Scottish Law Commission

(SCOT. LAW COM. No. 67)

FAMILY LAW

REPORT ON ALIMENT AND FINANCIAL PROVISION

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[1]Lord Hunter's term of office expires on 30 September 1981; his successor as Chairman of the Commission is the Hon. Lord Maxwell.

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SCOTTISH LAW COMMISSION

Item 14 of the Second Programme

FAMILY LAW

ALIMENT AND FINANCIAL PROVISION

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

We have the honour to submit our Report

(*Signed*) J. O. M. HUNTER, *Chairman*
A. E. ANTON
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E. M. CLIVE
JOHN MURRAY

R. EADIE, *Secretary*
17th July, 1981

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PART I GENERAL INTRODUCTION

1.1 In this Report we make recommendations for the reform of the law of Scotland on the obligation of support between family members and on financial provision and property readjustment on divorce and nullity of marriage. We have not previously reported on these topics. Corresponding areas of the law in England and Wales have been reviewed by the Law Commission in two reports and comprehensive reforms were enacted in 1970 and 1978.[1] There have been no equivalent reforms in Scotland. The changes in the law on aliment and financial provision in the Divorce (Scotland) Act 1976 were the minimum necessary to take account of the changes then made in the grounds for divorce.[2]

Consultation and research

1.2 In furtherance of our programme of work on family law reform[3] we published in March 1976 a consultative Memorandum on Aliment and Financial Provision.[4] We received a substantial number of comments in response to this Memorandum, not only from lawyers and legal organisations but also from members of the public particularly affected by the present law and from organisations representing them.[5] We had to postpone the preparation of a report because of the need to give priority to our work on occupancy rights in the matrimonial home and domestic violence.[6] The postponement has not been without advantages. We have been able to take into account the results of a survey on family property in Scotland carried out at our request by the Office of Population Censuses and Surveys in 1979[7] and the preliminary results of a study on the nature and scale of financial provision on divorce carried out early in 1981 by the Central Research Unit of the Scottish Office.[8] We have also been able to take into account the discussion paper on *The Financial Consequences of Divorce: the Basic Policy*[9] published by the Law Commission in October 1980 and to profit from the debate to which it gave rise.

1.3 In the light of the comments received on consultation and the research and other developments referred to above we decided to develop in greater detail some of the ideas which were referred to in outline in the

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[1]See Law Com. No. 25, *Family Law: Report on Financial Provision in Matrimonial Proceedings* (1969), implemented by the Matrimonial Proceedings and Property Act 1970 (now consolidated in the Matrimonial Causes Act 1973); and Law Com. No. 77, *Family Law: Report on Matrimonial Proceedings in Magistrates' Courts* (1976), implemented by the Domestic Proceedings and Magistrates' Courts Act 1978.

[2]See Parl. Debs., House of Commons, vol. 906, Col. 776.

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

[4]Memorandum No. 22 (1976)—referred to in this Report as "the Memorandum".

[5]A list of those who submitted written comments on the Memorandum is contained in Appendix B.

[6]Our Report on this subject was submitted in May 1980 (Scot. Law Com. No. 60). Its recommendations are being implemented, with certain modifications, by the Matrimonial Homes (Family Protection) (Scotland) Bill currently before Parliament.

[7]The report of this survey is due to be published this autumn. It is referred to in this Report as Manners and Rauta, *Family Property in Scotland.*

[8]It is hoped that the report of this research will be published later this year. The preliminary results are discussed in paras. 3.17 to 3.23 below.

[9]Law Com. No. 103 (1980), Cmnd. 8041.

Memorandum. We have discussed these ideas at various stages with a number of interested parties, including some of those who submitted comments on the Memorandum. We are grateful to all those who commented on the Memorandum and who assisted us in subsequent informal consultations.

Contents of Report in outline

1.4 Part II of this Report deals with the law of aliment. This branch of the law depends mainly on principles which were developed centuries ago for a society very different to that in which we now live. The present law recognises legally enforceable obligations of support not only between husbands and wives and parents and dependent children but also between great-grandparents and great-grandchildren, grandparents and grandchildren, and parents and adult children. It discriminates against fathers in that it imposes the primary obligation to aliment legitimate children on them, no matter how wealthy the mother may be. It contains distinctions, such as that between actions for interim aliment and actions for permanent aliment, which developed for historical reasons (such as the different powers of different courts) and which no longer serve any useful purpose. It has been complicated by piecemeal statutory additions. Our recommendations are designed to modernise, simplify and improve this branch of the law. We recommend a restricted list of alimentary relationships and one set of rules for all actions of aliment. Our proposals, if implemented, would have the effect of removing discrimination against fathers, of removing differences in this area between legitimate and illegitimate children, and of bringing the private law on aliment more into line with the law on liable relatives for the purposes of supplementary benefit.

1.5 Part III of the Report deals with the law on financial provision and redistribution of property on divorce. The present law has two major defects. The first is that it states no ascertainable objectives. The court, at present, is merely directed to make "such order, if any, as it thinks fit, having regard to the respective means of the parties to the marriage and to all the circumstances of the case, including any settlement or other arrangements made for financial provision for any child of the marriage".[10] There is no indication of what the court should be trying to do. There is no set of governing principles. There is no indication of what "circumstances" are relevant and important. Is it, for example, important to distinguish between property acquired by the parties by their joint efforts during their marriage and property owned by one of them before the marriage? There is nothing in the present law to say that it is not, and nothing to say that it is. Is it important to ask who was responsible for the breakdown of the marriage? The Act provides no guidance. Is it important to ask whether one party has made contributions, perhaps over many years of marriage, for the economic benefit of the other party? The Act does not say. Does it matter that one party has young children to bring up? The Act mentions settlements and other financial arrangements for children: it says nothing about the economic burdens of child-care. It seems unlikely that any systematic body of case law will develop

[10]Divorce (Scotland) Act 1976, s.5(2).

