the responsibilities of either party to support any other person" and "if the party whose maintenance is under consideration is cohabiting with another person - the financial circumstances of the cohabitation."[29]

3.79. In West Germany, the new family law reform project contains a carefully considered attempt to resolve the conflict between a first spouse and a second spouse. On the whole, the proposed rules lean in the direction of protecting the first spouse's claims. First, the obligation to support a new spouse can be taken into account only in a case where he or she would be entitled to maintenance if the rules on financial provision after divorce were applied, with any necessary modifications. This means that a second wife, who could support herself, cannot sit at home as a housewife to the prejudice of the first wife's claims. Second, the obligation to support a new spouse is to be left out of account if the divorced spouse is entitled to support on account of the care or upbringing of a child

---

[25] See Henry v. Henry supra. See also para. 2.117 above and para. 5.6. below. It should be noted, however, that a man is not liable to support his former wife for supplementary benefit purposes, so that it is only in relation to aliment for children that recovery is possible in any event. See Ministry of Social Security Act 1966, s.23.

[26] Barnes v. Barnes [1972] 1 W.L.R. 1381, C.A. at p.1384.

[27] Passingham, Law and Practice in Matrimonial Causes (1974) p.134.

[28] See Cockburn v. Cockburn [1975] 1 W.L.R. 1021 at 1024; Roberts v. Roberts [1970] P.1 at 7-8 and 10.

[29] See para. 3.50 above, heads (e) and (m).

[30] Entwurf eines Erstein Gesetzes zur Reform des Ehe-und Familienrechts (1 Ehe RG)(1974), new S1583 of BGB.

of the first marriage (literally, of a mutual child - "eines gemeinschaftlichen kindes") or if the first marriage were of lo duration.[31] In other cases the claims of first and second spouse rank equally.

3.80. Our proposals: At first sight, there are attractions in the West German solution. It faces up to the problem squarely and it isolates two situations in which the claims of a first wife are particularly strong - (i) where she has been left with children to bring up; and (ii) where her marriage had subsisted for a long time. In these cases it can be argued also that the second wife must take the husband as she finds him - with all his existing obligations.[32] Nevertheless, we suspect that, however strong sympathy may be for the first wife in such cases, it will often be unrealistic and futile to place her claims before those of a second wife. The official commentary on the West German proposal assumes, and accepts, that the above rules will often deprive the second wife of the possibility of a "housewife" marriage and indeed of the possibility of children: she will have to continue working in order to support herself.[33] We doubt whether people are likely to behave in such a rational, responsible and economically minded way.

3.81. There is, in truth, no adequate solution to be found, within the confines of private law, to the problem of making one limited income support two families. It is inevitable that "part of the cost of breakdown of marriage, in terms of the increase of households and dependencies, must fall on public funds."[34] 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 much more readily and satisfactorily

---

32 See Bundesrat Drucksache 260/73 p.143.

33 Ibid.

34 Report of the Finer Committee on One-Parent Families Vol.1 para. 4.49.(Cmnd. 5629; 1974).

than the unwilling husband. All that the private law can do is to ensure that the courts have power to reach reasonable results and that they are not fettered by rules giving an absolute preference to one family to the exclusion of the other. Under the present law, the judges have felt bound to prefer the legal claims of a wife to the non-legal but nonetheless real claims of a paramour with whom the husband is cohabiting.[35] They have felt bound, as a result, to grant decrees which they recognised as being unrealistic and unlikely to be enforced.[35] We take the provisional view that these restrictions should be removed and that, in assessing the ability to pay of the spouse who is being asked to make 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. (Proposition 80).

---

35 Henry v. Henry 1972 S.L.T. (Notes) 26.

Section D

Events subsequent to order

Effect of death.

3.82. Under the present law of Scotland, an order for payment of a periodical allowance ceases to have effect on the death of the pursuer, except in relation to accrued arrears.[1] We think that the death of the payee should continue to have this effect: the objective of equitable adjustment between the parties to the marriage does not require a periodical allowance to be continued for the benefit of the payee's estate.

3.83. The Succession (Scotland) Act 1964 provides that the pursuer can apply:

> "for an order for payment to him by the defender, or, in the event of the defender predeceasing him, by the defender's executor, of a capital sum or a periodical allowance or both."[2]

The Act, therefore, envisages that the court may make an order for periodical allowance which will continue to be payable by the defender's executors after his death. Indeed, it would seem that an order for payment by the defender, without any mention of his death, transmits against his executors.[3] The Act refers to termination on the pursuer's death and expressio unius est exclusio alterius. Nevertheless, our consultations on certain succession law aspects of the 1964 Act revealed that there was doubt on this point. There is also some doubt as to variation on death. The Succession (Scotland) Act 1964

---

1 Succession (Scotland) Act 1964, s.26(5). This is also the rule under the English Matrimonial Causes Act 1973, s.28; the Australian Family Law Act 1975, s.82(1); the West German Entwurf eines Ersten Gesetzes zur Reform des Ehe-und Familienrechts (1974) new S1586(1) of B.G.B.; and is also the intention behind the (curiously drafted)S316(b) of the U.S. Uniform Marriage and Divorce Act of 1970. See Commissioners' Note thereto.

2 S.26(1).

3 Cf. Docherty v. Corporation of Greenock 1946 S.L.T. 90 which concerned the passive transmissibility of an order for financial provision on divorce for incurable insanity under the Divorce (Scotland) Act 1938, s.2.

provides that an order for periodical allowance:

> "may, on an application by or on behalf of either party to the marriage or his or her executor on a change of circumstances, be varied or recalled by a subsequent order."[4]

Our view would be that death was clearly a relevant and important change of circumstances, but our consultations revealed a surprising uncertainty on this point. We note that the most recent Divorce (Scotland) Bill attempted to remove the above doubts by making it clear that an order for payment of a periodical allowance did continue to operate against the payer's executor, without prejudice to the making of an order for variation or recall.[5]

3.84. Comparative survey: In England, an order for periodical payments to a divorced spouse extends beyond the death of the paying spouse only if it is secured: an unsecured order terminates on the payer's death.[6] The position in England differs from that in Scotland, however, in that a former spouse can apply for a "reasonable provision for ... maintenance" out of the deceased person's estate.[7] In Australia, the Family Law Act provides that an order for maintenance of a divorced spouse ceases to have effect on the death of the payer.[8] But this general rule is subject to one sweeping proviso. It does not apply:

> "if the order is expressed to continue in force throughout the life of the person for whose benefit the order was made or for a period that had not expired at the time of the death of the person liable to make payments under the order and, in that case, the order is binding upon the legal personal representative of the deceased person."[9]

The Family Law Act 1975 does not, however, contain a provision found in the Bill which became the Act to the effect that even if an order does cease to have effect under the general rule, the payee can apply to have it revived so as to bind the deceased's legal personal representative.[10] In the United States of America, the Uniform Marriage and Divorce Act 1970 provides that the obligation to pay maintenance after

---

[4] Succession (Scotland) Act 1964, s.26(4).

