Scottish Law Commission

(SCOT. LAW COM. No. 72)

FAMILY LAW

REPORT ON FINANCIAL PROVISION AFTER FOREIGN DIVORCE

Laid before Parliament
by the Lord Advocate
under Section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed*
27th October 1982

EDINBURGH
HER MAJESTY'S STATIONERY OFFICE
£4.35

515

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Honourable Lord Maxwell, *Chairman,*
Mr. A. E. Anton, C.B.E.[1]
Mr. R. D. D. Bertram, W.S.,
Dr. E. M. Clive,
Mr. J. Murray, Q.C.

The Secretary of the Commission is Mr. R. Eadie. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

[1]Mr. Anton retired from membership of the Commission on 30th September 1982; his successor is Sheriff C. G. B. Nicholson.

ISBN 0 10 251582 4

SCOTTISH LAW COMMISSION

Item 14 of the Second Programme

FAMILY LAW

FINANCIAL PROVISION AFTER FOREIGN DIVORCE

To: The Right Honourable the Lord Mackay of Clashfern, Q.C.,
Her Majesty's Advocate

We have the honour to submit our Report on Financial Provision after Foreign Divorce

(*Signed*) PETER MAXWELL, *Chairman*
A. E. ANTON
R. D. D. BERTRAM
E. M. CLIVE
JOHN MURRAY

R. EADIE, *Secretary*
9th September, 1982

CONTENTS

PART I INTRODUCTION

1.1 The Scottish courts have no power to make an order for financial provision after a foreign divorce.[1] It follows that if a husband[2] goes to a foreign country and obtains a divorce there which is recognised in this country, his former wife has no claim for financial provision in the Scottish courts, even if the marriage was more closely connected with Scotland than with any other country and even if the husband returns to Scotland after obtaining his divorce abroad. In this Report, which is published as part of our programme of work on family law reform,[3] we consider whether, and if so in what circumstances, the Scottish courts should have power to make orders for financial provision after a foreign divorce.

1.2 English law is essentially the same as Scots law in this respect, and a series of cases in England has illustrated that the difficulties caused by the absence of any power to award financial provision after a foreign divorce are by no means theoretical.[4] Judges have criticised the existing law and called for reform.[5]

1.3 In 1980 the Law Commission for England and Wales published, for comment and criticism, a Working Paper on *Financial Relief after Foreign Divorce*.[6] We prepared a Consultation Paper on *Financial Provision after Foreign Divorce*[7] which was designed to supplement the Law Commission's Working Paper and adapt it to the Scottish situation. We sent both documents to a number of Scottish lawyers and professional bodies with an invitation to submit comments. Although the problem of financial provision after foreign divorce has an important human element, the solution to it turns on technical legal questions and we considered that a limited consultation on this issue was all that was required. We are grateful to those who commented on our proposals and have profited greatly from their advice.[8] We have in addition taken into account the comments received by the Law Commission on their Working Paper and have discussed the issues with them. We understand that they expect to publish shortly a Report containing recommendations for reform of the law of England and Wales on this subject.[9]

---

[1]Under the present law financial provision on divorce takes the form of a capital sum or a periodical allowance or both. In our Report on *Aliment and Financial Provision* (Scot. Law Com. No. 67, 1981) we have recommended that the court should have greater powers—including power to order transfers of property and to regulate the use and occupation of the matrimonial home after divorce. In this Report "order for financial provision" is intended to include any orders relating to the financial and property consequences of divorce which the court may have in a Scottish divorce action, whatever those orders may be from time to time.

[2]We refer to "the husband", here and elsewhere in the Report, purely for convenience. Exactly the same considerations apply if the wife obtains a divorce abroad.

[3]See our *Second Programme of Law Reform* (Scot. Law Com. No. 8, 1968) Item 14.

[4]*Turczac* v. *Turczac* [1970] P. 198; *Torok* v. *Torok* [1973] 1 W.L.R. 1066; *Newmarch* v. *Newmarch* [1978] Fam. 79; *Joyce* v. *Joyce and O'Hare* [1979] Fam. 93; *Quazi* v. *Quazi* [1980] A.C. 744.

[5]See *Torok* v. *Torok, supra* at pp. 1069 and 1070; *Quazi* v. *Quazi supra* at pp. 785, 810 and 819.

[6]Working Paper No. 77 (1980) (referred to hereafter as the "Working Paper").

[7]Referred to hereafter as the "Consultation Paper".

[8]A list of those who commented is given in Appendix B.

[9]This Report—*Financial Relief After Foreign Divorce*—was submitted to the Lord Chancellor on 30th July 1982 and is expected to be published towards the end of October 1982 as Law Com. No. 117.

PART II PRESENT LAW AND NEED FOR REFORM

Recognition of foreign divorces

2.1 The Recognition of Divorces and Legal Separations Act 1971 contains generous rules for the recognition of foreign divorces. It provides, for example, for the recognition in this country of an overseas divorce if, at the time when the divorce proceedings were commenced in the foreign country, (a) either spouse was habitually resident in that country or (b) either spouse was a national of that country.[10] In relation to a country which uses domicile as a ground of jurisdiction in divorce, "habitual residence" includes domicile as that concept is defined in that country.[11] A divorce obtained by non-judicial proceedings, such as *talaq,* is covered by the Act.[12] There are certain grounds on which recognition of a foreign divorce may be refused under the 1971 Act. These include (a) that the divorce was obtained by one spouse without such steps having been taken for giving notice of the proceedings to the other spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; (b) that the other spouse (for any reason other than lack of notice) was not given such opportunity to take part in the proceedings, as, having regard to the nature of the proceedings and all the circumstances, he should reasonably have been given; and (c) that recognition would manifestly be contrary to public policy.[13]

2.2 We have not attempted to give an exhaustive account of the provisions of the 1971 Act, which are complicated. The important point is that it may require a foreign divorce to be recognised in this country even though the marriage may have been much more closely connected with this country than with the country where the divorce was obtained. A husband of Hungarian nationality could, for example, divorce his wife in Hungary and that divorce would generally have to be recognised in Scotland even though the parties had lived in Scotland throughout most of their married life.[14] It would often be possible for a husband to go abroad for a short period and obtain a divorce which was entitled to recognition in Scotland even though his wife had never left Scotland.

2.3 It might be thought that one remedy for this situation would be to make the rules on the recognition of foreign divorces much more restrictive. Any significant change in that direction would, however, be contrary to the Hague Convention on Recognition of Divorces and Legal Separations,[15] to which the United Kingdom is a party. It would also be contrary to the policy of the 1971 Act, which was enacted to reduce the number of cases where a divorce

---

[10] S.3.

[11] S.3(2).

[12] *Talaq* is the Muslim procedure whereby, in its simplest form, the husband obtains a divorce by saying to his wife "I divorce you" three times. See *Quazi* v. *Quazi* [1980] A.C. 744.

[13] 1971 Act, s.8.

[14] Cf. *Torok* v. *Torok* [1973] 1 W.L.R. 1066.

[15] The 1971 Act went beyond what was required by the Hague Convention but even the minimum necessary for compliance with the Convention would leave room for the problems with which we deal in this Report.

was recognised in one part of the world but not in others. The defect in the present law is not that foreign divorces are widely recognised but that this recognition may unjustifiably cut off one party's claims to financial provision.

No claim in Scotland for financial provision or aliment after foreign divorce

2.4 The Divorce (Scotland) Act 1976 enables either party to a marriage to apply "in an action for divorce" for an order for financial provision[16] and empowers the court "on granting decree in that action" to make such order, if any, as it thinks fit.[17] The draft Family Law (Financial Provision) (Scotland) Bill included in our recent Report on *Aliment and Financial Provision,*[18] although it would extend the court's powers in several important respects, is similarly limited to Scottish divorces. There is thus no provision in the present law for a woman who has been divorced abroad to raise an action in Scotland for financial provision after the foreign divorce. Nor can she raise an action for aliment for herself (although she will usually be able to raise an action for aliment for any children of the marriage in her care). Being no longer a wife she is no longer entitled to aliment. Moreover any decree for aliment for herself which she may have obtained before the divorce will cease to have effect on the divorce.[19] If she obtains supplementary benefit the State has no right to recover its expenditure from the former husband. A man is liable to maintain his wife for the purposes of the supplementary benefit law but not his former wife.[20]

May be no claim abroad for financial provision in foreign divorce

2.5 A wife who is divorced abroad may sometimes be able to claim financial provision in the foreign divorce proceedings. If she does so successfully the foreign order will often be recognised and enforced in this country. International conventions have been entered into to facilitate this process and statutes have been enacted to give effect to them.[21] There may, however, be cases where it is impossible or impracticable for a wife to obtain an adequate order for financial provision in the foreign divorce proceedings. Even if she receives proper notice of them, it may be financially impossible for her to intervene. Even if she wishes to intervene there may be legal delays and difficulties which prevent her doing so.[22] There may be no point in her intervening because the foreign court may have no power, or only an extremely limited power, to award financial provision on divorce, or no jurisdiction over property (say, a matrimonial home in Scotland) situated outwith its territory.[23] The foreign proceedings may be unilateral non-judicial proceedings such as the Muslim *talaq*.

---

[16]S.5(1).

[17]S.5(2).

[18]Scot. Law Com. No. 67 (1981).

[19]*Donald* v. *Donald* (1864) 2 M. 843; *Stewart* v. *Stewart* (1872) 10 M. 472; *Gatchell* v. *Gatchell* (1898) 6 S.L.T. 224.

[20]Supplementary Benefit Act 1976, s.17.

[21]The most important in this context are the Maintenance Orders (Reciprocal Enforcement) Act 1972 and the Civil Jurisdiction and Judgments Act 1982 (in relation to orders coming within the category of "maintenance" orders—see *De Cavel* v. *De Cavel* [1980] E.C.R. 731).

[22]Cf. *Newmarch* v. *Newmarch* [1978] Fam. 79; *Joyce* v. *Joyce and O'Hare* [1979] Fam. 93.

[23]Cf. *Torok* v. *Torok* [1973] 1 W.L.R. 1066.