to fill these gaps.[11] In any event, it is arguable that Parliament rather than the judges should regulate matters of this nature which raise important questions of social policy. Our recommendations, and the relevant clauses of the draft Bill annexed to this Report,[12] are designed to put forward for consideration by Parliament a system of financial provision on divorce which is firmly based on fair and clearly stated principles but which leaves adequate scope for the exercise of judicial discretion to cater for the different circumstances of different cases. We think that a reform of this nature is necessary whether or not jurisdiction in divorce is conferred on the sheriff courts.[13]

1.6 The second major defect in the present law is that it gives the court an inadequate range of powers. Under the present law the court can order the payment of a capital sum or a periodical allowance or both and can vary the terms of marriage settlements.[14] It has no power to order the transfer of property or to regulate the use and occupation of property. For years the courts in England and Wales have been able to make orders to ensure that the family home is preserved after divorce as a home for the dependent children of the marriage, while recognising in appropriate cases the claims of both spouses to a share in its capital value. The Scottish courts have been unable to do this.[15] Our proposals would help to remedy this situation. They would give the court power to order the transfer of property, to regulate the occupation of the matrimonial home after divorce, and to make various incidental orders. In one respect, however, our recommendations would tend to restrict the court's powers. We received much criticism of long-term awards of periodical allowance after divorce. We recommend below that such awards should be limited to cases where there are young children or where the award is necessary to relieve grave financial hardship (for example, to an older wife). This would not prevent the court from awarding capital sums payable by instalments, the total amount of which would be fixed in advance at the time of the divorce, or short-term periodical allowances for not more than three years from the date of the divorce.

1.7 Under the present law in Scotland, in contrast with England and Wales, the court has no power to award financial provision on granting a declarator of nullity of marriage. The parties to a void or voidable marriage may, nonetheless, have lived together and bought a house and taken on the responsibility of children just as in the case of a valid marriage. We therefore

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[11]Many Outer House decisions have been reported but they are concerned mainly with *quantum* and, in any event, are not binding on any judge. The Inner House has rarely been called upon to pronounce on the law on financial provision and when it has been it has understandably declined to fetter the statutory discretion conferred on the judge of first instance. See *McRae* v. *McRae* 1979 S.L.T. (Notes) 45; *Lambert* v. *Lambert,* 17 June 1981 (unreported).

[12]Appendix A.

[13]The *Report of the Royal Commission on Legal Services in Scotland* (1980) Cmnd. 7846 recommended (at paras. 10.17 to 18) that in divorce actions the sheriff courts should have exclusive jurisdiction at first instance.

[14]Divorce (Scotland) Act 1976, s.5(1).

[15]The Matrimonial Homes (Family Protection) (Scotland) Bill currently before Parliament does not deal with the transfer of owner-occupied property, although an opportunity was taken in the Bill to give the courts power to transfer tenancies on divorce. The occupancy rights conferred by the Bill cease on divorce.

recommend below that the court should have the same power to award financial provision in nullity actions as in the case of divorce.

Related matters not dealt with in the Report

1.8 It could be said that those who have cohabited as husband and wife without ever going through a marriage ceremony, even a void one, should have the right, on the breakdown of their relationship, to apply to the court for an adjustment of their economic affairs. We did not deal with this problem in the Memorandum. It raises issues on which we would wish to have the benefit of full consultation before making recommendations. We therefore do not deal with it in this Report.

1.9 We do not deal in this Report with matrimonial property rights during marriage but we intend to consult on that subject in due course. The reforms which we recommend in this Report do, however, go some way to meet the desire, which the research on family property in Scotland shows to be widely felt, for some recognition of the idea of partnership in marriage.

1.10 We considered whether we should deal in this Report with the alimentary relationship between the donor and the child in a case of artificial insemination. We decided, however, that artificial insemination raised a number of legal problems which should be considered together and on which there should be consultation with a number of people and organisations who were not consulted in the course of the present project. We have therefore made no recommendations on this matter.

1.11 We intend to consult on the collection and enforcement of aliment and periodical allowance after divorce in the course of our work on diligence. We do not therefore deal with these topics in this Report. Nor do we deal with financial provision after a foreign divorce. We are currently engaged in separate consultations on that topic.

"Forum-shopping"

1.12 We do not think that the implementation of our proposals would lead to a significant increase in the number of people moving between Scotland and other parts of the United Kingdom in order to take advantage of whichever law they considered would be more advantageous to them. In a large proportion of divorce cases, there is no claim for financial provision at all.[16] In a proportion of the remainder, the results to be expected would be much the same under our proposals as under the laws applying in other parts of the United Kingdom. In many cases there would be practical constraints on the parties' mobility. Taking all these factors together we are not convinced that "forum-shopping" between Scotland and other parts of the United Kingdom would be much more of a problem if our proposals were implemented than it is under the present law.[17] At the worst the courts of the country where a

[16]See paras. 3.17 to 3.23 below for Scottish statistics on this point.

[17]There are provisions in the Domicile and Matrimonial Proceedings Act 1973, ss.5(6) and 11, which are designed to deal with the situation which arises where divorce proceedings are raised in both Scotland and England. Their effect in a case where a spouse had deliberately moved from one jurisdiction to the other to seek a divorce would generally be to give priority to the proceedings brought by the spouse who had remained in the jurisdiction where the parties last resided together.

party was domiciled or where he or she had been habitually resident for at least a year would exercise jurisidiction and apply their own law to the question of financial provision.

Effect on public expenditure

1.13 There are two questions to be considered here. First, would our proposals result in more people having to rely on supplementary benefit?[18] Secondly, would our proposals increase the cost of legal proceedings and hence the amount of civil legal aid? The questions are important only in relation to financial provision on divorce. We do not expect our recommendations on aliment or nullity of marriage to have any significant effect on public expenditure.