[5] Divorce (Scotland) Bill (No.2) 1975 (introduced by Mr. Iain MacCormick M.P.) cl. 5(5).

[6] Matrimonial Causes Act 1973, s.28(1).

[7] Matrimonial Causes Act 1965, s.26.

[8] S.82(2).

[9] S.82(3).

[10] Family Law Bill 1974 (200/2.4.1974) clause 61(4).

divorce is terminated on the payer's death "unless otherwise agreed in writing or expressly provided in the decree."[11] In West Germany, the new family law reform project is particularly interesting in this respect. Under the proposed new S1586 of the B.G.B., the obligation to pay maintenance transmits against the heir, but the heir is obliged only up to the amount of the legal rights (Pflichtteil) which the payee spouse would have received if the marriage had not been dissolved.[12] In France, the obligation to pay a periodical allowance on divorce transmits against the heirs of the payer.[13]

3.85. Our proposals: The death of the person by whom financial provision is payable will often provide an opportunity for the court to complete the process of equitable adjustment between the parties. Funds falling into the deceased party's estate may be available for payment of a capital sum which could not, because of lack of means, be ordered before. The court can hardly be expected to foresee, at the time of divorce, the situation which will emerge on the payer's death. It will, therefore, usually be preferable for the original order, if any, to make no reference to this contingency and for the new situation on death to be dealt with on a new application for an order or for variation. We therefore suggest that 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. (Proposition 81). The effect of this proposition, when taken along with our later suggestions on more flexible time limits on applications and awards (Propositions 87 and 88 below) would be to enable a party who, because

---

[11] S.316(b).

[12] Entwurf eines Ersten Gesetzes zur Reform des Ehe-und Familienrechts 1974.

[13] Code civil arts. 276-2 and 284 (added by law of 11 July 1975). The previous law was the same. See Carbonnier, Droit Civil Vol.II pp. 154 and 163 (9th ed. 1972).

of the other party's lack of means, had been refused a capital sum on divorce, to obtain an award of a capital sum out of the other party's estate. It would also enable the court to commute a periodical allowance into a lump sum which would enable the deceased's estate to be wound up without the complication of a continuing obligation to pay periodical allowance. Either party should be able to apply for a variation of an existing order and it should be open to the payer's executor, if so advised, to apply for a commutation of a periodical allowance into a lump sum or transfer of property.

3.86. If no application for variation is made, we think that the obligation to pay a capital sum or periodical allowance should, in the absence of express provision to the contrary in the order, transmit against the payer's executor. The executor will always be aware of the death and will almost always be legally advised, whereas the payee spouse may be neither, and it would seem to be preferable on practical grounds to place the burden of changing the position on the executor. The converse solution, involving termination of the order unless varied on death, would also have the disadvantage of leaving a gap between the death and the variation when nothing would be payable to the payee spouse. Moreover, a continuing right to payment would give the payee spouse a bargaining counter which he or she could exchange for a capital payment by agreement with the executor (who would not infrequently be the deceased's second spouse). Only in the case of failure to agree would an application to the court be necessary. We therefore suggest that 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. (Proposition 82). This, of course, is subject to the provisions on variation and recall which we have discussed at paragraphs 3.64 to 3.66 above.

Effect of remarriage and cohabitation

3.87. Scots law: Under the present law of Scotland, an order for payment of a periodical allowance ceases to have effect on the remarriage of the pursuer, except in relation to arrears due under it.[14] This seems to reflect a "support" view[15] of periodical allowance: a woman who remarries casts in her lot with a new man and can no longer look to her previous husband for support. The rule, however, applies to a husband-pursuer who marries a woman who will be dependent on him and it applies to a wife-pursuer who marries a man who will be dependent on her, even although in both cases the remarriage may increase the pursuer's needs. In these respects, the rule is not fully consistent with a support philosophy and may reflect other values.

3. 88. On an "adjustment" view[15] of financial provision, the question is not whether the remarriage of the payee should terminate an obligation of support, but whether it is such a fundamental change as to bring to an end any adjustment process which has not yet been completed. The answer to this may depend on the nature of the adjustment. If a wife has been awarded a periodical allowance as a way of giving her, by instalments as it were, a share of the property acquired during marriage (which for some reason cannot be more directly redistributed), there is no reason for terminating the allowance on her remarriage. On the other hand, if the periodical allowance is designed to ease her position as the head of a one-parent family and to distribute the burden of this situation equitably between the two ex-spouses, then her remarriage does fundamentally alter the situation. Similarly, an older woman who has made marriage and home-making her career may regard herself, and may be regarded by the law, as having mitigated her loss so completely by a suitable remarriage as to make further adjustment or compensation by means of a periodical allowance unnecessary.

---

14 Succession (Scotland) Act 1964, s. 26(5).

15 For the "support view" and the "adjustment view" see para. 3.2. above.

3.89. Comparative survey: In England, the Law Commission found that there was "almost unanimous support" for the view that periodical payments should finally cease on remarriage.[16] This is now the English rule.[17] It is the usual rule in Australia "unless in special circumstances the court...otherwise orders".[18] In France, the rule formerly was that alimentary allowances on divorce ceased on remarriage.[19] Under the new divorce law, however, that rule applies only to the duty of support which continues to bind the spouse who obtains a divorce on the ground that the married life has broken down.[20] A "compensatory" periodical allowance awarded after a divorce on the ground of mutual consent or fault is designed to counterbalance disparities caused by the rupture of the marriage and does not terminate automatically on the remarriage of the payee (although presumably the court could award it for a period ceasing on remarriage).[21] The West German family law reform project also proposes to alter the existing law whereby the right to maintenance after divorce ceases altogether on remarriage. Under the proposed new rules, the claim will be capable of reviving in certain circumstances on the dissolution of the second marriage: for example, a wife who is prevented from undertaking employment because she must look after the children of the first marriage, may claim support from her first husband on the dissolution of her second marriage.[22] In the United States of America, the Uniform Marriage and Divorce Act of 1970 contains a still more flexible solution: the payee's remarriage terminates the obligation "unless otherwise agreed in writing or expressly provided in the decree.[23]

3.90. Our proposals: We think that economically, socially and psychologically, the remarriage of a divorced spouse in receipt of a periodical allowance will usually amount to such a fundamental change and such a fresh start as to justify the termination of the periodical allowance. Nevertheless,

---

[16] Law Com. No.25 para. 14.

[17] Matrimonial Causes Act 1973, s.28. Before 1970 an ex-wife's right to maintenance did not necessarily cease on remarriage. See Law Com. Working Paper No.9 (1967) para. 40.

