

**SCOTTISH LAW COMMISSION**  
**FAMILY LAW**  
**FINANCIAL PROVISION AFTER FOREIGN DIVORCE**  
**CONSULTATION PAPER**

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1. This Consultation Paper has been prepared as part of the Scottish Law Commission's examination of Family Law.<sup>1</sup> The Commission are at present in the course of completing a report on aliment and financial provision following on Memorandum No. 22<sup>2</sup>, prepared in accordance with the same programme subject. It seems desirable to seek views at this stage on whether there are any circumstances in which the Scottish courts should have power to award financial provision to a spouse who has been divorced in another jurisdiction, especially as the Law Commission for England and Wales have recently discussed the same issues in their Working Paper No. 77.<sup>3</sup> A copy of the Law Commission's Working Paper is enclosed with this paper, and the Commission would welcome comments from interested parties on the proposals which it contains, as modified and explained for the purposes of Scots law in the paragraphs which follow.

2. The present law of Scotland imposes reciprocal obligations of aliment on a husband and wife which subsist until the marriage is terminated by death, divorce or declarator of nullity. Various problems occur in enforcing these obligations where the parties are separated, but these problems are outwith the scope of this paper. The Scottish courts at present have no power to award financial provision on granting decree of declarator of nullity of marriage but,

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<sup>1</sup>Item No. 14 of our Second Programme of Law Reform (Scot. Law Com. No. 8) 1968.

<sup>2</sup>Published in March 1976.

<sup>3</sup>Published in the autumn of 1980.

following on consultation on Memorandum No. 22, the Commission will be recommending in the forthcoming report that the courts should have the same powers to award financial provision on granting decree of declarator of nullity as on granting decree of divorce. Thus the proposals in this paper should be regarded as applying mutatis mutandis to both divorce and nullity. The only circumstances in which a person may seek an award of financial provision in a Scottish court arise where he or she is party to an action of divorce - whether as pursuer or defender - in the Court of Session.<sup>1</sup> Thus for practical purposes the problem in Scotland is the same as that in England, described in the opening paragraphs of the Working Paper.<sup>2</sup>

3. The Commission are in substantial agreement with the analysis of the problem as presented by the Law Commission and with the proposed solutions discussed in the Working Paper and summarised in paragraph 67. It seems appropriate, however, to examine the general arguments which can be advanced for and against the granting of any powers to the Scottish courts where the marriage has been dissolved abroad.

4. The main argument for giving the Scottish courts power to award financial provision after a foreign divorce is that injustice and hardship may result if they do not have this power. A husband may have gone abroad with the specific intention of seeking divorce, especially if the foreign court is one which will award little or nothing to his wife by way of financial provision. Whether or not this was his intention, it may prove difficult or

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<sup>1</sup>This is the effect of s.5 of the Divorce (Scotland) Act 1976, which commences: "(1) In an action for divorce ... either party to the marriage may, at any time prior to decree being granted, apply to the court for any one or more of the following orders."

<sup>2</sup>Part I, paras. 1 to 5.

impossible in certain circumstances for the wife to intervene in the proceedings.<sup>1</sup> A second, and related, argument is that where there is no power to award financial provision after a foreign divorce there will be a strong temptation for a party seeking an award of financial provision to argue that the foreign divorce is not entitled to recognition.<sup>2</sup> This is undesirable. The mischief which the Hague Convention on the Recognition of Divorces and Legal Separations of 1970 was designed to cure was that of the "limping marriage", that is "marriages that were recognised in some jurisdictions as having been validly dissolved, but in other jurisdictions as still subsisting".<sup>3</sup>

5. Conversely there are a number of arguments against giving the Scottish courts power to award financial provision after a foreign divorce. One of these is that we should not assume too readily that our rules on financial provision on divorce are the only justifiable rules. Other countries may have other approaches to this question. The fact that the courts in other countries may be less generous to wives than the courts in this country is not a reason for allowing our courts to intervene. This, however, could be regarded as an argument for restraint in the exercise of a power rather than against conferring powers of any kind.