1.14 Although it is impossible to give an accurate estimate of the effect of our proposals on supplementary benefit[19] we do not think that it would be substantial. We know that a periodical allowance is claimed in only about 33% of all divorce actions and in only about 16% of divorce actions in which there are no children under the age of 16.[20] We have reason to suspect that in a sizeable proportion of the cases where it is claimed and awarded it is not paid.[21] Although our proposals reject the idea of an obligation of lifelong support after divorce they are by no means draconian. They provide for all cases where, in our view, financial provision on divorce is justified. They provide for a fair division of property on divorce. They provide for the spouse who has made contributions for the economic benefit of the other spouse or who has sustained economic disadvantages in the interests of the other spouse or of the family. They provide for the spouse who has the care of dependent children. They provide for the spouse who would suffer grave financial hardship as a result of the divorce. Even in a case not coming within these categories our proposals provide for financial provision to ease any necessary adjustment to independence over a period of up to three years after the divorce. Those cases where, in theory at least, a divorced spouse would qualify for a long-term financial provision under the present law but not under our proposals would generally be the cases where there would be most reason to expect the divorced spouse to be self-supporting.

1.15 We do not think that our proposals would lead to a significant increase in public expenditure on litigation. The factors which would be relevant to an assessment of financial provision under our proposals are almost all relevant or potentially relevant under the present law[22] while lengthy investigations into past misconduct should be less prevalent under our scheme.[23] Cases

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[18]Our proposals would not affect in any way the rights of the State to recover from liable relatives under the Supplementary Benefits Act 1976. A divorced spouse is not a liable relative for this purpose.

[19]It cannot be known how the courts would exercise their discretion under the existing law, if it were unchanged, or their more limited discretion under our proposals, if they were implemented. There is insufficient information about the amount of financial provision paid under the existing law and the extent to which it operates to save expenditure on supplementary benefit.

[20]See para. 3.18 below.

[21]See para. 3.21 below.

[22]The present law requires the court to have regard to "all the circumstances of the case": Divorce (Scotland) Act 1976, s.5(2).

[23]See Appendix A, clause 11(7).

where our proposals for the division of property might be thought to involve increased difficulties (for example, in distinguishing between property bought before the marriage and property bought after the marriage) would usually be cases where there was a substantial amount at stake and where the parties would be bearing their own expenses.[24] In the normal case, where the main asset is the house, there would be no difficulty in deciding when it was acquired and no more difficulty in applying the provisions we recommend than in applying the present law. In the long run, the provision of a set of statutory principles should make it easier for parties to avoid expensive litigation by settling their disputes out of court.

[24]Cases involving substantial capital would, in any event, be few. There is a claim for a capital sum in less than 10% of divorce actions and in most of these the amount claimed is modest. See para. 3.20 below.

PART II ALIMENT

THE OBLIGATION OF ALIMENT

2.1 The law of aliment is that branch of family law which lays down that certain persons are legally entitled to claim support from others on account of their connection with them by kinship or marriage.[1] In Scots law reciprocal rights and obligations exist at present not only between parents and children, but also between grandparents and grandchildren and remoter ascendants and descendants; there are no such rights and obligations, however, between brothers and sisters. The obligation arising from marriage is for practical purposes restricted to husband and wife, and does not extend to a spouse's relations.

Need for obligation

2.2 In the Memorandum we discussed at the outset[2] whether a private law of aliment was still needed in a society where, for the most part, indigent persons looked to the State for support rather than to their relatives. The State's rights of recovery from relatives are limited in law[3] and in practice are often worthless. However, the civil judicial statistics offer clear evidence that many actions for aliment are still brought each year in the sheriff courts,[4] and in addition aliment for children and interim aliment for wives is awarded each year in several thousand divorce actions in the Court of Session. There is no information available on how many decrees are actually complied with, but there is obviously a demand for decrees for aliment. There is no way of knowing how many people who at present pay aliment reluctantly but voluntarily would cease to pay if the legal obligation no longer existed. The cost to the taxpayer of abolishing the obligation of aliment might be substantial.[5] The Finer Committee, while it was critical of many aspects of the private law of aliment, did not recommend its complete abolition.[6]

2.3 On consultation virtually all those who commented supported, either expressly or by implication, the continuation of the private law of aliment.

Basis of obligation

2.4 It would be unwise to seek to base the legal obligation of aliment on any single principle. Much will depend on current attitudes to the rights conferred by particular family relationships and to the extent to which these rights

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[1] *Encyclopaedia of the Laws of Scotland,* "Aliment", vol. I, p. 287.

[2] Paras. 2.6 to 2.9.

[3] From a husband or wife, or from the parents of a child under 16 (Supplementary Benefits Act 1976, s.17). Only parents can be obliged to contribute towards the cost of keeping a child in care (Social Work (Scotland) Act 1968, s.78(1)).

[4] In 1979 1,859 ordinary actions which included conclusions for aliment were initiated in the sheriff courts: see Civil Judicial Statistics 1979, Cmnd. 8111, Table 3.4. However, these figures do not by any means reveal the true position, because they do not include claims for aliment made by summary cause procedure. See paras. 2.124 to 2.126 below.

[5] The Supplementary Benefits Commission observed to us that the purpose of State aid through the supplementary benefits scheme is to provide a safety net so that a person's resources do not fall below a minimum level, and that such provision should not affect in any way the obligations on a man to support his wife and children.