[18] Family Law Act 1975, s.82(4).

[19] Civ.[2] 8 janv. 1960, D.60, 245; Civ.[2] 17 fevr. 1971, D.71, S.119. Carbonnier, loc. sit. pp. 163 and 165.

[20] See Code civil art. 283 (added by law of 11 July 1975).

[21] Cf. art. 276-1 (periodical allowance to be awarded for a period equal to, or less than, the life of the payee).

[22] Bundesrat, Drucksache 260/73 pp. 150-151.

[23] S.316(b).

there may be exceptional cases where this is not so and we invite views on the suggestion that 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. (Proposition 83). We have considered whether any time limit (say, a year from the remarriage) should be placed on an application by the payee for revival of an order but have concluded that the limitations in the proposition would be sufficient to prevent abuse. We would envisage that this power would be utilised only rarely but that it could provide a useful measure of flexibility, particularly where periodical allowance had been used to adjust property rights.

3.91. We have considered whether the duty to pay periodical allowance should be suspended or terminated on the payee's cohabitation with another person as man and wife.[24] This situation is expressly provided for by 'cohabitation rules' in various social security contexts.[25] These rules are, however, notoriously difficult to administer and, although we would welcome comments, our preliminary view is that 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. (Proposition 84). The circumstances of cohabitation may justify a variation of periodical allowance but cohabitation as such should not have any automatic effect.

---

[24]Under the new French divorce the duty to support after a "breakdown" divorce ends on remarriage or if the payee lives in a state of notorious concubinage. Code civil art. 283 (added 11 July 1975).

[25]See Social Security Act 1975 ss.24(2), 25(2) 26(2) and 31, Ministry of Social Security Act 1966, Sch. 2, para. 3.

The undesirability and artificiality of distinguishing too sharply between remarriage and cohabitation in this conext provide another justification for the element of flexibility which we have suggested in Proposition 83.

Effect of bankruptcy on orders for financial provision.

3.92. Normally an insolvent spouse or a spouse verging on bankruptcy at the time of a divorce action would not be ordered to pay a capital sum or to transfer property on divorce. He would be able to demonstrate that his means were not sufficient. It is conceivable, however, that through inadvertence or collusive agreement between the spouses, a capital payment or property transfer could be ordered. We think that, in such a case, the payment or transfer would not be challengeable by creditors under the existing enactment or rule of the common law.

3.93. The reasons for this view can be briefly summarised.

> First, at common law, creditors may challenge a transfer of money or property if the transfer was gratuitous and the transferor was insolvent at the time of transfer.[30] We do not, however, consider that this rule would extend to a capital payment or property transfer made under a court order on divorce. The basis of the common law rule is that a voluntary and gratuitous alienation made by a debtor when in a state of insolvency is deemed to be a fraud on his creditors. But a payment or transfer of property ordered by the court on divorce is not voluntary since the debtor is required to make it by the court. Arguably, it is not gratuitous since the order imposes an obligation which transforms the nature of the payment or transfer into an onerous one.
>
> Second, a cash payment would not be challengeable[31] by creditors as a gratuitous alienation by an insolvent to a "conjunct or confident person" under the Bankruptcy Act 1621,[32] and the question arises whether the Act would cover a transfer of property under a divorce decree. Under the 1621 Act, an alienation to a "conjunct or confident person" is presumed to be gratuitous and, if the transferor is proved to be insolvent at the raising of the action

[30] Goudy, Bankruptcy (4th ed.; 1914) pp. 22-35.

[31] Armour v. Learmonth 1972 S.L.T. 150.

[32] A.P.S. 1621, record ed. c.18; 12mo ed. c.18; see Goudy, op. cit. pp. 43-56.

of reduction of the transfer, he is presumed to have been insolvent at the time of the transfer.[33] In the absence of authority on this point it is far from clear that a former spouse, transacting ex hypothesi at arm's length, would be treated as a "conjunct or confident person" within the meaning of the Act or that a payment made under an order on divorce would be treated as an alienation "without true, just and necessarie causes" in terms of the Act. It seems therefore that the 1621 Act would not apply to such payments or transfers. The matter, however, should not be left in doubt.

Third, we think that a payment or property transfer made under an order on divorce would not be reducible as a fraudulent preference. Both under the common law and the Bankruptcy Act 1696,[34] a preference is subject to challenge only if it is voluntary, and cash payments are in any event excluded. We conclude, therefore, that it would be difficult to challenge a payment or transfer of property made under an order of the court on divorce.

3.94. The question whether the claims of one party to a marriage should be preferred or postponed to the claims of the other partner's creditors on his or her bankruptcy is one on which we must be guided by public opinion. As we have seen in other contexts, the general rule is that a spouse must follow the other spouse's fortunes.[35] For this reason, among others, a wife cannot obtain security for future aliment by arrestment of future or contingent debts owed, or to be owed, by third parties to the spouse who is the common debtor.[36]

---

33 Goudy, op. cit. (previous note).

34 A.P.S. 1696, c.5; 12mo ed. c.5.

35 Symington v. Symington (1875) 3 R.205 per L.P. Inglis at p. 207; McNaught v. McNaught's Tr. 1916, 2 S.L.T. 291 (Sh. Ct.).

36 Symington v. Symington, supra.

Again, on the dissolution of marriage by death, the legal rights of the surviving spouse are exigible only from the free estate of the deceased spouse after the claims of his or her creditors have been satisfied. In England, it is specifically provided[37] that the fact that a transfer of property had to be made in order to comply with a property adjustment order on divorce does not prevent the transfer from being set aside by the trustee in bankruptcy of the transferor-spouse under the English bankruptcy legislation.[38] This provision stems from a recommendation of the Law Commission who argued that:

> "Marriage is a form of partnership and, on normal partnership principles, neither partner should compete with the other partner's creditors".[39]

We think that the creditors of an ex-spouse making a capital payment or transfer of property under a court order on divorce would have good reason to complain if the ex-spouse was insolvent at the time of the payment or transfer or became insolvent as a result of it. We suggest, therefore, that a transfer of property between spouses should not be immune from challenge as a gratuitous alienation at common law by reason only of the fact that the transfer has been 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 such a transfer. (Proposition 85). The effect would be that creditors could reduce a transfer of property if they could prove that the transferor-spouse was insolvent and that (apart from the court order) the transfer was gratuitous at the time it was made. But they would not be aided by presumptions which would be artificial and unrealistic in the normal, non-collusive divorce situation.

---

[37] By the Matrimonial Causes Act 1973, s.39.

[38] See Bankruptcy Act 1914, s.42(1) (which provides that, where a person settles property and within two years of the execution of the settlement has been adjudicated bankrupt, the settlement may be set aside by his trustee in bankruptcy. No intent to defraud need be proved.)