The need for reform

2.6 The main criticism of the present law is that it leads to unjustifiably harsh results in certain cases. The most obvious example is where the parties have married in Scotland and lived in Scotland throughout their married life until the husband goes abroad to obtain a divorce, perhaps in the country of his nationality or in a country where he establishes a habitual residence for the purpose. For the reasons explained above, the wife may not be able to obtain any award of financial provision in the foreign divorce proceedings. If the "husband" then returns to this country it would seem wrong that the "wife" (now a former wife) should have no claim against him. This is an extreme case. A less extreme case would be where, on similar facts, the husband goes abroad, obtains a divorce, and stays abroad. Again it is hard to justify the denial to the wife of any claim in the Scottish courts, particularly if the husband has left substantial assets in this country or if a decree obtained by the wife in this country could be enforced against the husband abroad.[24]

2.7 Another criticism of the present law is that it may encourage trumped-up challenges to foreign divorces. If a wife in this country can establish that a foreign divorce is not entitled to recognition (for example, because she did not receive adequate notice of it, or because recognition would manifestly be contrary to public policy) she will often be able to claim aliment as a wife or bring an action for divorce in this country in which she could claim financial provision. Yet a doubtful challenge of a foreign divorce may absorb a quite excessive amount of time and money.[25] It would, moreover, be undesirable if the courts were to give exaggerated effect to the provisions in the present law enabling foreign divorces to be denied recognition on certain grounds merely because denial of recognition in a particular case would enable a wife to claim aliment or a financial provision.[26] That would frustrate the policy of the Recognition of Divorces and Legal Separations Act 1971.

2.8 That there are defects in the present law is clear. There is, however, a danger of over-reacting to these defects. The question of devising a suitable reform is not so simple as it might appear at first sight. It is necessary to bear in mind the nature of a claim for financial provision on divorce, the need to do justice to defenders as well as pursuers, and the requirements of international comity. We consider these matters in turn.

2.9 In our recent Report on *Aliment and Financial Provision*[27] we rejected the idea that the purpose of financial provision on divorce should be to place the parties in the position in which they would have been had the marriage continued. The Law Commission has come to the same conclusion.[28] This

[24]E.g. the Maintenance Orders (Reciprocal Enforcement) Act 1972 provides for the reciprocal enforcement of maintenance orders in relation to many foreign countries. "Maintenance order" for this purpose includes "an order which has been made in Scotland, on or after the granting of a decree of divorce, for the payment of a periodical allowance by one party to the marriage to the other party": s.21 as amended by Domestic Proceedings and Magistrates' Courts Act 1978, s.55(*a*).

[25]See *Quazi* v. *Quazi* [1980] A.C. 744.

[26]Cf. *Joyce* v. *Joyce and O'Hare* [1979] Fam. 93.

[27]Scot. Law Com. No. 67 (1981).

[28]*The Financial Consequences of Divorce* (Law Com. No. 112, 1981) para. 17.

affects the approach to financial provision after a foreign divorce. It cannot, on this view, be assumed that a wife living in this country but divorced abroad is entitled to be supported by her former husband. It is necessary to seek some justification for financial provision other than the mere fact of being a former spouse. In our recent Report we suggested that the principles governing an award of financial provision should be

"(*a*) that the net value of the matrimonial property should be shared fairly between the parties to the marriage;

(*b*) that there should be due recognition of contributions made by either party for the economic benefit of the other party and of economic disadvantages sustained by either party in the interests of the other party or of the family;

(*c*) that the economic burden of caring after divorce for a child of the marriage should be shared fairly between the parties;

(*d*) that a party who has been financially dependent to a substantial extent on the other party should be awarded such financial provision as is reasonable in the circumstances to enable him the more easily to adjust over a period of not more than three years from the date of decree of divorce to the cessation on divorce of such dependence; and

(*e*) that a party who at the time of divorce seems likely to suffer grave financial hardship as a result of the divorce should be awarded such financial provision as is reasonable in the circumstances to relieve him over such period as is reasonable of such hardship."[29]

It will be seen that all of these principles relate back, to a greater or lesser extent, to the marriage or to the position of the spouses at the time of its dissolution. In many cases effect would be given to these principles by an award of a periodical allowance or a capital sum payable by instalments, but nonetheless they represent an attempt to settle the financial consequences of a terminated marriage rather than an attempt to pretend that, economically, the marriage has not been dissolved at all. What we are concerned with here is not maintenance of a spouse during the subsistence of a marriage but the financial consequences of the dissolution of a marriage. This being so, it seems reasonable to require that before Scots law is applied there should be a sufficient connection between the marriage and Scotland.

2.10 Many of those who commented on the Law Commission's Working Paper and our Consultation Paper were rightly concerned about the plight of wives divorced abroad and left with no claim for financial provision. They stressed the need to ensure that relief could be provided in all cases of hardship. Other commentators, however, pointed out that there could be a serious danger of injustice to defenders if the court had a wide jurisdiction to make orders for financial provision after foreign divorce. We think there is force in this point. Considerations of financial hardship cut both ways: one person's relief is another's burden. So too do considerations of distance and inconvenience: if it is right to take into account that a wife in this country may find it difficult and expensive to make a justified claim for financial provision

[29]See clause 9(1) of the draft Bill appended to Scot. Law Com. No. 67 (1981).

in divorce proceedings in a distant country, it is also right to take into account that a husband in a distant country may find it difficult and expensive to defend an unjustified claim for financial provision in this country.

2.11 We deal later with the effect on our proposals of statutes and international conventions on the recognition of foreign judgments.[30] All we wish to say at this point is that, quite apart from any binding obligations under international conventions, international comity suggests a certain restraint in assuming for ourselves a jurisdiction which we would be reluctant to see other countries assuming for themselves.

Possible approaches to reform

2.12 The problem is to find a solution which will enable financial provision after a foreign divorce to be claimed and awarded in appropriate cases, but will not enable it to be claimed or awarded in inappropriate cases. Partly this is a question of value judgments. Which cases are "appropriate" and which "inappropriate"? Partly it is a question of legal technique. Should inappropriate cases be sifted out by fairly strict rules on jurisdiction, or should the sifting process be left to the courts in the exercise of a very wide discretion with the help of statutory guidelines? The questions of value judgments and technique overlap. If the technique used is to have very wide grounds of jurisdiction and a minimum of restraints on the powers of the courts then, in effect, the value judgments are left to whichever judge happens to be deciding a particular case.

2.13 It is here that we find ourselves differing from the Law Commission. They prefer a solution in which there are wide grounds of jurisdiction and in which it is left to the courts, guided by a list of factors to be taken into account, to sift out cases where an award would be inappropriate. We prefer a solution in which there are stricter grounds of jurisdiction and the legislation identifies certain cases as inappropriate in advance. In our view, a system based on rules is likely to be fairer to defenders and less objectionable to other countries than a system which depends almost entirely on judicial self-restraint. We accept that strict rules on jurisdiction may exclude some cases which a judge in his discretion might allow to proceed. A power to award financial provision after a foreign divorce is, however, a new and exceptional one in our law, and we would rather proceed with caution. We should add that, although our consultation was much more limited than that of the Law Commission, there was a tendency on the part of the Scottish consultees to favour stricter grounds of jurisdiction than those put forward for consideration in the Working Paper. We note too that a feature of the Law Commission's proposals is that there would be a preliminary barrier to unmeritorious cases, in that an applicant would be required to obtain leave to apply before he or she could proceed with an application for financial relief after foreign divorce. Although it would no doubt be possible to introduce some form of leave to apply procedure in this type of case in Scotland, it would be something of a novelty.[31] We believe that actions for financial provision after foreign divorce will be infrequent in Scotland, and we doubt

[30]Para. 3.26.

[31]There is a precedent for it in the case of vexatious litigants, but this is a rather special case.

whether the introduction of a special set of procedural rules for this limited situation would be justified. There is no accumulated judicial experience of operating leave to apply provisions in Scotland and there are no special officers, such as masters or registrars, within the court system to whom the exercise of this discretion could be entrusted. It may also, perhaps, be doubted whether the technique would achieve the desired results. If the application for leave were dealt with in the absence of the defender, the court would be deciding on the basis of the pursuer's own averments which might be exaggerated and incomplete. There is no way of knowing how effective a sift of this nature would be. If, on the other hand, the defender were given an opportunity to be heard the main object of the exercise (to protect him from the expense and inconvenience of becoming involved in a case with little chance of success) would be defeated. In short, we doubt whether a leave to apply procedure would be a desirable adjunct to this type of action in the Scottish context. This makes it all the more necessary to have a set of exclusionary rules for the protection of defenders from unmeritorious cases.

PART III SUGGESTED SOLUTION

3.1 In our Consultation Paper we set out the arguments for and against conferring powers on our courts to make orders for financial provision after a foreign divorce. We noted that there was an argument for doing nothing on the grounds that there were advantages in leaving all aspects of the divorce to be dealt with by the court granting the divorce and that cases were, in any event, likely to be infrequent. Against this, we noted that cases of undoubted hardship could arise and that, for the reasons given above, it was not always realistic to expect the question of financial provision to be dealt with, or to be fully dealt with, by the foreign court. On balance we came to the provisional conclusion, agreeing with the Law Commission, that there was a case for conferring powers on our courts to make orders for financial provision after a foreign divorce. This conclusion was strongly supported on consultation. We therefore **recommend:**

1. The Scottish courts should have power to make orders for financial provision after a foreign divorce.

Grounds of jurisdiction

3.2 In our Consultation Paper we invited views on the suggestion made by the Law Commission that the courts should have jurisdiction if either of two grounds was satisfied. The first was that either party was domiciled, or habitually resident for the past year, in this country at the date when the foreign divorce became effective. The second was that either party was domiciled, or habitually resident for the past year, in this country at the date of the application for financial provision.[32] We also invited views on the question whether it should be necessary for both these grounds to be satisfied before our courts should have jurisdiction. We pointed out that it could be argued that an 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 at least one party had some present connection with Scotland sufficient to justify an assumption of jurisdiction.