6. Another argument is that, wherever possible, all matters arising out of or ancillary to divorce are best dealt with in the context of the divorce proceedings, where it is more likely that the court will be aware of the whole facts and circumstances of the case. This course prevents a party from having to litigate

<sup>1</sup>See, e.g., Joyce v. Joyce and O'Hare [1979] Fam. 93.

<sup>2</sup>See Part II of the Working Paper, paras 6 to 15.

<sup>3</sup>Quazi v. Quazi [1979] 3 WLR 833, 836 per Lord Diplock; quoted at para. 7 of the Working Paper.

subsequently in another jurisdiction on a matter closely connected with the divorce. This is undeniably a sound objective, but any hardship to one party caused by litigation in more than one country has to be set against the hardship sustained by the other party if no financial award or an inadequate award is made by the foreign court. For one reason or another a spouse may have been prevented from intervening in the foreign proceedings. Some foreign courts may have no powers at all to award financial provision, or no power to make an award to the defender in the proceedings. The powers of some foreign courts may not be extensive, or those courts may be reluctant to make orders relating to property not situated within the jurisdiction. Moreover, this argument takes for granted the kind of divorce proceedings with which we are familiar in this country. The argument might not apply to a system of postal or administrative divorce.

7. A third argument is that the concession of any power to the Scottish courts would encourage forum-shopping. This is perhaps inevitable, but the problem can be eased by a careful choice of criteria to justify the intervention of our courts. In particular, the argument has less force where one of the parties to a marriage has gone abroad for the specific purpose of obtaining a divorce, than where there has been no connection between Scotland and either of the parties during the subsistence of the marriage.

8. We conclude, therefore, with the Law Commission, that there is a case for conferring adequate powers on our courts to make orders for financial provision after a foreign divorce. For the reasons given by the Law Commission<sup>1</sup> we think that these powers should be

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<sup>1</sup>Paras. 28-30.

available where the foreign court has made some award by way of financial provision, or no award at all. We therefore endorse the first two Provisional Recommendations.<sup>1</sup>

9. The crucial question discussed in the Working Paper concerns the rules of jurisdiction.<sup>2</sup> We agree with the Law Commission that the task is to formulate rules strict enough to prevent persons whose marriage is insufficiently connected with this country from invoking the powers of a Scottish court, but not so strict as to exclude meritorious cases.<sup>3</sup> The Law Commission conclude that two alternative grounds for jurisdiction can be justified.<sup>4</sup> The first of these is that either party is domiciled in this country at the date when the foreign divorce became effective, or was habitually resident here throughout the period of 12 months before this date. This criterion is adapted from the rule on jurisdiction in divorce proceedings,<sup>5</sup> and finds its justification in that the applicant might have sued for divorce in this country, and claimed financial provision in the divorce action, at the time of the foreign proceedings. The second alternative ground advocated by the Law Commission is that either party is domiciled in this country at the date of the application for financial provision, or was habitually resident here throughout the period of 12 months before the date of application.<sup>6</sup>

10. We have considered whether both these tests should be satisfied before our courts are to have jurisdiction, on the ground that an

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<sup>1</sup>Para. 67.

<sup>2</sup>Paras. 31-46; Provisional Recommendations(3) and(4).

<sup>3</sup>Para. 31.

<sup>4</sup>We have re-arranged these slightly to bring out the contrast between the satisfaction of jurisdictional criteria at the time of the foreign divorce, and at the time of the application for financial provision in this country.

<sup>5</sup>Para. 33.

<sup>6</sup>Para. 37.

applicant should have to show both that Scotland had some connection with the marriage (as much connection as would have justified the Scottish courts in awarding financial provision at the time of the foreign divorce) and that he or she has some present connection with Scotland sufficient to justify an assumption of jurisdiction. A cumulative approach would have the advantage of discouraging applications where the only connection with Scotland arises after the granting of divorce by a foreign court, and applications where the pursuer has no sufficient present connection with this country. On the other hand this approach would deny the pursuer's claim in some cases<sup>1</sup> where it might be thought that the claim should be admitted, and it would increase the risk of difficult questions, for example where was a person's domicile at a particular past date, and when did a foreign divorce become effective.<sup>2</sup> We invite views.