[6] *Report of the Committee on One-Parent Families,* Cmnd. 5629, 1974: referred to subsequently as the Finer Report or the Finer Committee as appropriate.

should be legally enforceable. In the Memorandum we did, however, try to establish a general line of approach to the basis of liability.[7] We suggested that there should be a general presumption against the imposition of a potentially onerous financial obligation on particular individuals and that the general approach should be to seek some justification for doing so other than the mere existence of a blood link—for instance, that a person had himself assumed liability to the alimentary creditor (by marriage, for example, or by bringing a child into the world, or by adopting a child) or might be equitably bound to aliment someone (such as a parent) who had earlier supported him. There was no dissent on consultation from any of these views except that based on equitable reciprocity, which some commentators found unconvincing. We return to this point later.[8]

Parties to obligation

Husband and wife

2.5 Under the present law a husband is bound to aliment his wife, and *vice versa*. The husband's liability depends on the common law; the wife's liability was never clearly recognised by the common law but is now imposed by statute.[9]

2.6 Doubts have arisen, however, whether a wife's liability is identical to that of her husband. The statutory provision speaks of the husband "being unable to maintain himself", which may mean that the wife's obligation does not arise if the husband can maintain himself at subsistence level. If so, there is a difference between their respective obligations, because a husband may be bound to pay suitable aliment to his wife even though she has the means of bare subsistence. We suggested in the Memorandum[10] that there should be fully reciprocal obligations of aliment between husband and wife. This view was generally endorsed by those consulted and we so recommend.[11] The actual content of the obligation will, of course, depend on the parties' means and circumstances. In practice, if one spouse is earning and the other is not, the obligation of aliment will generally fall on the former.

2.7 Under the present law a wife who is a party to a polygamous marriage can raise an action for aliment against her husband and *vice versa*.[12] Aliment may in either case be awarded by the court. In the absence of a court decree, however, there may be a doubt about the right of such a spouse to aliment. We suggested in the Memorandum[13] that this doubt should be removed and that the polygamous spouse should be regarded as having a right to aliment. This suggestion was supported unanimously on consultation. As the point may not be adequately covered by the Interpretation Act 1978[14] we think that

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[7]Paras. 2.10 and 2.11.

[8]See paras. 2.8 to 2.11.

[9]Married Women's Property (Scotland) Act 1920, s.4.

[10]Proposition 2 and para. 2.13.

[11]See Appendix A, clause 1(1)(*a*) and (*b*).

[12]Matrimonial Proceedings (Polygamous Marriages) Act 1972, s.2.

[13]Proposition 3 and para. 2.14.

[14]S.6: "In any Act, unless the contrary intention appears, . . . (*c*) words in the singular include the plural . . .". The danger is that a contrary intention might be inferred from the generally monogamous nature of marriage in this country. Cf. *Nabi* v. *Heaton*, The Times, 4 March 1981 ("wife" in income tax legislation means only one wife).

it should be provided for expressly in any legislation implementing our recommendations.[15] An obligation of aliment would arise, of course, only if the polygamous marriage was regarded as valid by Scots law.

Parent and legitimate child

2.8 Scots law recognises a reciprocal obligation of aliment between parent and legitimate child.[16] We had no difficulty in concluding that the obligation of parents to aliment their children should continue, subject to what is said later about age limits. We have had more difficulty with the question whether there should continue to be a legal obligation on children to aliment their parents. In the Memorandum we put forward as a starting point for discussion the proposition that there should continue to be a reciprocal obligation.[17] Consultation revealed a difference of opinion on this issue. The majority of those commenting on it agreed with the proposition but a minority disagreed.

2.9 The principal arguments for retaining a reciprocal legal obligation are as follows:

(*a*) The legal obligation expresses a widely felt moral obligation. Most people think it right that adult children should support their indigent parents, and would expect them to do so. It is desirable that moral obligations of this kind should also be enforceable legal obligations.

(*b*) There is a possibility that some children support their indigent parents for no other reason than that they know they are legally obliged to do so, and generally obey the law. A change in the law might therefore lead to a greater unwillingness on the part of children to support their elderly parents.

(*c*) It is equitable that a parent who has supported a child should in turn be entitled to support.

(*d*) The legal obligation can operate to relieve the public purse.

2.10 Arguments to the contrary are as follows:

(*a*) Even if there is a widely felt moral obligation this is not a sufficient reason for imposing or retaining a legal obligation. The moral obligation on a child to support a parent is much weaker than on a parent to support a child.

(*b*) It cannot be assumed that people in Scotland generally realise that there is a legal obligation to support their parents. Nor can it be assumed that, if such knowledge exists, it has any significant effect on conduct or attitudes.

(*c*) Parents have some choice as to whether or not they bring a child into the world. If they choose to do so they can be said to have voluntarily assumed the obligation to support the child at least during the period of dependency. Children have no choice about being brought into the world. They cannot be said to have voluntarily assumed the obligation to support their parents.

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[15]See Appendix A, clause 1(4).

[16]See e.g. *Thom* v. *Mackenzie* (1864) 3 M.177; *Fife County Council* v. *Rodger* 1937 S.L.T. 638; *Dickinson* v. *Dickinson* 1952 S.C. 27.

[17]Proposition 4 and para. 2.16.

(*d*) The question of relief of the public purse falls to be decided in the context of the supplementary benefits scheme on a United Kingdom basis. It is unfair to impose an obligation on the children of Scottish parents in order to relieve the public purse if that obligation is not also imposed on the children of parents in other parts of the United Kingdom.

(*e*) The present law no longer squares with social reality. Parents do not expect to be able to recover aliment from their children. They do not regard themselves as dependants of their children. They look elsewhere for their support. At one time actions for aliment by parents against their legitimate children were fairly common:[18] they are now rare.[19]

(*f*) The burden of supporting parents falls much more heavily on some children than on others. In some cases it may never materialise and in others it may prove to be extremely onerous over a long period.

(*g*) Abolition of the obligation would bring private law into line with public law. For the purposes of the Supplementary Benefits Act 1976 a person is not bound to support his parents.[20]

(*h*) Abolition of the obligation would bring Scots law into line with the laws in the other parts of the United Kingdom, which is desirable in this area given the interrelation of public and private law and given that the question is one of broad social policy rather than legal principle or technique.