3.3 The general response on consultation, on a United Kingdom basis, was in favour of an alternative test of the type suggested by the Law Commission. A minority, however, criticised the proposed tests, either expressly, or impliedly by suggesting other tests. Some thought the tests were too narrow and might exclude deserving cases—for example, cases where a former matrimonial home, or other property, was situated here. Others thought the tests were too wide.[33] There was a danger of unfairness to defenders in distant countries who might be exposed to unfounded or exaggerated claims in this country. There was a danger that divorced people with no previous connection with this country might come here after the foreign divorce in order to claim financial provision. There was no need to provide a remedy unless the *applicant* was closely connected with this country at the time of the application. It was wrong on principle to have a *jurisdictional* test based on a

[32]The grounds were differently arranged in the Working Paper but the substance was the same.

[33]As we have mentioned above (para. 2.13), the Scottish commentators tended to take this view.

connection with this country at a time (i.e. the time of the foreign divorce) prior to the commencement of the proceedings in this country. Although these arguments in favour of narrower grounds of jurisdiction were made by a minority of commentators, it seemed to us that they had considerable force. We have, therefore, carefully reconsidered the question of jurisdiction in the light of the comments received. We have found it helpful for the purposes of analysis and presentation to distinguish between jurisdiction (concerned with whether there are sufficient connections between the parties and Scotland at the time of the commencement of the proceedings in Scotland[34]) and competence (concerned with whether the application should be prevented from proceeding on some other ground).

3.4 We have come to the conclusion, first, that there is no strong justification for conferring this exceptional jurisdiction on the Scottish courts unless the applicant is domiciled or habitually resident in Scotland on the date when the application is made. The mischief is largely that "Scottish" wives are left financially unprotected after a foreign divorce. Our general inclination is to proceed with caution in this difficult and uncharted territory, and we think that, at least to begin with, there is no need to open our courts to applications by those who were divorced abroad and who, at the time of the application, are domiciled and habitually resident abroad. We have considered whether any length of habitual residence should be required. In the case of an action for divorce one year's habitual residence immediately prior to the commencement of proceedings confers jurisdiction. In the present context, however, there are other requirements to be satisfied before an application will be competent[35] and it seems unnecessary to insist on any particular period of habitual residence.

3.5 We have also come to the conclusion that considerations of fairness to defenders require that, as a general rule, there should be a sufficient connection between the defender and this country at the time of the application for financial provision. We considered whether the normal rules on jurisdiction in ordinary actions for money[36] should be applied for this purpose, but concluded that many of these rules would be inappropriate and that it would be better to devise special rules. These would be designed to ensure that even if the pursuer is domiciled or habitually resident in Scotland the court will not have jurisdiction unless the defender *also* has a sufficient connection with Scotland.

3.6 A defender who is domiciled[37] or habitually resident in Scotland could not usually complain of being subjected to proceedings in Scotland for financial provision after divorce. To stop there, however, would be unduly narrow. If it were always necessary for the defender to be domiciled or habitually resident in Scotland before proceedings could be brought, there

[34]There would be one exception to the general rule that jurisdiction would be based on connections with Scotland at the time of the commencement of proceedings in Scotland. See para. 3.6 below.

[35]See paras. 3.9 to 3.18 below.

[36]See now the Civil Jurisdiction and Judgments Act 1982, Sched. 8.

[37]We are aware that in some cases a connection based on domicile (e.g. a domicile of origin) may be somewhat tenuous. Such cases will, however, be rare and we think that the place to deal with this problem is in a general re-examination of the law on domicile.

would be no remedy for a wife who had lived in Scotland throughout her marriage until her husband abandoned her. If he went abroad, obtained a divorce abroad and did not return to Scotland, she would be unable to claim financial provision in the Scottish courts however meritorious her claim. This would leave a mischief unremedied.[38] The question whether the deserting spouse can, by the very act of desertion, deprive the Scottish courts of jurisdiction is not a new one. When the main ground of jurisdiction in divorce was the domicile of the husband at the commencement of the proceedings it was held that the Scottish courts would nonetheless have jurisdiction in an action by the wife if the husband had been domiciled in Scotland at the time of the desertion.[39] A similar exception to the normal rule was introduced by statute into English law.[40] We think that a similar rule could, and should, be resorted to in the present context and that the Scottish courts should have jurisdiction if the defender was domiciled or habitually resident in Scotland when the parties last lived together as husband and wife. This rule would cater for the case where the husband deserts his wife, goes abroad and divorces her abroad. In theory, the rule might be open to the objection that it would confer jurisdiction over the husband in cases where the *wife* had deserted him and gone abroad, but other restrictions in the scheme we propose would prevent this being a serious practical problem.[41]

3.7 We have considered whether the defender's ownership of property in Scotland should be an additional ground of jurisdiction. We have concluded that it should not be a general ground of jurisdiction but that special considerations apply to a matrimonial home or former matrimonial home. The mere ownership of property is nowadays generally regarded as an exorbitant ground of jurisdiction. It is, for example, expressly rejected as a ground of general jurisdiction by the European Judgments Convention.[42] It would, in our view, be wrong to subject a defender to the jurisdiction of the Scottish courts in an action for financial provision after foreign divorce *merely* because he happened to own any property—say, an acre of peat bog or a book—situated in Scotland. The position is different, however, in relation to a former matrimonial home in Scotland. If a defender retains an interest in such a home this would seem to constitute a sufficient connection with Scotland to justify the court in assuming jurisdiction to make at least certain types of order for financial provision. There is in this case a direct link between the property and the remedy sought. The property is not just any property: it is the property which was the parties' home at some time during their marriage. The orders which the court should be empowered to make where jurisdiction is based only on this ground should, we think, be limited to

[38]Our proposal in para. 3.7 that jurisdiction could be based on rights in a former matrimonial home in Scotland would be only a partial remedy.

[39]See *Jack* v. *Jack* (1862) 24 D. 467 at pp. 473, 476, 477, 485; *Mason* v. *Mason* (1877) 14 S.L.R. 592; *Pabst* v. *Pabst* (1898) 6 S.L.T. 117; *Mayberry* v. *Mayberry* (1908) 15 S.L.T. 1016; *Robertson* v. *Robertson* 1915, 2 S.L.T. 96 and 1916, 2 S.L.T. 95. This rule was later extended to cover cases where the husband committed adultery while domiciled in Scotland but later abandoned his Scottish domicile. See *Clark* v. *Clark* 1967 S.C. 296.

[40]Matrimonial Causes Act 1937, s.13.

[41]See Recommendation 2(*a*) (pursuer must be domiciled or habitually resident in Scotland when action for financial provision is begun) and 3(*b*) (pursuer in action for financial provision did not initiate the foreign divorce proceedings).

[42]Art. 3. See the Civil Jurisdiction and Judgments Act 1982, Sched. 1.

an order relating to the home or its furniture and plenishings and an order for payment by the defender of a capital sum not exceeding the value of his interest in the home and its furniture and plenishings. Under the present law the court has only very limited powers to make orders relating to the matrimonial home or its contents. It can order the transfer of a tenancy in the home;[43] or it can vary a settlement of the home or contents in certain circumstances;[44] or it can make an order reducing, varying or interdicting certain dealings with the home or contents designed to defeat the pursuer's claims for financial provision;[45] but it has no power to order a transfer of the property or a share in it or to regulate the occupancy of it. All the court can do if it wishes to ensure that the pursuer derives some benefit from the defender's ownership of the matrimonial home is to make an order for payment of a capital sum which the defender may have to raise by selling, or borrowing on the security of, the home. Under the recommendations made in our Report on *Aliment and Financial Provision* the court would have powers to make a wider range of orders relating to the home or its furniture and plenishings, including an order for the transfer of the home, or a share in it, to the pursuer; an order regulating the occupation of the home or the use of its furniture and plenishings; and an order for the sale of the home and its contents.[46]

3.8 Before summarising our recommendations on jurisdiction we must consider the effects of the European Judgments Convention[47] in this area. If the Convention applied in any particular case then (a) the defender might be able to argue that a ground of jurisdiction went beyond what was permitted by the Convention and (b) the pursuer might be able to argue that the court had jurisdiction under the Convention even though it did not have jurisdiction on any of the grounds discussed above. The main concern of the Convention is with civil and commercial matters and it might therefore be assumed that it would have no application in relation to financial provision on divorce. This, however, would not be a safe assumption. Although the Convention does not apply to

> "the status or legal capacity of natural persons, *rights in property, arising out of a matrimonial relationship,* wills and succession,"[48]

it certainly does apply to "matters relating to maintenance".[49] The European Court of Justice has held that a "compensatory payment" under Article 270 of the French Civil Code, which is intended to compensate a divorced spouse, so far as possible, for the disparity in the parties' living standards caused by the breakdown of the marriage and which is fixed according to the parties' needs

---

[43]Matrimonial Homes (Family Protection) (Scotland) Act 1981, s.13.

[44]Divorce (Scotland) Act 1976, s.5(1)(*c*).

[45]Divorce (Scotland) Act 1976, s.6.

[46]See clauses 8(1)(*a*) and (*c*) and 14 of the draft Bill appended to Scot. Law Com. No. 67 (1981).

[47]The English text of the Convention is set out in Sched. 1 to the Civil Jurisdiction and Judgments Act 1982.

[48]Art. 1(1). The phrase in italics was interpreted fairly widely in *De Cavel* v. *De Cavel* [1979] E.C.R. 1055 where it was held that the Convention did not apply to protective measures against the property of a spouse ordered by the judge in a French divorce action. The court said that the phrase covered not only rights arising under a community property regime but also other patrimonial rights arising directly from the matrimonial relationship or its dissolution.

[49]Art. 5(2).

and resources, is a payment in the nature of maintenance.[50] Although we have tried in our Report on *Aliment and Financial Provision*[51] to emphasise that there is no continuing obligation of maintenance or aliment between divorced spouses and that financial provision on divorce is concerned with the patrimonial consequences of the dissolution of a marriage, there can clearly be no guarantee that the European Court would regard all applications for financial provision after divorce under Scots law as being outwith the scope of the Convention. If the Convention did apply in any particular case the result would be that the provisions on jurisdiction which we recommend in this Report would be subject to the provisions of the Convention. The effect of this might be, for example, to enable a wife domiciled or habitually resident in Scotland to claim a periodical allowance after a foreign divorce from her husband if he was domiciled in another EEC country. This is because Article 5 of the Convention provides that:

> "A person domiciled in a Contracting State may, in another Contracting State, be sued: . . . in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident . . ."