[39] Report on Financial Provision in Matrimonial Proceedings, Law Com. No 25 (1969), para. 78.

3.95. With regard to the situation in which the payer becomes insolvent after the date when a capital sum should have been paid or property transferred in pursuance of a court order on divorce, we think that the payee should be able to rank as an ordinary creditor for any outstanding amounts due but unpaid. This would be the present position and we make no suggestions for change. The question of ranking for future instalments of periodical allowance is similar to that which arises in relation to future aliment[40] and we think it is best dealt with in the context of bankruptcy law reform.

Capital transfer tax

3.96. Section 40 of the Finance Act 1975 has the effect of exempting certain transfers of capital on divorce from capital transfer tax. It is, however, framed in "maintenance" terms and is not easy to apply even in relation to the present law of financial provision on divorce. It would be equally difficult, if not more so, to apply section 46 to the system which we have outlined for consideration in this memorandum, under which financial provision on divorce would not be seen as designed primarily to provide "maintenance". The relevant provisions of section 46, so far as it concerns spouses,[41] are as follows:

> "46.-(1) A disposition is not a transfer of value if it is made by one party to a marriage[42] in favour of the other party ... and is -
>
> (a) for the maintenance of the other party, ..."

If a disposition is only partly for the maintenance of the other party it must be apportioned and only the "maintenance" part qualifies for exemption.[43] It seems to us that the notion

---

[40] See para. 2.118 above.

[41] The section also applies to children, but does not give rise to the same difficulties in that respect.

[42] "Marriage", in relation to a disposition made on the occasion of the dissolution or annulment of a marriage, and in relation to a disposition varying a disposition so made, includes a former marriage". S.46(6).

[43] S.46(5).

of splitting capital sums[44] or transfers of property into a "maintenance" element and a "non-maintenance" element is an unhappy one and that a case could be made out for exempting transfers made in pursuance of a court order on divorce from capital transfer tax. Transfers between spouses are normally exempt[45] so that the present law appears to favour the spouses who complete their financial arrangements by agreement before the divorce. This, however, is a matter on which a uniform solution for the whole of the United Kingdom is obviously desirable. We raise it for consideration, but make no suggestions in the meantime.

---

[44] The same problem could in theory arise in relation to periodical allowances on divorce but in practice they would usually be covered by the exemptions for "Values not exceeding £1,000 per annum" and "Normal expenditure out of income". See Finance Act 1975, Sch. 6 paras. 2 and 5.

[45] Id. Sch. 6, para. 1.

Section E

Procedural questions

Who may apply?

3.97. Except in the case of divorce for incurable insanity,[1] the present law is that only the pursuer can apply for financial provision on divorce, but there is no distinction between the sexes.[2] Applications by husbands are not unknown.[3] It follows from our suggestion in Proposition 66 above (court should have power to award financial provision to either spouse: see paragraph 3.19.) that either the pursuer or the defender should be able to apply for a financial provision on divorce. (Proposition 86).

Time limits on application

3.98. Under the present law, application for a periodical allowance or capital sum or both can be made at any time prior to decree of divorce being granted.[4] Application for a periodical allowance can be made at any time after the date of the decree (if no application was made before decree, or if an application was withdrawn or refused) but only if there has been a change in the circumstances of either party since the decree.[5] No application for a capital sum can be made after the decree. This may be an undesirable restriction. A husband may, for example, be unable to meet a claim for a capital sum at the time of the divorce but may later come into funds which would enable him to do so. On the other hand, it is clearly desirable that, whenever possible, the question of financial provision should be regulated at the time of the divorce. A useful compromise[6] might be to provide that

[1] In incurable insanity cases under the existing law, either party can apply: Divorce (Scotland) Act 1938, s.2 as substituted by Divorce (Scotland) Act 1964, s.7. See also Rule of Court 165.

[2] Succession (Scotland) Act 1964 s.26(1)(a).

[3] See e.g. Gould v. Gould 1969 S.L.T. (Notes) 89.

[4] Succession (Scotland) Act 1964, s.26(1)(a).

[5] Ibid. s.26(3).

[6] Cf. the English Matrimonial Causes Act 1973, s.26. See also the Morton Report (Cmd. 9678; 1956) paras. 506-510.

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 were to be presented outwith certain time limits. (Proposition 87).

Time limits on making order

3.99. Under the present law, the court has power to make an order awarding financial provision under section 26(1) of the Succession (Scotland) Act 1964 only "on granting decree of divorce."[7] Similar wording in English law gave rise to a good deal of difficulty and the Morton Commission recommended that the court's power should be exercisable at the time of making the decree "or at any time afterwards."[8] This recommendation has been implemented.[9] We have already suggested (Propositions 67(f) and 68; paragraphs 3.35. and 3.52.) that the court should have power to make orders pending disposal of a divorce action transferring certain tenancies or regulating the use and occupation of property. The range of powers suggested above makes a slightly more detailed solution necessary. We suggest for consideration that 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 (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. (Proposition 88).

---

[7]Succession (Scotland) Act 1964, s.26(2).

[8]Cmd. 9678 (1956) para. 505.

[9]See now Matrimonial Causes Act 1973, s.93.

Undefended actions

3.100. We have discussed in relation to aliment[10] whether or not the court in an undefended action should have a discretion to award a lesser sum than the amount claimed. On the one hand, it can be argued that, if the defender thinks too much has been claimed, he should defend the action and that, if the defender is content with the amount claimed, the court should not be required or encouraged to investigate whether the claim is appropriate. On the other hand, it can also be argued that the court's task is to arrive at a reasonable solution in the light of all the relevant circumstances and that it should retain the fullest discretion to enable it to do so. This last argument is perhaps stronger in relation to financial provision on divorce than in relation to aliment. The court on divorce is winding up a relationship and it has a range of powers which, arguably, should remain entirely within its control even in an undefended action. Under the present law, the court does have a discretion[11] and, on the whole, we are inclined to think that this should continue to be the position. The question is, however, closely linked to aliment. A wife may claim aliment for children and financial provision for herself in the same action. Should different rules apply? What should be the position in an action of separation and aliment? We make no positive suggestion at this stage but, as we have already done in relation to aliment, invite views on the question whether if a claim for financial provision is undisputed, the court should, or should not, have a discretion to award a lesser sum than the amount claimed. Clearly the court should not have power to award more than an intimated claim.

10 Para. 2.208 above.

11 Gould v. Gould 1966 S.C. 88; Cf. Robson v. Robson 1973 S.L.T. (Notes) 4; Seed v. Seed 1971 S.L.T. 305; Marshall v. Marshall 1965 S.L.T. (Notes) 17; Adamson v. Adamson 1939 S.L.T. 272.