(*i*) Abolition of the obligation would make for greater simplicity in the law. If the obligation is retained questions arise as to the hierarchy of alimentary rights and obligations if aliment is claimed from a man by, say, his parents and his children, or if a man has a claim for aliment against both children and parents. Questions also arise as to the nature and extent of the obligation of each child if there are several children who are potentially liable, and as to rights of relief by a child who has provided aliment against other children who have not. The complexity of any legal solution to these problems would be out of all proportion to their practical importance at the present day.

2.11 This question has caused us considerable difficulty. We are not greatly influenced by the arguments on consistency between the laws of different parts of the United Kingdom and between public law and private law. Such inconsistencies have existed for a long time and have not given rise to great harm. Consistency and coherence are virtues in the law although they must sometimes give way to other considerations. We would not wish, and it is clear that those consulted would not wish, to diminish in any way the force of the moral obligation to support parents. On the other hand we hesitate to perpetuate a situation in which a parent has a legal right to take his child to

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[18]In *Palmer* v. *Palmer* (1885) 2 Sh. Ct. Rep. 55, Sheriff Lees said (p. 56) that: "Hundreds of actions of this kind are disposed of . . . in the Small Debt forum . . .".

[19]The most recent reported example appears to be *Jack* v. *Jack* (1953) 69 Sh. Ct. Rep. 34. Alimentary actions between parents and children are not shown separately in the Civil Judicial Statistics.

[20]1976 Act, s.17.

court to recover aliment from him. This right exists in theory at present, but in practice it is hardly ever exercised. If it were frequently exercised we believe that there would be demands for a change in the law and that such demands would have considerable force. We do not think that at the present time parents can reasonably expect to have a legal right to compel their children to support them. If a man becomes unemployed at the age of 48 we doubt whether he should have a legal right to be supported by his son of 25. The son has his own life to lead and, in many cases, will have his own family to support. No doubt if he could afford to he would often be prepared to assist his father, but we think that this should be a matter of moral obligation rather than legal compulsion. The father's right to be supported by his son could continue to be enforced for twenty or thirty years or even more. If this right did not exist already in the law we question whether anyone would seriously suggest its introduction. We have concluded that it should not continue to exist. We therefore recommend that parents should have no legal right to compel their children to support them.[21]

Parent and adopted child

2.12 An adopted child is treated in law as if he were the legitimate child of the adopter and as if he were not the child of any other person.[22] The alimentary obligation is therefore the same as in the case of a legitimate child. None of our consultees suggested any change in this position and we recommend none.[23]

Parent and illegitimate child

2.13 Under the present law both parents are bound to support an illegitimate child, but the child is not reciprocally bound to support either parent.[24] In the Memorandum we suggested that the alimentary obligation between parent and illegitimate child should be the same as that between parent and legitimate child.[25] All except one of those consulted agreed with this suggestion.

2.14 We have recommended above[26] that parents should be bound to support their legitimate children but that the obligation should not be reciprocal. We recommend the same solution in the case of illegitimate children.[27] This represents no change in the existing law.

2.15 Under the present law the father of an illegitimate child is not liable to aliment the child's mother. He is, however, liable for her "inlying

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[21]See Appendix A, clause 1(1)(*c*).

[22]Children Act 1975, s.8 and Sch. 2; Adoption (Scotland) Act 1978, s.39 (*prosp.*). In the Memorandum we suggested that this should continue to be the case: Proposition 5 and para. 2.17.

[23]As the matter is already covered by statute there is no specific reference to adopted children in the draft Bill annexed to this Report.

[24]*Clarke* v. *Carfin Coal Co.* (1891) 18 R. (H.L.) 63.

[25]Proposition 6 and para. 2.18.

[26]Paras. 2.8 and 2.11.

[27]See Appendix A, clause 1(1)(*c*) and (4).

expenses".[28] In the Memorandum we raised the question whether the liability for inlying expenses should extend to liability for the support of the mother for a period of, say, six weeks before and eight weeks after the birth of the child with the possibility of an extension of this period for a limited time if the mother could not work as a result of the pregnancy, the birth, or the need to care for the child.[29] There was some support for this suggestion on consultation although the support was sometimes qualified. On reconsideration we have concluded that the link between the father and the mother of an illegitimate child is, as such, too tenuous to justify the imposition of an obligation of support such as exists between husband and wife. Moreover, as we noted in the Memorandum, the difficulties of proof in an action of affiliation and aliment are such that the results of imposing such an obligation might be somewhat arbitrary. We do not therefore recommend that the father of an illegitimate child should be liable to aliment the mother.

2.16 The expenses of the mother associated with the birth of the child (such as baby clothing and equipment) can best be regarded as related to the needs of the child and as factors to be taken into account in assessing aliment for the child.[30] We recommend later[31] that the court should have power, in an action for aliment, to award sums to cover special alimentary needs, including inlying expenses. This power would replace the court's existing power to order payment of inlying expenses by the father to the mother of an illegitimate child.

2.17 In the Memorandum we discussed briefly whether a man should be liable to aliment an illegitimate child merely because he *might have been* the father.[32] Liability under the present law depends on proof or admission of paternity, and in the absence of such proof or admission a man is not liable. We raised the question because some legal systems[33] recognise that possible paternity justifies the imposition of an alimentary obligation. The experience in Norway, which formerly had but has now abolished such a rule, was that where a mother recovered aliment from several potential fathers the child might be placed under a psychological strain as a result, and that the rule served as a constant reminder of the mother's promiscuity.[34] No support for any change in the present law was forthcoming on consultation, and we recommend none.

Children accepted into the family

2.18 At present, the court hearing an action of divorce, nullity of marriage,

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[28]Illegitimate Children (Scotland) Act 1930, s.1(2). The term "inlying expenses" is not defined. In *Freer* v. *Taggart* 1975 S.L.T. (Sh. Ct.) 13 at p. 16 it was regarded as covering the mother's expenses on "an outfit of garments, toilet articles, a cot, bedding and a pram for the child". It should be noted that the fact that the mother of an illegitimate child is entitled to maternity benefit cannot be taken into account by a court in awarding inlying expenses: Social Security Act 1975, s.23(2).