Conversely, the effect of applying the Convention might be to enable a husband domiciled in another EEC country to challenge jurisdiction based on his domicile or habitual residence in Scotland when the parties last lived together or, in some cases, jurisdiction based on his interest in a former matrimonial home in Scotland.[52]. We would not regard these results as disastrous even if such cases were to occur frequently, which is unlikely. The cases in which the question of financial provision after a foreign divorce has arisen in England[53] appear generally to have been cases where the parties were not domiciled in another EEC country. We have therefore concluded that the possibility that the European Judgments Convention might be held to apply to certain cases coming under our recommendations is not a reason for modifying them. For the avoidance of doubt, however, we think that it should be provided that the rules on jurisdiction here recommended should be subject to the European Judgments Convention. We therefore **recommend:**

2. Subject to the European Judgments Convention, the court should have jurisdiction to entertain an action for financial provision after a foreign divorce if:—
   (*a*) the pursuer is domiciled or habitually resident in Scotland on the date when the action is begun;[54] and
   (*b*) the defender (i) is domiciled or habitually resident in Scotland on the date when the action is begun; or (ii) was domiciled or habitually resident in Scotland when the parties last lived together as husband and wife;[55] or (iii) is an owner, tenant or has any other beneficial interest in property in Scotland which was at any time the matrimonial home of the parties.[56]

---

[50]*De Cavel* v. *De Cavel* [1980] E.C.R. 731.
[51]Scot. Law Com. No. 67 (1981).
[52]See para. 3.7 above.
[53]See para. 1.2 above.
[54]See para. 3.4.
[55]See para. 3.6.
[56]See para. 3.7.

In an action in which jurisdiction is based only on paragraph (*b*)(iii) above, the court should have power to make only an order relating to the former matrimonial home or its furniture and plenishings or an order for payment of a capital sum not greater than the value of the defender's interest in the former matrimonial home and its furniture and plenishings.[57]

Other restrictions

3.9 Having rejected the idea of leaving restrictions to the discretion of the court, we must consider what restrictions should be embodied in rules. In so doing we have drawn on the proposed guidelines set out in the Working Paper[58] and have elevated some of them into rules. We have also reconsidered the restrictions provisionally rejected in the Working Paper. Some of them, such as a time limit and a bar on an application by the person who was himself the pursuer in the foreign proceedings, although unnecessary in a system which relies on the exercise of a judicial discretion, seem to us to be useful and important in a scheme based on exclusionary rules.

3.10 *Divorce must be obtained outside British Isles.* A spouse who is faced with divorce proceedings elsewhere in the British Isles can reasonably be expected to seek financial provision in those proceedings rather than in a subsequent application in Scotland. The courts in other parts of the British Isles are reasonably accessible, they have adequate powers, there is likely to be adequate notice of the proceedings, and there are unlikely to be great difficulties in obtaining legal advice and representation. We therefore conclude that an action for financial provision after a foreign divorce should be competent only if the divorce was granted outside the British Isles.[59]

3.11 *Divorce must be entitled to recognition in Scotland.* If the foreign divorce is not recognised in Scotland the parties remain married and have their normal remedies including, if the Scottish courts have jurisdiction, an action for aliment or for divorce and financial provision. The mischief to be remedied arises only if the foreign divorce is entitled to recognition in Scotland. We therefore conclude that an action for financial provision after a foreign divorce should be competent only if the divorce falls to be recognised in Scotland.

3.12 *Pursuer must not have initiated foreign divorce proceedings.* If a spouse, having the choice of seeking a divorce in Scotland,[60] chooses to seek a divorce abroad, he or she can hardly complain of the financial consequences of that decision. This is so whether the spouse has been the sole applicant for the foreign divorce or has applied along with the other party in a joint application (as is permitted in some countries). On the other hand, a spouse who has stayed in this country would have grounds for complaint if, having been

---

[57]*ib.*

[58]Para. 52.

[59]This conclusion forms part of a composite recommendation on restrictions. See para. 3.18 below.

[60]See para. 3.14 below.

exposed to divorce proceedings abroad, possibly including a claim for financial provision and expenses, he or she were then exposed to fresh proceedings for financial provision in this country. We therefore conclude that an action for financial provision after a foreign divorce should be competent only if the pursuer in that action was not the pursuer (or a joint pursuer) in the foreign divorce proceedings.

3.13 *Time limit.* One of the guidelines suggested in the Working Paper[61] was the "time which has elapsed since the foreign divorce, and the reasons for any delay in bringing the application in this country". We have considered whether, if there are no guidelines, there ought to be a time limit on proceedings for financial provision after a foreign divorce. In our Report on *Aliment and Financial Provision* we stressed the desirability of finality, whenever fair and possible, in relation to the financial consequences of divorce.[62] This consideration is no less important in the present context. It would, in our view, be wrong to expose a former spouse indefinitely to a claim for financial provision after a foreign divorce. A spouse with a claim for financial provision should be encouraged to make it quickly or not at all. We think, therefore, that there should be a time limit. We consider the duration of this time limit later but, for the purposes of discussion, let us assume that it might be three years.[63] A question which has given us some difficulty is the date from which the period should run. The date when the foreign divorce took effect seems, at first sight, to be the obvious starting date. It provides a clear rule in most cases, although not necessarily in all.[64] As one of the purposes of a time limit is to prevent a defender from being put to the trouble and expense of disputing debatable issues of fact, there is clearly much to be said for a rule which normally could be easily applied. On the other hand an unqualified three-year limit from the date of the foreign divorce might operate harshly in the case of a wife in this country who did not learn until some time after the foreign divorce that she had been divorced. Such a wife could sometimes claim that the divorce should not be recognised on the ground that reasonable steps had not been taken to give her notice of the proceedings, but that would not always be the case.[65] A way round this difficulty would be to make the starting date for the time limit the date when the pursuer learned of the foreign divorce decree. This, however, could give rise to difficulties of proof: it would be easy for a spouse to deny knowledge of a foreign decree and difficult for the other spouse to prove the contrary. We do not think that in this context elaborate rules on constructive knowledge would be justified. The problem is likely to arise infrequently. Moreover a solution based on knowledge or constructive knowledge would still disqualify a pursuer who had known of the decree for more than three years but had wrongly assumed that it was invalid.[66] A solution which would cover this situation would be to have a period of, say, three years from the date of the foreign decree coupled with a discretionary power to allow an action to proceed if in all the circumstances, including the pursuer's knowledge of the

[61]Para. 52(f).
[62]Scot. Law Com. No. 67 (1981) paras. 3.116, 3.121 to 3.123.
[63]This was the period given by way of example in the Working Paper, para. 55.
[64]Cf. *Quazi* v. *Quazi* [1980] A.C. 744.
[65]Recognition of Divorces and Legal Separations Act 1971, s.8(2).
[66]Cf. *Quazi* v. *Quazi* [1980] A.C. 744.

foreign proceedings and their effect, it would be fair and reasonable to do so. This, however, would again lead to uncertainty. A defender in a distant foreign country might be forced to enter into a complicated dispute about whether it would be fair and reasonable to dispense with the normal time limits. What is needed in this situation, it seems to us, is above all a clear and simple rule which would enable stale claims to be excluded without debate. The danger of unfairness to pursuers could be met to some extent by lengthening the period to five years. This should allow ample time, in all but exceptional cases, for proceedings to be taken. Aliment for children could, of course, be claimed even after the five-year period. Given that recognition of a foreign divorce could be challenged on the ground of lack of proper notice, we think that the risk of injustice inherent in a simple five-year rule would be very slight indeed. We therefore conclude that an action for financial provision after foreign divorce should be competent only if the action is begun within five years of the date when the foreign divorce took effect.

3.14 *Scottish court must have had jurisdiction to grant divorce immediately before foreign divorce took effect.* The situation with which we are concerned is where a divorce action could have been brought in Scotland (so far as jurisdiction is concerned), but one of the parties (say, the husband) has obtained a divorce abroad. The justification for the reforms we propose is that the wife should not, by the mere fact of the husband's choice of forum, lose all rights to claim financial provision. There is not a strong case for allowing the Scottish courts to grant financial provision after a foreign divorce if at the time of the foreign divorce neither party could have brought a divorce action in Scotland. Our law on financial provision on divorce is designed for those who are divorced in Scotland. It is not unreasonable to make it available to those who were divorced abroad but who (so far as jurisdiction is concerned) could have been divorced in Scotland: the question of financial provision could have come before the Scottish courts had one of the parties not opted to raise proceedings abroad. It would, we think, be going too far to allow our law to be applied in cases where, had a divorce action been brought in Scotland, our courts would have had to decline jurisdiction. A requirement that the English courts should have had jurisdiction at the time of the foreign divorce was provisionally rejected in the Working Paper for practical reasons.[67] It was pointed out that such a requirement could confront the court with the problems of deciding (a) which of several foreign divorces actually dissolved a marriage, and (b) in which country the parties were domiciled or habitually resident at the time of the relevant divorce. These are precisely the types of problem which gave rise to so much difficulty in *Quazi* v. *Quazi*,[68] and which led to calls for reform. However, if the foreign divorce were challenged, the court would in any event have to decide whether it was entitled to recognition in Scotland. In cases like *Quazi*, this would necessarily involve deciding which divorce was effective and, often, where the parties were domiciled or habitually resident at the relevant times. We do not think that the requirement proposed would add significantly to the difficulty of operating the new law, and we think that it is right to insist that a divorce action could have been raised in this country at the time of the foreign

[67]Paras. 34 to 36.
[68]See para. 3.13 above.

divorce. We therefore conclude that an action for financial provision after a foreign divorce should be competent only if the Scottish court would have had jurisdiction to entertain an action for divorce between the parties if such an action had been brought in Scotland immediately before the foreign divorce took effect.