Ascertainment of party's means

3.101. The problem faced by the pursuer in an action for aliment who finds it difficult to ascertain the defender's means[12] may also be faced by an applicant for financial provision on divorce. The court does not require detailed evidence of the defender's means in an undefended action in which a periodical allowance is claimed. In the usual case where the husband is a salary or wage earner -

> "The court should normally be able to deal properly with an application for a periodical allowance on the basis of the pursuer's evidence as to the defender's wages or occupation and the parties' general standard of living at the time when they last lived together and as to her own means at the date of the proof." [13]

In more complicated cases, a commission and diligence may be granted to recover the defender's business books and other relevant documents.[14] We have discussed above,[15] in the context of aliment, the suggestion that it should be made mandatory for the defender to supply details of his capital and income, whether he is disputing the pursuer's claims or not. We referred to the lack of an appropriate sanction, and the pointlessness of an obligation without a sanction. We are no more enthusiastic about this proposal in relation to divorce but invite views. We also discussed in relation to aliment the possibility of a standard form of means questionnaire.[16] It may be that the information on means which is required to be given in a divorce summons, in defences or, sometimes, in a minute, could usefully be embodied in replies to a standard form of questionnaire. The change would, however, be a minor one which would not require to be made by statute. We invite views but make no proposals.

---

12 Discussed in para. 2.209 above.

13 Gould v. Gould 1966 S.C. 88.

14 E.g. Douglas v. Douglas 1966 S.L.T. (Notes) 43. Cf. Galloway v. Galloway 1947 S.C. 330.

15 Para. 2.206.

16 Para. 2.207.

Enforcing order

3.102. The enforcement of decrees awarding financial provision on divorce presents certain problems. In the present law such decrees are not enforceable in all respects as alimentary decrees.[17] On the other hand, as in the case of alimentary decrees, the creditor under a decree for periodical allowance can stand back and watch the arrears mount up and then do diligence for the accrued total.[18] It will be for consideration whether there should be some limitation on the extent to which arrears of periodical allowance can accumulate and whether the court should have power to remit the payment of longstanding arrears. In England, payment of arrears due under a financial provision order cannot be enforced without the leave of the court if the arrears become due more than twelve months before the enforcement proceedings are begun.[19] It will be for consideration whether a similar approach should be adopted in Scotland and we shall examine this matter, together with the problem of arrears of aliment, more fully in our forthcoming Memorandum on collection and enforcement of aliment and financial provision.

3.103. The procedure for variation of a periodical allowance is by way of minute in the process, and there is now provision for the making of interim orders.[20] The Law Reform (Miscellaneous Provisions)(Scotland) Act 1966, allowing variation or recall in the sheriff courts of certain orders made by the Court of Session, applies to orders for periodical allowance on divorce. We refer to our discussion of this

[17] See e.g. Clive and Wilson, Husband and Wife (1974) p.562 where it is submitted that a decree awarding periodical allowance is not enforceable by civil imprisonment.

[18] See para. 2.212.

[19] Matrimonial Causes Act 1973, s.32. This provision is designed to give the court an opportunity to decide whether it is right to remit arrears. See Law Com. No.25 para. 92 and Working Paper No.9 paras. 144-47.

[20] Rule of Court 158(b), as amended by Act of Sederunt of February 9, 1972. The amendment, following interim orders, meets the problem noted in Stewart v. Stewart 1971 S.L.T. (Notes) 71.

procedure in relation to aliment.[21] We pointed out there that the procedure involved the transmission of documents between the Court of Session and the sheriff court and was perhaps less attractive than might at first sight be supposed. We invited views on the working of the procedure in practice and on possible improvements to it. We should also welcome comments on its working in relation to periodical allowance on divorce.

---

21 Para. 2.220 above.

Section F

Agreements

Present law on agreements as to financial provision

3.104. Agreements concerning financial provision on divorce are not subject to specific regulation by the existing law. Such agreements are governed by the ordinary law of contract. They are valid and binding, within the limits applying to normal contracts, and are increasingly frequent in practice. The courts have no power to vary them and there is no statutory provision for referring them to the court for approval. It has never been collusion in Scots law for the parties to a divorce to agree about collateral matters such as the financial consequences of divorce, provided that there has been no agreement to put forward a false case or hold back a good defence,[1] and although the court has to be satisfied as to the arrangements for the care and upbringing of children before granting divorce,[2] it has no duty to be satisfied as to the financial arrangements for the parties to the marriage themselves. Sometimes the court will be asked to grant decree in terms of an agreement between the parties (often embodied in a joint minute).[3] The court is not bound to accede to such a request: it retains its statutory power to make such order as it thinks fit and the parties remain free to bring relevant circumstances and changes of circumstances to the notice of the court.[4] An order made by the court on financial provision on divorce is still an order under section 26 of the Succession (Scotland) Act 1964, even if it gives effect to an agreement between the parties. It can be en-

---

[1] See Walker v. Walker 1911 S.C. 163 at 168; McKenzie v. McKenzie 1935 S.L.T. 198.

[2] Matrimonial Proceedings (Children) Act 1958, s.8.

[3] E.g. Robson v. Robson 1973 S.L.T. (Notes) 4; Cf. Lothian v. Lothian 1965 S.L.T. 368.

[4] Robson v. Robson supra.

forced, varied or recalled as can any other order under section 26. The extent to which it supersedes the agreement remains unclear. Does the original agreement remain enforceable as a contract, or is it superseded by the decree?[5] Probably the answer depends on the intention of the parties as expressed in their agreement, although supersession would be the more usual and convenient result.

3.105 There is a clash of policies on the question of regulating agreements on financial provision on divorce. On the one hand there is the policy of encouraging parties to agree on as much as possible and to bring as little as possible before the court, both so as to save expense and so as to take the bitterness out of divorce proceedings. This policy suggests that agreements as to financial provision should be encouraged, that they should be binding and that they should not be variable by or referable to the court. On the other hand there is the policy of protecting the economically weaker party to the marriage. One of the justifications of judicial divorce, as opposed to administrative or even private divorce, is that the court has an opportunity to make sure that a marriage is wound up in a way which is as fair as possible to the parties and the children. To enable it to protect the economically weaker party, it should have control over agreements as to financial provision. On this view, such agreements should either be altogether void (so that the court has to decide the issues if they are to be decided at all) or at least subject to approval and variation by the court. The question is affected by the policies adopted in relation to the grounds of divorce. If divorce may be granted on the basis of consent (with or without a period of separation or further evidence of breakdown) or on the basis of irretrievable breakdown, then the notion of protecting the weaker party is clearly appropriate and important. But if one party has a right to divorce, based on the fault of the other party, then the notion of protection of the weaker party seems, at first

---

[5] Cf Johnson v. Robinson (1931) 48 Sh. Ct. Rep. 65 (joint minute on aliment for children remained enforceable as a contract).

sight, inappropriate. It is well known however, that there is considerable room for bargaining between the spouses even with predominantly fault-based grounds of divorce,and there is no necessary inconsistency between such grounds and powers to control agreements as to financial provision on divorce. These powers need not include power to refuse a divorce, but could include power to vary or set aside agreements.