11. Our rules of procedure contain no equivalent to obtaining leave of a judge for an application to be allowed to proceed, and accordingly Provisional Recommendation(5) will require some modification for Scottish purposes. This is a minor matter: it is inherent in Provisional Recommendation(5) that the court's power should be exercised only sparingly.<sup>3</sup> We accordingly agree with the Law Commission that guidelines should be provided. This is an area where caution should be exercised, given the absence of any international consensus on the principles which should govern awards of financial provision, and we fully agree with the Law Commission that it would be inappropriate to encourage applications to our

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<sup>1</sup>E.g. Quazi.

<sup>2</sup>See paras. 35 to 36 of the Working Paper.

<sup>3</sup>Paras. 47-52.

courts inviting them to act, in effect, as a court of appeal from courts of another country.<sup>1</sup> We invite comment on the guidelines (a) to (f) set out at paragraph 52 of the Working Paper. If either party was domiciled or habitually resident in Scotland at the time of the foreign divorce, that in itself may be regarded as sufficient connection with Scotland, as a divorce action might have been raised here. It is only, or primarily, in cases where jurisdiction is founded on domicile or habitual residence at the time of the application to a Scottish court, that it is important to look for a connecting factor between the marriage and Scotland.

12. It is our provisional view that in Scotland the Court of Session should have exclusive jurisdiction to hear applications, for the reason (also advanced in the Working Paper) that there would otherwise be the risk of the development of divergent practices.<sup>2</sup>

13. We also take the view, in relation to Provisional Recommendation(8), that Scots law should govern any application made to the Court of Session, for reasons similar to those given in paragraph 56 of the Working Paper. This would entail that the Court of Session would have the same powers which it may exercise in an action of divorce raised in Scotland<sup>3</sup>. The existing powers of the Court of Session are not confined to assets situated within Scotland,<sup>4</sup> and we would not advocate the introduction of any such restriction.<sup>5</sup> We shall be recommending in our forthcoming report

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<sup>1</sup>Para. 48.

<sup>2</sup>Provisional Recommendation(6) and para. 53.

<sup>3</sup>Provisional Recommendation(9).

<sup>4</sup>The court has jurisdiction to make incidental orders under the Domicile and Matrimonial Proceedings Act 1973, including orders relating to avoidance transactions under s.6 of the Divorce (Scotland) Act 1976, if it has jurisdiction in the action of divorce itself.

<sup>5</sup>Provisional Recommendation(10) and para. 58.



on aliment and financial provision that a wide variety of specific powers should be conferred on the court, inter alia to order the transfer of property, and we shall not be proposing that these powers should be subject to any territorial limitation.

14. Provisional Recommendation(12) has no relevance for Scotland.

15. As to Provisional Recommendation(13), the Matrimonial Homes (Family Protection) (Scotland) Bill, at present before Parliament, would apply in any case where a matrimonial home is situated in Scotland. The statutory right of a spouse to occupy a matrimonial home, as proposed by this Bill, would terminate on divorce, and thus the right of occupation would be terminated on recognition by a Scottish court of a foreign divorce. Having regard to the extended powers to award financial provision on divorce which we shall be proposing in our forthcoming Report<sup>1</sup>, we do not consider that any additional legislation is required in relation to occupancy rights.

16. We have already suggested<sup>2</sup> that any powers to be conferred on the Scottish courts should apply in Scotland after a foreign decree of nullity. Foreign decrees of separation present problems of a different kind.<sup>3</sup> The powers available to the Scottish courts on granting a decree of separation are less extensive than those they possess on granting a decree of divorce: in effect, a party is entitled only to aliment. The courts have no further power to deal with financial provision, such as the power to transfer property. If a foreign decree of separation has been obtained, a Scottish court will only be able to award aliment. It would be anomalous to confer on the Scottish courts greater financial powers in relation to a foreign decree of separation.

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<sup>1</sup>See para. 13 above.

<sup>2</sup>At para. 2 above.

<sup>3</sup>See Provisional Recommendation (14) and para. 64.

17. We agree with the Law Commission's Provisional Recommendation (15). There should be no right to apply to a Scottish court for an order for financial provision after a decree of divorce or nullity has been obtained elsewhere in the British Isles.