3.15 *Marriage must have had a substantial connection with Scotland.* The requirement discussed in the previous paragraph would ensure a minimal connection between the marriage and Scotland at the time of the foreign divorce. The grounds of jurisdiction in divorce are, however, generous. A person with no previous connection with Scotland can establish a domicile here overnight and raise a divorce action immediately thereafter or, even without the intention to remain which is necessary for the establishment of a domicile of choice, can live here for a year and then raise a divorce action. Domicile or one year's habitual residence at the time of commencing divorce proceedings are proper grounds of jurisdiction in divorce[69] but they do not necessarily indicate a sufficient connection between a marriage and a country to justify applying its laws to the financial consequences of the dissolution of the marriage. Where the divorce itself is granted in Scotland there are very powerful arguments of convenience and practicality for allowing the financial consequences of divorce to be dealt with at the same time by the Scottish court, even if the marriage itself had little or no connection with Scotland. These arguments do not apply where the action is simply for financial provision after a foreign divorce, and we think that in this situation some further connection between the marriage and Scotland should be required. The guidelines set out for consideration in the Working Paper included:

> "The connection of the parties, and of the marriage, with this country and whether it would be appropriate for English financial relief to be granted."[70]

We have asked ourselves how this guideline could best be incorporated into a system based on rules. We considered whether there should be a requirement that the parties should have lived in Scotland for a specified number of years during their marriage, or for a specified proportion of their married life together, but concluded that any such rule could lead to anomalies. Cases under these provisions are likely to be infrequent and it would, in our view, be sufficient to require that the marriage should have had a substantial connection with Scotland. We considered whether it should be necessary that the marriage was more closely connected with Scotland than with any other country. Such a provision would be very attractive in theory: there could be little objection from foreign countries if we applied our law on the financial consequences of divorce in cases where not only were reasonable jurisdictional requirements satisfied but also the marriage was more closely connected with this country than with any other country. There would, however, be practical disadvantages. It would not always be easy to determine the country with which a marriage was *most* closely connected. This point was made in the Working Paper:

> "At a time when people can travel easily from one country to another marriages are increasingly connected with several different systems of

[69]See our Report on *Jurisdiction in Consistorial Causes affecting Matrimonial Status* (Scot. Law Com. No. 25) (1972) paras. 47 to 84.

[70]Para. 52(a).

law (for example, with the law of the parties' nationality, or the law of their place of residence, the law of the place where the marriage was celebrated, or even with the law of their religion). In our view, it is unrealistic to suppose that a process of juristic analysis will identify any single 'right' system of law to which all questions relevant to a particular marriage should be referred to the exclusion of all other systems."[71]

It would, on the other hand, seldom be difficult to determine whether or not a marriage had a substantial connection with Scotland. We therefore conclude that an action for financial provision after a foreign divorce should be competent only if the marriage had a substantial connection with Scotland.

3.16 *Both parties living.* It would complicate the law on financial provision after a foreign divorce if an application could be made against the executors of a former spouse who had died since the date of the foreign divorce. This could also lead to practical difficulties. The deceased party's estate might have already been distributed. On purely practical grounds, therefore, we think that our proposals should be confined to cases where both parties are alive at the time of the application. We understand that the Law Commission intend to recommend that a person whose marriage has been terminated by a foreign divorce or annulment should be eligible to apply as a "former spouse" under the Inheritance (Provision for Family and Dependants) Act 1975. This Act does not apply in Scotland and the place to consider whether there should be any equivalent in Scotland is in a future consultative memorandum on the law of succession rather than in this Report.

3.17 *No further restrictions necessary.* A scheme on the above lines would deal with the defects in the existing law without opening our courts to applications by people who had had no sufficient connection with this country during their marriage or at the time of the foreign divorce. It would not be possible for a divorced person to come to this country for the first time after the foreign divorce and claim financial provision in our courts. Nor would it be possible for a spouse who had deliberately chosen to bring divorce proceedings in a foreign country instead of in Scotland to use a Scottish court as a court of appeal against the foreign court's decision. The scheme as a whole, including the rules on jurisdiction, would also protect spouses domiciled and habitually resident in foreign countries and with no interest in a former matrimonial home in this country from having to defend proceedings, perhaps at great inconvenience and expense, in this country. The time limit would mean that defenders would not be exposed indefinitely to the risk of proceedings for financial provision after a foreign divorce. We have considered whether it would be desirable to add a further restriction which would prevent an action for financial provision in this country if the pursuer had appeared or been represented, even as a defender, in the foreign divorce proceedings. We do not think such a restriction would be necessary or justified. The defence might have been only on the grounds of divorce. It might have been highly inconvenient and expensive to raise the issue of financial provision in the foreign proceedings. It might also, in certain cases, have been impossible (e.g. because the foreign law allowed only an "innocent" spouse to claim financial provision) or pointless (e.g. because the

[71]Para. 27.

foreign court had only very restricted powers in relation to financial provision). There are no other restrictions on competency which seem to be necessary.

3.18 *Recommendation on restrictions.* We therefore **recommend:**

3. An action for financial provision after a foreign divorce should be competent only if:—
   (*a*) the divorce was granted outside the British Isles[72] and falls to be recognised in Scotland;[73]
   (*b*) the pursuer in the action for financial provision was not the pursuer (or a joint pursuer) in the foreign divorce proceedings;[74]
   (*c*) the action is begun within five years of the date when the foreign divorce took effect;[75]
   (*d*) a Scottish court would have had jurisdiction to entertain an action for divorce between the parties if such an action had been brought in Scotland immediately before the foreign divorce took effect;[76]
   (*e*) the marriage had a substantial connection with Scotland;[77] and
   (*f*) both parties are living at the time of the application.[78]

Law to be applied

3.19 *Scots law of financial provision to apply.* We have no doubt that the law to be applied in any competent action for financial provision after a foreign divorce should be Scots law. That was the view put forward for consideration in the Consultation Paper[79] and it was strongly supported on consultation. Any other view would require the identification of a "proper law of the marriage" and would throw into question the present rule that Scots law applies to the financial consequences of Scottish divorces. It would give rise to difficulty and expense in obtaining expert evidence of foreign laws. To say that Scots law, rather than some other law, should apply is not, however, the end of the question. It must still be asked *how* it should apply in an action for financial provision after a foreign divorce and whether any modifications to the normal rules are necessary for this new situation.

3.20 *Basis on which Scots law should apply.* If Scots law were applied without modification, on the assumption that there had been no foreign divorce and that the Scottish court was itself granting a divorce in the action for financial provision, there could be circumstances in which the applicant would benefit from the fact that the divorce was obtained abroad rather than in Scotland. Under the present law on financial provision, for example, a spouse might be able to benefit from a dramatic change in the other spouse's

[72]See para. 3.10.
[73]See para. 3.11.
[74]See para. 3.12.
[75]See para. 3.13.
[76]See para. 3.14.
[77]See para. 3.15.
[78]See para. 3.16.
[79]See also the Working Paper, para. 56.

resources since the divorce. Under the rules recommended in our Report on *Aliment and Financial Provision*[80] a spouse might be able to claim a periodical allowance for a lengthy period after the divorce[81] or might be able to found on events occurring after the divorce[82] in circumstances where he or she could not have done so had the divorce been granted in Scotland. The mischief at which our recommendations are aimed is that a foreign divorce, although entitled to recognition, may unfairly cut off a spouse's claims to financial provision under Scots law in circumstances where the Scottish courts would have had jurisdiction had the divorce action been brought in Scotland and where the marriage had a substantial connection with Scotland. It seems to us to be fair and reasonable to introduce provisions to ensure that a Scottish spouse is not prejudiced financially by the foreign divorce in these circumstances. We can see no reason, however, why the Scottish spouse should benefit from the fact that the divorce took place abroad rather than in Scotland. The general principle is that, in the circumstances covered by our proposals, a spouse should be neither prejudiced financially nor given a financial advantage by the fact that the divorce was obtained abroad. In practice, of course, it may be impracticable or unreasonable to give full effect to this principle. The principle should therefore be that the parties should be placed, *in so far as it is reasonable and practicable to do so,* in the financial position[83] in which they would have been had the question of financial provision been dealt with by a Scottish court at the time of the foreign divorce.

3.21 *Factors to be taken into account.* The application of Scots law in this way would mean that the factors normally taken into account in making an order for financial provision in a Scottish divorce would be taken into account in relation to financial provision after a foreign divorce. These would include the resources of the parties at the time of the foreign divorce. We think that, in addition, in deciding how far it is reasonable and practicable to place the parties in the financial position in which they would have been had the question of financial provision been dealt with by a Scottish court at the time of the foreign divorce, the court should have regard in particular to (a) the parties' present and foreseeable resources and (b) any order for financial provision[84] made by a foreign court in or in connection with the divorce proceedings. It would also inevitably have to take into account that, in a case where jurisdiction was based solely on the defender's interest in a matrimonial home in Scotland, its powers would be limited as recommended above.

3.22 *Powers of the court.* In a case where jurisdiction is based only on the defender's interest in a matrimonial home in Scotland, the court's powers

[80]Scot. Law Com. No. 67 (1981).

[81]See clauses 9(1)(*d*) and 13(3) of the draft Bill appended to our Report.

[82]See clause 9(1)(*e*) of the draft Bill, the effect of which is to confine a claim based on relief of grave financial hardship to hardship which, *at the time of the divorce,* seems likely to arise as a result of the divorce. See also clause 10(2) which, in certain cases, fixes the value of matrimonial property as at the date of commencement of the divorce proceedings.

[83]We use the expression "financial position" in a broad sense, to include the position in relation to property.

[84]Foreign orders may take various forms (e.g. "maintenance", "compensatory payment", "property transfer"). We intend to cover any order for financial provision (in whatever form) or the transfer of property by one of the parties to the other.

would be limited as recommended above.[85] In other cases the court should have all the powers which it would have in dealing with an application for financial provision in a Scottish divorce action. Under the present law it would therefore have power to make orders for the payment of a capital sum or periodical allowance or both, orders varying settlements, and orders counteracting certain transactions designed to defeat the applicant's claim.[86] If the recommendations in our Report on *Aliment and Financial Provision* are implemented, the court will have a much wider range of powers. It will be able to make the following orders:

(1) an order for the payment of a capital sum or the transfer of property;
(2) an order for the making of a periodical allowance;
(3) any "incidental order", including an order for the sale or valuation of property and an order regulating the occupation of the matrimonial home or the use of furniture and plenishings in it;
(4) an order varying, in certain strictly limited circumstances, an agreement on financial provision made between the parties;
(5) an order to counteract or interdict transactions calculated to defeat a spouse's claim for financial provision;
(6) a warrant for inhibition or arrestment on the dependence;
(7) an order that either party should provide details of his resources.[87]

The court will also, if our recent recommendations are implemented, have powers to make incidental orders (including interim orders regulating the occupation of the matrimonial home) during the divorce action but before the final decree[88] and to vary orders.