3.106. Comparative survey: Other legal systems adopt a variety of approaches to agreements on financial provision on divorce. In England, such agreements used to be frowned on as collusive, but are now regarded as desirable. "Not only the parties but also the children can hardly fail to benefit from the fact that some of the 'heat' has, so to speak, been taken out of the breakdown of the marriage."[6] Section 7 of the Matrimonial Causes Act 1973 allows provision to be made by rules of court for enabling agreements or arrangements in relation to divorce proceedings to be referred to the court and for enabling the court "to express an opinion, should it think it desirable to do so, as to the reasonableness of the agreement or arrangement and to give such directions, if any, in the matter as it thinks fit." This provision dates from a time when collusion was part of English divorce law and when attempts were being made to modify its effects. With the disappearance of collusion, the provision has become "toothless".[7] A Practice Direction of 1972 made it clear that where the parties had reached a concluded agreement with the assistance of their legal advisers it was rarely necessary or desirable for them to incur the considerable expense of referring the agreement to the judge prior to the hearing[8] and the Matrimonial Causes Rules of 1973 appear to carry this policy a stage further by omitting any provision for reference to the court for prior approval.[9] The same Practice Direction regulates the procedure to be followed where the parties wish agreed provisions to be embodied in an order of the court.[10] The position in England, therefore, is that the parties can enter into an agreement as to financial provision and can either leave the situation to be regulated by their agreement or can ask the court to grant an order in terms of their agreement (assuming that the terms are suitable for this purpose). In England, however, unlike Scotland, there is some statutory regulation of the former situation. A maintenance agreement[11] cannot restrict any right to apply to a court for an order containing financial

---

[6] Passingham, Law and Practice in Matrimonial Causes (2d ed. 1974) p.148.

[7] Beales v. Beales [1972] Fam. 210.

[8] [1972] 3 All E.R. 704.

[9] Passingham op. cit. pp. 60 and 148.

[10] [1972] 3 All E.R. 704.

[11] As defined in Matrimonial Causes Act 1973, s.34 this term includes agreements in writing between the parties to a marriage containing financial arrangements on divorce.

arrangements.[12] Moreover, the courts have extensive powers to alter maintenance agreements on a change in circumstances.[13] It has been argued that these rules depress the number of maintenance agreements entered into. A husband has no incentive to enter into an agreement if his wife can apply to the court at any time for a financial provision and if the court has wide powers to vary the terms.[14] There are also provisions in English law enabling the court to refuse a decree in "five year separation cases" if the dissolution of the marriage would result in grave financial or other hardship to the respondent and if it would in all the circumstances be wrong to dissolve the marriage,[15] and, on the application of the respondent, to refuse to make a decree of divorce absolute in cases based on five years' separation or on two years' separation coupled with the respondent's consent if it is not satisfied as to the financial provision made for the respondent.[16] These provisions emphasise the special protective role of the court in relation to financial provision for the parties in non-fault cases of divorce.

3.107. In the United States of America, the policy of encouraging parties to reach agreement as to financial matters was deliberately accepted by the Commissioners responsible for the Uniform Marriage and Divorce Act.[17] Section 302 of the Uniform Act (as amended in 1973) provides for a single, non-fault ground of divorce (irretrievable breakdown of the marriage) and provides that the court cannot grant a divorce unless

> "to the extent it has jurisdiction to do so, the court has considered, approved or provided for child custody, the support of any child entitled to support, the maintenance of either spouse, and the disposition of property; or has provided for a separate later hearing to complete these matters."

The court, therefore, has a duty at least to consider the terms of any agreement between the parties as to financial provision. Subject to this, the parties are given extensive freedom to regulate their affairs by agreement. Section 306 provides that they may "enter into a written separation agreement containing provisions for disposition of any property owned by either of them, maintenance of either of them and support, custody and visitation of their children". The provisions on children are not binding on the court but the

---

[12] Matrimonial Causes Act 1973, s.34(1). Any purported restriction is void.

[13] Ibid. s.35 (alteration during lives of parties) and s.36 (alteration after death of one party).

[14] Passingham op. cit. pp. 171-173.

[15] Matrimonial Causes Act, 1973 s.5.

[16] Ibid. s.10(2)-(4). The value of these provisions is "substantially diminished" now that the court has very wide powers to deal with financial provision on divorce. Applications under them should be "limited to those cases where for some special reason they [are] thought to have special value": Cumbers v. Cumbers [1975] 1 All E.R.1

[17] See Commissioners' Note to S306 of the Uniform Marriage and Divorce Act.

other terms of the agreement are binding upon the court and unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by parties, on their own motion or on request of the court, that the separation agreement is unconscionable as to disposition of property or maintenance, and not unsatisfactory as to support then, unless the separation agreement provides to the contrary, its terms will be set forth in the divorce decree and the parties ordered to perform them. If the agreement does provide that its terms are not to be set forth in the decree, the decree will refer to the agreement and state that the court has found the terms not unconscionable. Terms set forth in the decree are enforceable both as terms of a judgment and as contract terms. Terms relating to support, custody and visitation of children are always variable but with regard to other terms the decree can expressly preclude or limit modification of terms set forth in the decree if the separation agreement so provides. If this is not done, the terms of a separation agreement set forth in the decree are automatically modified by modification of the decree. An agreement, the terms of which are not set forth in the decree, is not modifiable so far as financial provision for the parties are concerned, unless it itself provides for variation. The policy behind the Uniform Act in this respect is to enable the parties to reach a final agreement as to financial provision. "Such an agreement maximises the advantages of careful future planning and eliminates uncertainties based on the fear of subsequent motions to increase or decrease the the obligations of the parties."[18]

3.108. In Australia, the Family Law Act of 1975[19] provides that a maintenance agreement[20] is not enforceable unless it has been approved by the court. The court is directed to refuse its approval if not satisfied that the provisions of the agreement on financial matters "are proper". An approved maintenance agreement is deemed to be registered in the court and is enforceable as if it were an order of the court.

3.109. In France, the view was at first taken that agreements on financial provision were valid and that, for example, a wife could renounce her right to periodical allowance in exchange for a capital sum.[21] This view was supported by the

---

[18] Ibid.

[19] S.87(2).

[20] "Maintenance agreement" is defined widely so as to include any agreement in writing between the parties to a marriage which makes provision with respect to financial matters." S.4.