[29]Proposition 7 and para. 2.24.

[30]The court may award aliment at different rates for different periods to reflect variations in the parties' circumstances: see *Freer* v. *Taggart* above.

[31]Para. 2.86.

[32]Proposition 12 and para. 2.51.

[33]See e.g. French *Code Civil* Arts. 340 and 342.

[34]Arnholm, "The New Norwegian Legislation relating to Parents and Children" (1956) 3 Scand. Studies in Law, 11.

or separation has powers to make orders providing for the maintenance of a child who "is the child of one party to the marriage (including an illegitimate child) and has been accepted as one of the family by the other party".[35] In considering what order, if any, to make against an "accepting" parent the court is directed to:

> "have regard to the extent, if any, to which that party had, on or after the acceptance of the child as one of the family, assumed responsibility for the child's maintenance and to the liability of any person other than a party to the marriage to maintain the child".[36]

2.19 There have been no reported Scottish cases on the meaning of "accepted as one of the family by the other party".[37] In England it has been held that a child *in utero* can be accepted into the family[38] and that the mere fact that a man marries a woman with children is not of itself acceptance into the family.[39] A family normally comes into existence on marriage[40] but once the spouses have separated there may no longer be a family into which the children can be accepted.[41] It has also, and more questionably, been held in England that acceptance requires an element of mutuality[42] and full knowledge of all the relevant facts, so that a man was held not to have accepted a child whom he thought to be his but who was in fact illegitimate.[43] It is not clear how far the Scottish courts would follow these views, which could well be regarded as adding requirements (mutuality and full knowledge) which are not in the statute.

2.20 The Matrimonial Proceedings (Children) Act 1958 applied to Scotland and England in very similar terms. However, following on recommendations of the Law Commission,[44] English law no longer involves the question of "acceptance" in matrimonial causes. The English courts are now empowered to make orders for the maintenance of

(*a*) a child of both parties to the marriage; and

(*b*) "any other child, not being a child who has been boarded-out with those parties by a local authority or voluntary organisation, who has been *treated* by both of those parties as a child of their family".[45]

In deciding whether to exercise its powers against a party to a marriage in favour of a child who is not his child and, if so, in what manner, the English courts must have regard (among the circumstances of the case):

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[35]Matrimonial Proceedings (Children) Act 1958, s.7(1). There is a similar power in actions of adherence.

[36]s.7(2).

[37]*Lothian* v. *Lothian* 1965 S.L.T. 368 was decided on the legal effect of a joint minute between the parties.

[38]*Caller* v. *Caller* [1968] P. 39.

[39]*Bowlas* v. *Bowlas* [1965] P. 450.

[40]*Ibid.*

[41]*B.* v. *B. and F.* [1969] P. 37.

[42]*Holmes* v. *Holmes* [1966] 1 W.L.R. 187; *Dixon* v. *Dixon* [1968] 1 W.L.R. 167; *Snow* v. *Snow* [1972] Fam. 74.

[43]*R.* v. *R.* [1968] P. 414. But cf. *Kirkwood* v. *Kirkwood* [1970] 1 W.L.R. 1042 (husband's belief that wife's children were her legitimate children by another man, whereas they were illegitimate, did not prevent acceptance).

[44]Law Com. No. 25, *Family Law: Report on Financial Provision in Matrimonial Proceedings* (1969), esp. paras. 23 to 32.

[45]Matrimonial Causes Act 1973, s.52(1) (emphasis added).

"(*a*) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;

(*b*) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;

(*c*) to the liability of any other person to maintain the child."[46]

2.21 In our Report on damages for injuries causing death,[47] where we were concerned with those children who should have a dependant's claim on the death of an adult, we criticised the test of "treatment", because it would not necessarily restrict the claimants to those children whose membership of the family was permanent and who had been regarded by the deceased himself as members of his family. Accordingly, we recommended that a child who was unrelated to the deceased or to his spouse but who had been accepted by him as a child of his family should have a dependant's claim.[48] Our recommendations were implemented by the Damages (Scotland) Act 1976.[49] We consider that a similar test should be adopted here. We also think it desirable to make clear that the term "family" includes a one-parent family.

2.22 Several criticisms have been levelled against section 7 of the 1958 Act, the most important being that it is remedy-based. The court's powers arise only in four types of consistorial action.[50] This gives rise to anomalies. Suppose, for example, that a woman obtains a divorce, an award of aliment for her son by that marriage, and an award of aliment for her son by a former marriage who was accepted by her husband into the family. Both boys attain the age of sixteen and both continue their education. The first can seek to ensure that his aliment continues by raising an independent action for aliment. The second cannot: his claim is linked to the divorce action and the court's powers in such an action terminate when the child attains the age of sixteen. This particular defect could be cured by altering the age limits, but others are not so easily cured. Suppose the mother dies before she can raise her divorce action: under the present law, a stepson has no claim for aliment against his stepfather. Or suppose that the mother leaves both boys with a relative and vanishes without making any claim for aliment against her husband. One child has a claim for aliment against him, the other has not.

2.23 In the Memorandum we discussed several possible options. These are to retain the present law; to adopt the English solution;[51] to return to the pre-1958 law, under which a child accepted into the family had no right to aliment from the "accepting" parent; or to introduce a right to aliment. Little support was forthcoming on consultation for any of the first three options, and we have no doubt that, within the framework of Scots law, the last of them is the most attractive. It concentrates on the child's relationship with the

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[46] *Ibid.*, s.25(3).

[47] Scot Law Com. No. 31, 1973, para. 80.

[48] Both for loss of support and loss of society: paras. 81 and 112.

[49] Ss. 1 and 10; Sch. 1 para. 1(*c*). This right is not reciprocal: it is not available to the "accepting" parent.