3.23 *Interim awards of periodical allowance.* Neither under the present law nor under the rules recommended by us in our recent Report would the court have power to award interim aliment *pendente lite* to an applicant for financial provision after a foreign divorce. The reason is that the applicant would not be a spouse at the time of the action. There would be no subsisting obligation of aliment.[89] There may be cases where an interim award of a periodical allowance would be appropriate in an action for financial provision after a foreign divorce. One such case might be where both parties were resident in Scotland, where the former wife had young children in her care, where the former husband had substantial means, and where on the pursuer's averments the action was one where an award of a periodical allowance was likely to be made. We suggest, therefore, that the court should have power to make an interim award of a periodical allowance,[90] in an action for financial provision after a foreign divorce, where on the pursuer's averments it appears that he or she is likely to receive an award of financial provision on the disposal of the action and that an interim award is necessary to avoid hardship. It can, we think, be assumed that in the exercise of this discretion the court would not

[85]See para. 3.7.
[86]Divorce (Scotland) Act 1976, ss.5 and 6.
[87]See clauses 8, 12, 13, 14, 16, 18, 19 and 20 of the draft Bill annexed to Scot. Law Com. No. 67 (1981).
[88]Clause 14(1).
[89]See clause 6(1) of the draft Bill.
[90]We use this terminology rather than "interim aliment" so as to avoid any implication that there is an obligation of aliment between divorced spouses.

make an interim order if, on the facts available to it at the time, the order would be unfair or unreasonable in the circumstances, including the means of the defender. This power should not be available where jurisdiction is founded only on the defender's interest in a matrimonial home in Scotland.

3.24 *Procedural rules.* We envisage that the procedure in an action for financial provision after a foreign divorce will be the same as in a Scottish divorce action with appropriate modifications. Thus the consistorial rules on the citation of defenders;[91] on intimations to third parties (so far as applicable);[92] on the induciae of the summons;[93] on the need for a proof;[94] and on the admissibility of affidavit evidence in undefended cases,[95] might all apply. These and other procedural questions are, however, matters for the Court of Session and Sheriff Court Rules Councils and we make no recommendations on them.

3.25 *Reporting restrictions.* The Judicial Proceedings (Regulation of Reports) Act 1926 contains special restrictions on the reporting of actions for divorce, nullity of marriage and judicial separation. The purpose of the Act was to protect public morals by preventing reporting of salacious details from the evidence in these actions.[96] This problem is unlikely to arise in relation to actions for financial provision after foreign divorce and we think that the Act should not apply to them. This is not a matter which requires any recommendation because the Act as it stands would not apply to an action for financial provision after a foreign divorce.

3.26 *Effect of foreign judgment.* Under various international Conventions, and Acts passed in connection with them, certain foreign judgments must be recognised in this country. Judgments which order the payment of a periodical allowance after divorce may, for example, be regarded as "maintenance orders" and as such may be entitled to recognition and enforcement in this country, either under the European Convention on Jurisdiction and the Enforcement of Judgments[97] or under the Maintenance Orders (Reciprocal Enforcement) Act 1972.[98] Judgments emanating from many foreign countries are also entitled to recognition and, if they are money judgments, may be registered and enforced in this country under the Foreign Judgments Reciprocal Enforcement Act 1933.[99] The question which we have to consider is whether any provision needs to be made for the case where a

[91]Rule of Court 159.

[92]E.g. Rule of Court 155(3)(*a*) (defender cited edictally); 170 D(4) (third party having interest in settlement or disposition liable to be set aside under court's anti-avoidance powers).

[93]Rule of Court 158.

[94]Court of Session Act 1830, s.36 as amended by Divorce (Scotland) Act 1976, s.12(2), Sched. 2.

[95]Rule of Court 168.

[96]See 194 H.C. Deb. 733 to 815.

[97]Arts. 1, 5(2) and 25. See Civil Jurisdiction and Judgments Act 1982, ss.2 and 5. In *De Cavel* v. *De Cavel* [1980] E.C.R. 731 the European Court of Justice held that a periodical allowance after divorce was "maintenance" at least where it was calculated by reference to the needs and resources of the parties.

[98]See the definition of "maintenance order" and "maintenance"in ss.21 and 39 (as amended in both cases by the Domestic Proceedings and Magistrates' Courts Act 1978, ss.55(*a*)(ii), 60(4), 89).

[99]See, in particular, s.8 and the views expressed on that section in *Vervaeke* v. *Smith* [1981] 2 W.L.R. 901 at pp. 946 and 947.

foreign court has made an order for financial provision and, if so, what. It seems clear, first, that if the matter is *res judicata* as a result of a foreign judgment which is entitled to recognition in this country the Scottish court should not make an inconsistent order. It would be rare for a plea of *res judicata* to be available in this area, given the diverse nature of different countries' laws on the financial consequences of divorce, but it could conceivably be. If, for example, a foreign divorce court had applied Scots law in a contested claim for a capital sum on divorce and had awarded the claimant £60,000, and if the foreign decree were entitled to recognition in Scotland, an attempt by either party to relitigate the matter of a capital sum in an action for financial provision in Scotland might well be met by a plea of *res judicata.* If the matter is not *res judicata,* it seems equally clear that the Scottish court should not be precluded from making an order merely because the foreign court has made an order. The foreign order might have dealt with only one aspect of the matter within some quite different conceptual framework. The Scottish court should, of course, take the effects of the foreign order into account as part of the relevant circumstances of the case. Our main difficulty in this area has been in deciding whether any express legislative provision is necessary on these points. It seems unnecessary to provide expressly for the question of *res judicata.* That is a general question which is not confined to financial provision after a foreign divorce. It also seems unnecessary to provide expressly that a Scottish court should not be precluded from making an order merely because a foreign court has made an order. We think, however, that it would be useful to provide, as we have already suggested,[100] that a Scottish court dealing with an application for financial provision after a foreign divorce should have regard to any order for financial provision (in whatever form) or the transfer of property which may have been made by a foreign court in or in connection with the divorce proceedings. This would serve to draw the attention of parties and their legal advisers to the need to bring any foreign orders to the notice of the court, and would allow the court to give due weight to the fact that an order had already been made by the foreign court.

3.27 *Recommendation on law to be applied.* Our **recommendations** on this subject are as follows:

4. (*a*) In an action for financial provision after a foreign divorce Scots law should apply,[101] subject to the following modifications, as it applies in relation to a claim for financial provision in a Scottish divorce action, and accordingly the court should, in general, have the same powers to make orders for financial provision and related and ancillary orders as it would have in a Scottish divorce action.

   (*b*) The court should exercise its powers so as to place the parties, in so far as it is reasonable and practicable to do so, in the financial position in which they would have been had the question of financial provision been dealt with by a Scottish court at the time of the foreign divorce.[102]

---

[100]See para. 3.21.
[101]See para. 3.19.
[102]See para. 3.20.

(*c*) In deciding what is reasonable and practicable for this purpose the court should have regard, in particular, to (i) the parties' present and foreseeable resources; (ii) any order for financial provision made by a foreign court in or in connection with the divorce proceedings; and (iii) the restriction on its powers where jurisdiction is based only on the defender's interest in a matrimonial home in Scotland.[103]

(*d*) In addition to the powers available in relation to a claim for financial provision in a Scottish divorce action[104] the court should have power to make an interim award of a periodical allowance where on the pursuer's averments it appears that he or she is likely to receive an award of financial provision on the disposal of the action and that an interim award is necessary to avoid hardship. This power should not be available where jurisdiction is based only on the defender's interest in a matrimonial home in Scotland.[105]

Foreign nullity decrees

3.28 The Working Paper[106] and Consultation Paper[107] suggested that any powers to award financial provision after a foreign divorce should also be available after a foreign annulment of a marriage. This was generally supported on consultation. Under the present law in Scotland, however, the courts have no power to make orders for financial provision on granting declarator of nullity of marriage, and it would seem anomalous to confer power to make such orders after a foreign annulment. The situation would change if the proposals in our Report on *Aliment and Financial Provision*[108] were implemented. We there recommended that a Scottish 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. If this were the law we think it would be right that the Scottish courts should have the same powers to award financial provision after a foreign annulment as we recommend they should have after a foreign divorce. Nullity and divorce may be used more or less interchangeably to achieve the same results. In countries which do not allow divorce, or in which the grounds for divorce are very limited, annulment of a marriage may be widely used. A husband who goes abroad to obtain an annulment should be in no better position than a husband who goes abroad to obtain a divorce decree. We therefore **recommend:**

5. If the Scottish courts are given power to make orders for financial provision on granting decree of declarator of nullity of marriage, they should also be given power to make such orders after a foreign annulment of a marriage.

Foreign separation decrees

3.29 The considerations are quite different in relation to foreign decrees of judicial separation. They do not dissolve the marriage. It is therefore still

---

[103]See para. 3.21.
[104]See para. 3.22.
[105]See para. 3.23.
[106]Para. 63.
[107]Para. 2.
[108]Scot. Law Com. No. 67 (1981) paras. 3.201 to 3.203.

open to a spouse in this country to raise an action for aliment or to raise an action for divorce in which a claim could be made for financial provision. The mischief which requires to be remedied in relation to foreign divorce—namely that a person in this country may find his or her rights to claim aliment or financial provision cut off by a foreign decree—does not therefore exist in the case of a foreign separation. In Scotland, moreover, the courts do *not* have wide powers to make orders for financial provision on granting a decree of separation. Their powers are limited to awarding aliment. After consultation we have recommended that this should continue to be the case.[109] It would be anomalous to give the Scottish courts greater financial powers in relation to a foreign decree than a Scottish decree. We therefore do not recommend that the courts should be given power to make orders for financial provision after a foreign separation. This was the view provisionally advanced in our Consultation Paper and it was supported by the Scottish commentators who commented on it.