[21] Carbonnier, Droit Civil (9th ed. 1972) Vol. 2 p. 165 Civ. 23 mai 1949, D.49, 443.

theoretical consideration that financial provision on divorce was in the nature of an indemnity and by the practical consideration that amicable arrangements between the parties were to be encouraged where possible.[22] However, monetary depreciation frequently meant that the spouse could no longer live on the provision he or she had agreed to accept, and from 1949 the Cour de Cassation changed its view and began to emphasise the alimentary character of a periodical allowance after divorce with the result that the right to such an allowance came to be regarded as unrenouncable.[23] Until recently the law was, therefore, that renunciations of periodical allowance (whether outright or in exchange for some consideration) were null.[24] An agreement merely fixing the amount of a periodical allowance, and not involving any renunciation or bargaining away, was not null, but the allowance being inherently alimentary, the amount was variable by the court.[25] The new law of 1975 goes a long way in the direction of encouraging the parties to make their own arrangements while reserving judicial control over the contents of these arrangements.[26] In the case of divorce on the joint request of the parties they must submit for the judge's approval an agreement regulating the consequences of divorce, including the amount and method of payment of financial provision. After the lapse of the statutory time for reflection by the parties, the judge, if satisfied that the wish of each spouse is genuine and that each has freely consented, grants decree of divorce and homologates the agreement on consequences. He can, however, refuse to do both if he considers that the agreement does not sufficiently safeguard the interests of the children or one of the spouses.[27] In the case of divorce proceedings commenced on fault or breakdown grounds the spouses can at any time before decree ask the court to note that they have come to terms and to homologate an agreement on the consequences of divorce.[28] A homologated agreement on financial provision is enforceable as a judgment.[29] It cannot normally be modified except by means of a new agreement between the parties, which must also be submitted for homologation: the parties, however can provide in their agreement that either can request variation by the court in the case of unforeseen changes in his means or needs.[30]

---

[22] Ibid.

[23] Ibid.

[24] Carbonnier, loc. cit. pp. 155 and 165; Pelissier, loc. cit. pp. 323-324.

[25] Carbonnier, loc. cit. p.165.

[26] See Code civil, arts. 229-285 (added by law of 11 July 1975).

[27] Art. 232. Cf. art. 278 (Judge to refuse homologation if agreement on financial provision fixes the rights and obligations of the spouses inequitably.)

[28] Art. 246.

[29] Art. 279.

[30] Art. 280.

3.110 In West Germany, both the existing law[31] and the new family law reform project[32] expressly allow spouses to enter into agreements relating to the obligation to provide maintenance after divorce. The official commentary on the new provision recognises the desirability of avoiding unnecessary disputes by allowing spouses to reach early and final agreement on financial provision.[33] There is no statutory provision for the variation of such agreements, and it is open to the parties to enter into an arrangement which is final and unalterable.[34] However, it has been held that, if the agreement merely quantifies the legal obligation to provide maintenance, it is variable on a significant change in circumstances.[35]

3.111 Our proposals: It clearly appears from the above survey that there has been a movement away from disapproval of agreements between the parties on financial provision, as favouring collusion, and towards approval of such agreements, as reducing the area of dispute in divorce. Scots law, which has never outlawed agreements of this nature, appears to have anticipated this trend. We see no reason to change direction and suggest that it should continue to be possible for the parties to a marriage to enter into agreements relating to financial provision on divorce. (Proposition 89).

3.112 We also see no reason why a spouse should not renounce his or her right to apply to the court for financial provision on divorce. This is possible under the present law. Indeed, under section 33 of the Succession (Scotland) Act 1964 a renunciation of legal rights in a marriage contract (made

[31] S.72 Ehe G.

[32] 1 Ehe R.G. S.1585 c.

[33] Bundersat. Drucksache 260/73 p. 149.

[34] Brühl, Unterhaltsrecht, (3rd ed. 1973) p. 596. A renunciation of the right to financial provision is in particular, regarded as being, by its nature and purpose, unalterable. Ibid. n.53 and related text.

[35] Ibid. pp. 596-597; Beitzke, Familienrecht (14th. ed. 1968) p.139.

before, and taking effect on a divorce after 10 September 1964) is to be construed as a renunciation of any right to a financial provision under section 26 of that Act. If the spouses wish to settle the matter of financial provision once and for all, then they should be encouraged to do so. A husband will have less inclination to come to an amicable arrangement with his wife if he knows that, notwithstanding the agreement, she can apply to the court for a financial provision on a subsequent change of circumstances. It might be objected that it is contrary to public policy to allow one spouse to free the other from liability if this throws the burden of support on to public funds. This presupposes a "support" view of financial provision, which we have criticised above. Moreover, even under the present law, a spouse is not obliged to claim financial provision on divorce and a person is not "liable to maintain" a former spouse for supplementary benefit purposes. We suggest later[35A] a way of dealing with fraudulent and unconscionable agreements. Subject to that, we suggest that <u>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</u>. (Proposition 90). We are referring here, of course, only to financial provision for the spouse, and not to aliment for children.

3.113. We invite views on the question whether such agreements should require to be referred to the court for approval. Our preliminary view is that this would involve an unnecessary expenditure of time and money. The parties to a divorce will usually be legally advised and it can perhaps be assumed that <u>most</u> agreements will be reasonable and "proper" and "not unconscionable". What seems to us to be required is some provision for dealing specifically with agreements which are unconscionable rather than a blanket provision for approval of all agreements. We therefor suggest that <u>there should</u>

[35A] See para. 3.115.

continue to be no requirement that agreements on financial provision should be referred to the court for approval. (Proposition 91).

3.114. The question of variability is a difficult one. On the one hand, it can be argued that the parties should be encouraged, or at least enabled, to settle the question of financial provision once and for all, free from the danger of subsequent applications for variation. On the other hand, fluctuations in the value of money, and the possibility of other changes may make some spouses unwilling to conclude an agreement unless there is a possiblity of judicial variation. We are attracted by the type of solution which gives the parties a choice between variability and finality and suggest for consideration that 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. (Proposition 92). It is for consideration also whether a similar solution should apply to bonds or unilateral voluntary obligations.

3.115. The desirability of protecting the weaker party on divorce is recognised in the English, American, Australian and French provisions on agreements to which we have referred at paras. 3.106 to 3.110 above. We think that there may be a danger of manifestly unfair agreements which might not be easily challengeable under the ordinary law on force, fraud and error but which have nevertheless been exacted by undue pressure, or circumvention, or deliberate non-disclosure of relevant circumstances. We think that the court should have power to reduce or set aside such agreements. The power would have to be expressed in terms which, of necessity, were fairly vague but which did not give the impression that it would be lightly exercised. We suggest for consideration that the court should be given power to reduce or set aside agreements on financial provision on divorce which are altogether unfair and unconscionable. (Proposition 93).

3.116. It seems to us that, as under the present law, the parties should be free either to leave their financial situation to be governed by their agreement or to request an order for financial

provision in the terms of a joint minute (where the order requested is within the court's powers). As under the present law the court should be under no obligation to accede to such a request. We invite views on the question whether 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. (Proposition 94).