[50] Actions for divorce, nullity, separation or adherence.

[51] Matrimonial Causes Act 1973, s.52(1).

adult, and not on the accidental features of the relationship between two adults and on the proceedings which they can bring against each other.

2.24 In discussing this option in the Memorandum, we suggested that some restrictions should be placed on the child's right. We were concerned that there would be cases where it would be unreasonable to expect a person to aliment an accepted child, especially where there were others, especially close relatives, who might be expected to assume the financial burden. We suggested some direct reference to whether it was reasonable in the circumstances to impose such an obligation, and that there should be a minimum period of five years during which the claimant had been supported as a member of the family.[52]

2.25 These qualifications were criticised on consultation, and we have therefore reconsidered them. It was said, and we are disposed to agree, that there is no point in referring to a test of reasonableness. In deciding how much aliment, *if any,* to award the court would be able to take account of the whole circumstances of the case. It may be assumed that it would not impose an obligation where it was unreasonable to do so.[53]

2.26 The five-year qualifying period also came in for criticism. Some commentators said that it was too long, others said the period should not be specified. Should it apply both to acceptance and to actual support? It was said that a child might have received support for a substantial period without the test of acceptance being satisfied; alternatively, if the five-year condition were satisfied, the court might be reluctant to hold that the child had not been accepted as a member of the family. On the whole we are impressed with the doubts expressed to us, and we are not convinced that it would serve any useful purpose to incorporate such qualifications in legislation.

2.27 It was also suggested to us that the guidelines specified in the English legislation should be referred to in any forthcoming Scottish legislation. We think, however, that the factors to which the court is directed to have regard in deciding how much aliment, if any, to award[54] in any action for aliment are sufficient and that separate provision for accepted children is unnecessary.

2.28 We referred in the Memorandum to a possible exception to the general principle where a child has been boarded out with foster parents by a local authority. In such a case the child is technically in the care of the local authority and the arrangement with the foster parents is to some extent a temporary and commercial one. It would be inappropriate and undesirable to allow the foster relationship to give rise to an obligation of aliment, as this might make it more difficult to find foster parents. Similar considerations apply to children boarded out by public authorities and voluntary organisations.[55] In cases where a parent makes a direct placement with a

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[52]Proposition 13 and para. 2.66.

[53]See para. 2.48 below.

[54]See paras. 2.96 to 2.110 below.

[55]Cf. Matrimonial Causes Act 1973, s.52(1), where there is a similar exception (confined to local authorities and voluntary organisations). In the draft Bill annexed to this Report "voluntary organisation" is defined as "a body, other than a public or local authority, the activities of which are not carried on for profit" (clause 24).

foster parent, however, the circumstances are so variable that it would be impossible to define by statute those cases in which an accepting relationship should not arise. In such cases it should be left to the court to determine whether the child has been accepted as a child of the family and if so what aliment, if any, should be awarded.

2.29 For reasons similar to those already advanced,[56] we do not consider that the obligation between parent and accepted child should be reciprocal.

2.30 We therefore recommend that a person who has accepted a child (other than a child who has been boarded out with him by a public or local authority or by a voluntary organisation) as a child of his family should have the like obligation of aliment towards the child as if the child were his legitimate child.[57]

Adult children

2.31 Under the present law there is no age limit on the entitlement of a legitimate child to aliment from his parents. If he is in need and his parents have means a "child" aged 40 could obtain aliment from his father aged 63.[58] Such claims, however, are rarely if ever encountered in practice. In the case of an illegitimate child aliment is usually awarded until the child attains the age of 16[59] but an award can be continued thereafter until the child attains the age of 21 if he is undergoing a course of education or training.[60] The obligation to an illegitimate child may subsist even longer if, for example, the child is disabled, because at common law the parents are liable so long as the child is incapable of self-support.[61] Again, however, claims by adult children appear to be rare in practice. In the case of an illegitimate child, but not a legitimate child, it seems that the parent's obligation ceases if the child becomes self-supporting and does not re-emerge if the child later becomes indigent.[62] Those are the private law rules. For the purposes of supplementary benefit a parent is not liable to maintain a child above the age of 16.[63]

2.32 The question whether there should be an upper age limit on the child's right to be supported by his parents depends partly on whether the obligation is reciprocal. If the child is bound to support his parents throughout their lives it might seem unfair if they are not bound to support him throughout his life.[64] If, on the other hand, the child is not legally bound to support his parents there is no compelling reason for imposing a lifelong obligation on them. It becomes possible to argue that the parents' obligation is only to

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[56]Paras. 2.8 to 2.11.

[57]See Appendix A, clause 1(1)(*d*).

[58]Cf. *Beaton* v. *Beaton's Trs.* 1935 S.C. 187.

[59]Illegitimate Children (Scotland) Act 1930, s.1.

[60]Affiliation Orders Act 1952, s.3.

[61]*Marjoribanks* v. *Amos* (1831) 10 S. 79; *Pott* v. *Pott* (1833) 12 S. 183; *Oncken's J.F.* v. *Reimers* (1892) 19 R. 519; *A.B.* v. *C.D.'s Exr.* (1900) 2 F. 610.

[62]*Clarke* v. *Carfin Coal Co* (1891) 18 R. (H.L.) 63 per Lord Watson at p. 69; *Anderson* v. *Fraser* (1909) 26 Sh. Ct. Rep. 130; *Archibald* v. *Wilkin* (1911) 27 Sh. Ct. Rep. 313.

[63]Supplementary Benefits Act 1976, s.17.

[64]Those who favoured a reciprocal obligation in their comments on the Memorandum also favoured no age limit on the child's right.

support the child during his period of dependency and that once he attains an age at which he can be regarded as an independent adult the responsibility for his support, should he become ill or unemployed or indigent for some other reason, falls on the State.