Which court?

3.30 So long as the Court of Session has exclusive jurisdiction in divorce it should, in our view, have exclusive jurisdiction to deal with financial provision after foreign divorce. If the sheriff courts are given jurisdiction in divorce[110] the question arises as to whether they should also be given jurisdiction to deal with financial provision after a foreign divorce. Our view is that they should be. The problems arising in relation to financial provision after a foreign divorce are similar to those arising in relation to ordinary divorce actions and we can see no good reason for not allowing whichever courts have jurisdiction in divorce to deal also with financial provision after foreign divorce. We therefore **recommend:**

6. The "Scottish courts" referred to in Recommendation 1 should be whichever courts have jurisdiction in divorce.

3.31 Form of draft Bill. Our original intention was to produce a draft Bill in general terms which could have applied equally well whether or not the reforms recommended in our Report on *Aliment and Financial Provision* were brought into force before legislation on financial provision after foreign divorce. It proved to be impossible, however, to draft terms which were wide enough for this purpose and yet precise enough to be acceptable. This being so, we decided that the most useful course was to draft a Bill based on the present law (and hence available for immediate use) while indicating in the accompanying notes the modifications which would be necessary if the Bill were to be introduced after the draft Bill appended to our Report on *Aliment and Financial Provision.* As will be seen, the necessary modifications are few and it would be a simple matter to adapt the Bill to the new law.

---

[109]Scot. Law Com. No. 67 (1981) para. 2.83.

[110]The Solicitor-General for Scotland announced in Parliament on 14 July 1982 that the Government intended to introduce legislation to give the sheriff courts concurrent jurisdiction in divorce. H.C. Deb. 1982, Vol. 27, col. 385.

PART IV SUMMARY OF RECOMMENDATIONS

1. The Scottish courts should have power to make orders for financial provision after a foreign divorce.
(Paragraph 3.1; Clause 1(1).)

2. Subject to the European Judgments Convention, the court should have jurisdiction to entertain an action for financial provision after a foreign divorce if:—

(*a*) the pursuer is domiciled or habitually resident in Scotland on the date when the action is begun; and

(*b*) the defender (i) is domiciled or habitually resident in Scotland on the date when the action is begun; or (ii) was domiciled or habitually resident in Scotland when the parties last lived together as husband and wife; or (iii) is an owner, tenant or has any other beneficial interest in property in Scotland which was at any time the matrimonial home of the parties.

In an action in which jurisdiction is based only on paragraph (*b*)(iii) above, the court should have power to make only an order relating to the former matrimonial home or its furniture and plenishings or an order for payment of a capital sum not greater than the value of the defender's interest in the former matrimonial home and its furniture and plenishings.
(Paragraph 3.8; Clauses 1(1), (2) and (4) and 2(5).)

3. An action for financial provision after a foreign divorce should be competent only if:—

(*a*) the divorce was granted outside the British Isles and falls to be recognised in Scotland;

(*b*) the pursuer in the action for financial provision was not the pursuer (or a joint pursuer) in the foreign divorce proceedings;

(*c*) the action is begun within five years of the date when the foreign divorce took effect;

(*d*) a Scottish court would have had jurisdiction to entertain an action for divorce between the parties if such an action had been brought in Scotland immediately before the foreign divorce took effect;

(*e*) the marriage had a substantial connection with Scotland; and

(*f*) both parties are living at the time of the application.

(Paragraph 3.18; Clause 1(3).)

4. (*a*) In an action for financial provision after a foreign divorce Scots law should apply, subject to the following modifications, as it applies in relation to a claim for financial provision in a Scottish divorce action, and accordingly the court should, in general, have the same powers to make orders for financial provision and related and ancillary orders as it would have in a Scottish divorce action.

(*b*) The court should exercise its powers so as to place the parties, in so far as it is reasonable and practicable to do so, in the financial position in which they would have been had the question of financial provision been dealt with by a Scottish court at the time of the foreign divorce.

(*c*) In deciding what is reasonable and practicable for this purpose the court should have regard, in particular, to (i) the parties' present and foreseeable resources; (ii) any order for financial provision made by a foreign court in or in connection with the divorce proceedings; and (iii) the restriction on its powers where jurisdiction is based only on the defender's interest in a matrimonial home in Scotland.

(*d*) In addition to the powers available in relation to a claim for financial provision in a Scottish divorce action the court should have power to make an interim award of a periodical allowance where on the pursuer's averments it appears that he or she is likely to receive an award of financial provision on the disposal of the action and that an interim award is necessary to avoid hardship. This power should not be available where jurisdiction is based only on the defender's interest in a matrimonial home in Scotland.

(Paragraph 3.27; Clause 2.)

5. If the Scottish courts are given power to make orders for financial provision on granting decree of declarator of nullity of marriage, they should be given power to make such orders after a foreign annulment of a marriage. (Paragraph 3.28.)

6. The "Scottish courts" referred to in Recommendation 1 should be whichever courts have jurisdiction in divorce.
(Paragraph 3.30.)

APPENDIX A

Financial Provision after Foreign Divorce (Scotland) Bill

ARRANGEMENT OF CLAUSES

SCHEDULE

DRAFT

OF A

BILL

TO

Provide as respects Scotland for the making by a party to a marriage of financial provision for the other party to the marriage after the marriage has been dissolved in a country outside the British Islands.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Circumstances in which court may entertain application for financial provision.

1.—(1) Where parties to a marriage have been divorced in a country outside the British Islands, then, subject to subsection (4) below, if the jurisdictional requirements and the conditions set out in subsections (2) and (3) below respectively are satisfied, the court may entertain an application by one of the parties for an order for financial provision.

(2) The jurisdictional requirements mentioned in subsection (1) above are that—

(*a*) the applicant was domiciled or habitually resident in Scotland on the date when the application was made; and

(*b*) the other party to the marriage either—

(i) was domiciled or habitually resident in Scotland on the date when the application was made; or

(ii) was domiciled or habitually resident in Scotland when the parties last lived together as husband and wife; or

(iii) on the date when the application was made, was an owner or tenant of, or had a beneficial interest in, property in Scotland which had at some time been a matrimonial home of the parties.

Long Title

In these notes the "1981 Bill" means the Family Law (Financial Provision) (Scotland) Bill appended to our Report on *Aliment and Financial Provision* (Scot. Law Com. No. 67, 1981). If the 1981 Bill is enacted before this Bill the words "or annulled" should be inserted after "dissolved".

Clause 1

This clause implements Recommendations 1 to 3 of the Report (with the exception of the last sentence of Recommendation 2, which is implemented by clause 2(5)).

Subsection (1)

This subsection gives the court power to deal with applications for financial provision after a foreign divorce if certain jurisdictional and other criteria are satisfied. It has to be read with clause 2(5) (which limits the court's powers in certain cases) and clause 3(1) (which defines "order for financial provision"). "The British Islands" means the United Kingdom, the Channel Islands and the Isle of Man. (Interpretation Act 1978, section 5 and Schedule 1.)

Subsection (2)

This subsection lays down the jurisdictional criteria which have to be met before a Scottish court can entertain an application for financial provision after a foreign divorce. It is subject to the Conventions referred to below. Both paragraph (*a*) and paragraph (*b*) have to be satisfied before the court will have jurisdiction (see paragraphs 3.2 to 3.8).

No period of habitual residence is laid down, so that if the other conditions are satisfied an applicant could raise proceedings, and could invoke the court's powers to counteract transactions designed to defeat her claims, as soon as she was habitually resident here. She would not have to wait for a year as in the case of jurisdiction for divorce.

If jurisdiction is based only on paragraph (*b*)(iii) the court's powers are limited (see clause 2(5)).

(3) The conditions mentioned in subsection (1) above are that—

(*a*) the divorce falls to be recognised in Scotland;

(*b*) the other party to the marriage initiated the proceedings for divorce;

(*c*) the application was made within five years after the date when the divorce took effect;

(*d*) the court would have had jurisdiction to entertain an action for divorce between the parties if such an action had been brought in Scotland immediately before the foreign divorce took effect;

(*e*) the marriage had a substantial connection with Scotland; and

(*f*) both parties are living at the time of the application.

Subsection (3)

Even if a Scottish court has jurisdiction under subsection (2) (or the Conventions—see subsection (4) and the notes on it) an application will be incompetent unless the conditions set out in this paragraph are met. They would normally be met in the type of case where a husband who has been living in Scotland with his wife deliberately goes abroad to obtain a divorce in order to defeat his wife's claims for aliment or financial provision.

Paragraph (*a*) provides that an application will not be competent unless the divorce falls to be recognised in Scotland. If it is not recognised, the parties will still be regarded as married by Scots law and an application for financial provision under these provisions would be inappropriate (see paragraph 3.11).

Paragraph (*b*) prevents a spouse who has chosen to raise divorce proceedings abroad instead of in Scotland from coming back to this country to claim financial provision (or further financial provision) from the other spouse (see paragraph 3.12). One effect of this condition should be to reduce considerably the risk of competing orders.

Paragraph (*c*) prevents a former spouse from being exposed indefinitely to the risk of proceedings for financial provision after a foreign divorce (see paragraph 3.13).

The law on financial provision on divorce is designed to settle the patrimonial consequences of the dissolution of a marriage. These consequences may include a redistribution of the spouses' property by means of a capital sum or otherwise. Paragraphs (*d*) and (*e*) ensure that the Scottish courts cannot exercise their powers to redistribute property after divorce unless they would have had jurisdiction to entertain an action for divorce at the time of the foreign divorce and the marriage had a substantial connection with Scotland. This term is not defined. The length of time the spouses had lived in Scotland would be an important factor but would not necessarily be the only important factor. It is not necessary that the marriage should have been *more* closely connected with Scotland than with any other country (see paragraphs 3.14 to 3.15).

Paragraph (*f*) makes it clear that an application cannot be made by, or against, an executor of one of the parties (see paragraph 3.16).

(4) The jurisdictional requirements of this section are subject to the Conventions as defined in section 1(1) of the Civil Jurisdiction and Judgments Act 1982.