3.117. Effect of divorce on marriage contracts. We are concerned in this paragraph with the effect of divorce on marriage contracts in the absence of any order for variation.[36] Before 1964, divorce (other than for incurable insanity) operated as a fictional death, so that the innocent spouse became entitled to any marriage contract provisions he or she would have received on the death of the other spouse. Section 25 of the Succession (Scotland) Act 1964 provides that:

> "any rule of law under which the person in whose favour [a divorce] decree has been granted is thereby entitled to claim from the defender the legal rights of courtesy, terce or jus relictae shall cease to have effect ..."

The intention behind this provision was probably to abolish the fictional death rule for all cases, including those governed by a marriage contract,[37] and it can be construed as achieving this result if the words after "any rule of law" are regarded as merely identifying the rule and not as restricting its scope.[38] However, the section is not as clearly phrased as it might be and we suggest that 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 is granted could claim provision under his marriage contract trust as if the other spouse had died. (Proposition 95).

---

[36] Cf. para. 3.61 above on powers to vary marriage settlements.

[37] See the Report of the Royal Commission on Marriage and Divorce (1956) Cmd. 9678 para. 554.

[38] See Clive and Wilson, op. cit. p.353.

Section G

Separation and Nullity

3.118. Financial provision on judicial separation. It is for consideration whether the courts chould have the same powers in relation to financial provision on judicial separation as on divorce.[1] Certainly, several minor modifications would be necessary because of the different nature of the remedy. Provision would have to be made, for example, for the possibility of a subsequent divorce. We think that it should be possible for the parties, or one of them, "to convert" a judicial separation into a divorce without having to re-open the whole question of financial provision. Judicial separation can be seen, for present purposes, as essentially divorce without permission to remarry. On this view, if the financial position has been regulated at the time of the judicial separation it should rarely be necessary to re-open it on later adding permission to remarry. On the other hand, divorce does finally sever the legal link between the parties in a way which judicial separation does not. In particular, there may be a continuing obligation of support between separated spouses ("separation and aliment") but no such continuing obligation between divorced spouses. We suggest therefore that 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. (Proposition 96). The effect of the last phrase would be that the order would be affected by the normal rules as to termination on remarriage.

---

1 See para. 2.196 above. We mention there and in para. 0.5. in Volume 1 that we intend to review judicial separation in a forthcoming Memorandum in a more radical way than is possible in the present Memorandum. In this Memorandum we assume the continuance of judicial separation for purposes of discussion.

3.119. Provision would also have to be made for the possibility of a resumption of cohabitation between the parties. It may be supposed that normally, in this event, the parties would be on sufficiently good terms to re-adjust their financial position by agreement. Moreover, the resumption of cohabitation would clearly bring into operation the powers of the court to vary orders on a change in circumstances. Nevertheless we think it would be unfortunate if any restriction in the court's powers were to make the re-adjustment of the parties' financial position on resumption of cohabitation more difficult than it need be and we suggest for consideration that on a genuine resumption of cohabitation between spouses who have been judicially separated the court should have power to make such order as it thinks fit to vary or recall any orders for financial provision made in connection with the judicial separation. (Proposition 97). This would mean, in particular, that the court could vary or recall orders for the payment of a capital sum or the transfer of property free from the restrictions referred to in Proposition 76.[1A]

3.120. We have suggested in paragraph 2.162 that the courts should have power to vary, on a change of circumstances, provisions for aliment in separation agreements or alimentary agreements. We have suggested in paragraph 3.88 a more limited power to vary agreements on financial provision on divorce. Which rule should apply to agreements in relation to judicial separation? It is tempting to say that the position should be the same as on divorce and that the parties should be able to opt for finality. But we think that this would be impracticable. Agreements on aliment may be made before, at, or after, a judicial separation. They quantify a continuing obligation. We suggest therefore that provisions for aliment in separation or other agreements should be variable by the court even if the parties are or become judicially separated. As this result follows from the terms of Propositions 29 and 82, we do not embody it in a separate proposition for consideration.

[1A] See para. 3.66 above.

3.121. Financial provision on nullity of marriage. Under the present law, the court granting a declarator of nullity of marriage has no power to order any financial provision. In theory, the marriage has never existed and, with regard to property, the parties should be restored so far as possible to their previous positions.[2] A person who has been fraudulently induced to enter into a void marriage (for example, the "victim" of a bigamist) may have a claim for damages against the guilty person,[3] but actions of this nature have been infrequent and the remedy does not cover all cases where one person has suffered lasting disadvantages as a result of a void or voidable marriage.

3.122. We shall be considering the law on nullity of marriage in a separate Memorandum. It is appropriate, however, to consider here whether the court granting a declarator of nullity should have the same, or similar, powers to order financial provision as the court granting a decree of divorce. This is the position in England[4] and in some states of the United States of America.[5] In West Germany, distinctions are drawn according to whether the party or parties entered into the marriage in good faith and according to whether the marriage is void or voidable (nichtig or aufhebbar), but under the present law it is often the case and under the proposed new law it will be the general rule that the financial consequences of nullity will be the same as for divorce.[6] In social reality if not legal theory, a void or voidable marriage may well have "existed" for many years. In what amounts, in fact if not in

[2] Cf. the conclusion in A.B. v. C.B. (1884) 11 R. 1060; (1885) 12 R. (H.L.) 36.

[3] See Mackenzie v. Macfarlane (1891) 5 S.L.T. 292; Van Mehren v. Van Mehren 1948 S.L.T. (Notes) 62.

[4] Matrimonial Causes Act 1973, Part II.

[5] See e.g. N.Y. Dom. Reb. Law S.236. The Uniform Marriage and Divorce Act S.208 enables the court granting a decree declaring the invalidity of a marriage to make the decree only prospective in effect. The court can then make the same orders for financial provision as it can on dissolution of marriage.

[6] See Ehe G. Ss. 26 and 37, as in present law and as amended in 1 Ehe RG (1974). As the new law tries to exclude fault from the financial consequences of divorce it has been felt necessary to retain the distinctions based on good faith in the law of nullity. For example, if one party entered the marriage knowing of its nullity and the other did not, the innocent party can opt not to have the financial consequences of divorce apply, so that he or she will not have to support the other.

law, to its judicial termination, the same patrimonial problems may well arise as in the case of divorce. The rules we have suggested earlier for divorce are flexible enough to enable the courts to deal with the problem of lack of good faith on the part of one or both of the parties where this is relevant.[7] We therefore suggest for consideration that 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. (Proposition 98).

[7] Cf. previous footnote. Similar problems of lack of good faith in entering into the marriage can arise in relation to divorce. See e.g. Hogg v. Hogg 1967 S.L.T. (Notes) 91.