Subsection (4)

The "Conventions" referred to are:

(*a*) the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (including the Protocol annexed to that Convention), signed at Brussels on 27th September 1968;

(*b*) the Protocol on the interpretation of the 1968 Convention by the European Court, signed at Luxembourg on 3rd June 1971; and

(*c*) the Convention on the accession to the 1968 Convention and the 1971 Protocol of Denmark, the Republic of Ireland and the United Kingdom, signed at Luxembourg on 9th October 1978.

The saving for the Conventions will have no effect in any case in which the application is concerned only with "rights in property arising out of a matrimonial relationship": the Conventions do not apply to such cases (see paragraph 3.8). In any case in which the Conventions did apply the effects of the saving clause would be as follows:

(1) If the defender is domiciled in another EEC country he could be sued in Scotland "in a matter relating to maintenance" if the pursuer is domiciled (within the meaning of section 41 of the Civil Jurisdiction and Judgments Act 1982) or habitually resident in Scotland. This would follow notwithstanding the more restrictive rules of clause 1(2). Clause 1(3) would not, however, be affected by the Conventions. It contains rules which go to competence rather than jurisdiction.

(2) If the defender is domiciled in another EEC country he could *not* be sued in Scotland if the Scottish courts did not have jurisdiction in terms of the Conventions. In particular, in a case not coming under the preceding paragraph, he could object to jurisdiction being based only on his domicile or habitual residence in Scotland when the parties last lived together as husband and wife. He could also object to jurisdiction being based on his interest in a matrimonial home in Scotland, but only if the application did not have as its object a right *in rem* in, or a tenancy of, the home (see paragraphs 3.7 and 3.8).

Disposal of application.

2.—(1) Subject to the following provisions of this section, Scots law shall apply, with any necessary modifications, in relation to an application under section 1 of this Act as it would apply if the application were being made in an action for divorce in Scotland.

(2) In disposing of an application entertained by it under the said section 1, the court shall exercise its powers so as to place the parties, in so far as it is reasonable and practicable to do so, in the financial position in which they would have been if the application had been disposed of, in an action for divorce in Scotland, on the date on which the foreign divorce took effect.

Clause 2

This clause implements Recommendation 4 and the last sentence of Recommendation 2.

Subsection (1)

Scots law applies as it would apply if the application were being made in a Scottish divorce action. The court therefore has the same powers as it would have in relation to an application for financial provision in such an action. Under the present law these include powers to award a capital sum or periodical allowance, to vary marriage settlements and to make orders counteracting transactions designed to defeat the applicant's claims (see the Divorce (Scotland) Act 1976, sections 5 and 6).

The subsection goes beyond mere equiparation of powers. It also has the effect that the rules of Scots law apply on such questions as the cessation of a periodical allowance on the death or remarriage of the payee (see the Divorce (Scotland) Act 1976, section 5(5)).

The phrase "with any necessary modifications" prevents the application of Scots law being frustrated by minor technical objections. For example, under the Divorce (Scotland) Act 1976, section 5, the court has power to award financial provision only "on granting decree in that action" which, it could be argued, must be a reference to granting decree of divorce. The modification necessary to prevent clause 2 being frustrated is to apply as if any reference to granting decree of divorce in section 5 of the Divorce (Scotland) Act 1976 were a reference to granting decree in the application for financial provision after foreign divorce. Similar minor modifications of a technical or procedural nature would be necessary if the 1981 Bill were enacted.

Subsection (2)

This subsection sets out the objective of the court's exercise of its powers. The general principle is that, so far as is reasonable and practicable, the applicant should neither lose nor gain because the other party has obtained his divorce abroad rather than in Scotland (see paragraph 3.20).

(3) In determining what is reasonable and practicable for the purposes of subsection (2) above, the court shall have regard in particular to—

(*a*) the parties' resources, present and foreseeable at the date of disposal of the application;

(*b*) any order made by a foreign court in or in connection with the divorce proceedings for the making of financial provision in whatever form, or the transfer of property, by one of the parties to the other; and

(*c*) subsection (5) below.

(4) Except where subsection (5) below applies, the court may make an order for an interim award of a periodical allowance where it appears from the applicant's averments that in the disposal of the application an order for financial provision is likely to be made and the court considers that such an interim award is necessary to avoid hardship to the applicant.

Subsection (3)

The words "in particular" are used to show that the list of factors is not exclusive. The order referred to in paragraph (*b*) need not have been made by the foreign court which granted the divorce but may have been made by another court.

Subsection (4)

This is needed because the court would not have power to award interim aliment to a divorced spouse (see paragraph 3.23). There is no need to refer to children in this subsection because an application for aliment for children, and for interim aliment for them *pendente lite*, is competent under the existing law. A foreign divorce does not terminate a parent's obligation to aliment his children or affect the remedies available to enforce that obligation.

(5) Where but for section 1(2)(*b*)(iii) of this Act the court would not have jurisdiction to entertain the application, the court may make an order—

(*a*) relating to the former matrimonial home or its furniture and plenishings; or

(*b*) that the other party to the marriage shall pay to the applicant a capital sum not exceeding the value of that other party's interest in the former matrimonial home and its furniture and plenishings,

but shall not be entitled to make any other order for financial provision.

Subsection (5)

Under the present law the court has only limited powers to make orders relating to the former matrimonial home or its furniture and plenishings. Apart from (*a*) orders varying marriage settlements in so far as they relate to the home or its furniture and plenishings, and (*b*) orders counteracting transactions with these items of property designed to defeat the applicant's claims (see the Divorce (Scotland) Act 1976, sections 5 and 6), the only power is to transfer a tenancy of the matrimonial home under the Matrimonial Homes (Family Protection) (Scotland) Act 1981, section 13. If the 1981 Bill is enacted, however, the court would have more extensive powers to make orders relating to the matrimonial home, and subsection (5)(*a*) would have much more substance (see paragraph 3.7). This would not, however, necessitate any amendment to the present Bill.

Nullity of marriage

If the 1981 Bill is enacted the following clause should be inserted immediately after clause 2 (see paragraph 3.28 and Recommendation 5).

Application of Act to annulled marriages.

3. The provisions of this Act shall apply to an annulment, of whatever nature, of a purported marriage in a country outside the British Islands as they apply to a divorce in such a country and references to marriage and divorce shall be construed accordingly.

The words "of whatever nature" in this provision would be designed to make clear that it covered retrospective and prospective annulments, declarations of nullity, declarators of nullity and any other decree having the same effect. In cases where both parties are living the grounds on which the Scottish courts have jurisdiction in actions for declarator of nullity of marriage are the same as in actions for divorce (see Domicile and Matrimonial Proceedings Act 1973, section 7). Thus no difficulty arises in applying clause 1(3)(*d*) to both types of action.

Interpretation.

3.—(1) In this Act, unless the context otherwise requires—

"the court" means the Court of Session;

"furniture and plenishings" has the same meaning as in section 22 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981;

"matrimonial home" has the same meaning as in the said section 22;

"order for financial provision" means any one or more of the orders specified in paragraphs (*a*) to (*c*) of section 5(1) of the Divorce (Scotland) Act 1976 (financial provision) or an order under section 13 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (transfer of tenancy of matrimonial home);

"tenant" has the same meaning as in the said section 22.

(2) Any reference in this Act to a party to a marriage shall include a reference to a party to a marriage which has been terminated.

Clause 3

Subsection (1)

"The court" is defined as the Court of Session purely as an interim measure. If the sheriff courts are given jurisdiction in divorce they should also be given jurisdiction to make orders for financial provision after a foreign divorce (see paragraph 3.30 and Recommendation 6). The "context otherwise requires" whenever the reference is to a foreign court.

"Order for financial provision" will have to be redefined if the 1981 Bill is enacted. The reference to "section 5(1) of the Divorce (Scotland) Act 1976" would become a reference to "section 8(1) of the Family Law (Financial Provision) (Scotland) Act". The present definition covers (*a*) an order for payment of a periodical allowance; (*b*) an order for payment of a capital sum; (*c*) an order varying the terms of a marriage settlement; and (*d*) an order for the transfer of a tenancy of the matrimonial home.

Consequential amendments.

4. The enactments mentioned in the Schedule to this Act shall have effect subject to the amendments respectively specified in that Schedule, being amendments consequential on the provisions of this Act.

Short title, commencement and extent

5.—(1) This Act may be cited as the Financial Provision After Foreign Divorce (Scotland) Act 1982.

(2) This Act shall come into operation on the expiry of a period of 3 months beginning with the date on which it is passed.

(3) Section 4 of, and the Schedule to, this Act in so far as they affect the operation of section 16 of the Maintenance Orders Act 1950 shall extend to England and Wales and to Northern Ireland as well as to Scotland, but save as aforesaid this Act shall extend to Scotland only.

EXPLANATORY NOTES

SCHEDULE Section 4

CONSEQUENTIAL AMENDMENTS

1. At the end of section 16(2)(*b*)(i) of the Maintenance Orders Act 1950 there shall be added the words "or section 2 of the Financial Provision After Foreign Divorce (Scotland) Act 1982".

2. At the end of section 33(2) of the Succession (Scotland) Act 1964 there shall be added the words "or section 2 of the Financial Provision After Foreign Divorce (Scotland) Act 1982".

3. At the end of section 8(1)(*c*) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 there shall be added the words "or section 2 of the Financial Provision After Foreign Divorce (Scotland) Act 1982".

4. In section 12(3)(*b*) of the Land Registration (Scotland) Act 1979 after "1976" there shall be inserted the words "or by an order made by virtue of section 2 of the Financial Provision After Foreign Divorce (Scotland) Act 1982".

EXPLANATORY NOTES

APPENDIX B

List of those who submitted written comments on the Consultation Paper

Professor Robert Black
Dr. J. Blaikie
Mrs. E. B. Crawford
Miss A. Griffiths
Law Society of Scotland
Dr. R. D. Leslie
Scottish Law Agents Society
Miss E. E. Sutherland

Printed in Scotland for Her Majesty's Stationery Office by
McCorquodale (Scotland) Ltd., Glasgow Dd 735594/4281 C15 10/82