2.33 We have recommended above that the alimentary obligation between parent and child should not be reciprocal. In these circumstances we think that the imposition of an obligation on a parent to aliment his child throughout the child's life is unjustified. Such a rule, like the rule giving the parent a lifelong right to support from the child, was appropriate in former times when the family was the sole source of support. It is inappropriate today when responsibility for the adult unemployed, ill and disabled is shared by society as a whole and is not imposed exclusively on a few individual family members. The question, as we see it, is to decide when a child can reasonably be regarded as ceasing to be a dependant of the parent. We think that this should normally be the age of majority (i.e. 18), but that the age of legal dependency could be regarded as continuing beyond that age up to a maximum age of 25 if the child is reasonably and appropriately engaged in a course of education or training. This would leave the way open, as it is under the present law, for students to sue their parents for aliment if the latter failed to pay the contribution expected of them under the students' grants scheme, but would cut off the right of unemployed adults to sue their parents for aliment—a right which, so far as we are aware, is nowadays never exercised in practice. The difference between the two cases is that State aid for students is calculated on the assumption that there will be a parental contribution whereas State aid for the unemployed is not. We therefore recommend that a parent (including an "accepting" parent) should be liable to aliment his child until the child attains the age of 18 years or, if the child is reasonably and appropriately undergoing instruction at an educational establishment or training for a trade, employment, profession or vocation, until the child attains the age of 25.[65]

Grandparents and grandchildren

2.34 Under the present law there is a reciprocal obligation of support between grandparent and grandchild in the legitimate line, but this arises only if the intermediate generation is unable to provide support.[66] Adopted grandchildren are treated in the same way as grandchildren in the legitimate line.[67] There is probably no obligation between grandparents and grandchildren where there is an illegitimate link in the relationship.[68] There is no

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[65]See Appendix A, clause 1(4). This formula is based on the Matrimonial Causes Act 1973, s.29 and the Domestic Proceedings and Magistrates' Courts Act 1978, s.5. The instruction or training need not be full time. The word "employment" is included to cover cases where a course of training is related to the trainee's employment or future employment but where that employment would not, or might not, be covered by the words "trade, profession or vocation". We can see no reason to distinguish, for example, between a young agricultural worker who is undergoing a course of training and an apprentice in one of the traditionally recognised trades or professions. If the effect on earning capacity is the same we think nothing should turn on the categorisation of the eventual employment.

[66]*Smith* v. *Smith's Trs.* (1882) 19 S.L.R. 552.

[67]Children Act 1975, s.8 and Sch. 2; Adoption (Scotland) Act 1978, s.39 (*prosp.*).

[68]Cf. *Nicoll* v. *Kirk Session of Dundee* (1832) 10 S. 670; *Clarke* v. *Carfin Coal Co* (1891) 18 R. (H.L.) 63.

obligation of support between grandparents and grandchildren in English law although there is such an obligation in several continental systems.[69]

2.35 In the Memorandum we suggested as a starting point for discussion that there should be no alimentary obligation between grandparent and grandchild.[70] Opinion was divided on consultation. After consideration we have decided to adhere to the suggestion made in the Memorandum. The present law seems, as the Law Society of Scotland pointed out in their comments, to be obsolete in practice and it is hard to justify on any theoretical ground other than the mere existence of a blood link. Although a parent may be said to be liable to aliment his children because he has brought them into the world, the same argument cannot be applied to grandparents. We therefore recommend that there should be no alimentary obligation between grandparents and grandchildren (or remoter relatives) as such. This does not, of course, prevent an obligation arising based on adoption or acceptance into the family.[71]

Collaterals

2.36 Scots law does not recognise any alimentary obligation between brothers and sisters as such.[72] Neither does English law, French law[73] or German law.[74] Those consulted were almost unanimously of the view that there should be no change in the present law and we so recommend.

Relations by affinity

2.37 For all practical purposes there is no obligation of aliment in Scots law between a person and the relatives of his or her spouse.[75] In the Memorandum we proposed that this should continue to be the case.[76] This was generally endorsed on consultation and we recommend accordingly.

2.38 Our **recommendations** on the parties to the alimentary obligation are, therefore, as follows:

1. A man should be liable to aliment his wife and a woman should be liable to aliment her husband.
   (Paragraphs 2.5 to 2.7; Clause 1.)
2. For the purposes of Recommendation 1 the terms "wife" and "husband" should include the parties to a valid polygamous marriage.
   (Paragraph 2.7; Clause 1(4).)

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[69]See the Memorandum, paras. 2.28 to 2.32.

[70]Proposition 8 and para. 2.36.

[71]See Appendix A, clause 1(1).

[72]We suggested in the Memorandum that this should continue to be the position: Proposition 11 and para. 2.48.

[73]See the Memorandum, para. 2.48 note 84.

[74]See the Memorandum, para. 2.48 note 85.

[75]For the development of the law and for a strictly limited exception, of no practical importance, based on the husband's liability for his wife's antenuptial debts where he has received property from her on the marriage, see the Memorandum, paras. 2.37 and 2.43.

[76]Proposition 9 and para. 2.42 (stepchildren); Proposition 10 and para. 2.46 (other relations by affinity).

3. A person should be liable to aliment
   (*a*) his legitimate child
   (Paragraph 2.8);
   (*b*) his adopted child, but not any child of his adopted by someone else
   (Paragraph 2.12);
   (*c*) his illegitimate child
   (Paragraph 2.13);
   (*d*) a child (other than a child who has been boarded out with him by a public or local authority or a voluntary organisation) who has been accepted by him as a child of his family.
   (Paragraphs 2.18 to 2.28 and 2.30; Clause 1.)

4. For the purposes of Recommendation 3 "child" should be limited to a person under the age of 18 or a person over that age but under the age of 25 who is reasonably and appropriately undergoing instruction at an educational establishment or training for employment or for a trade, profession or vocation.
   (Paragraphs 2.31 to 2.33; Clause 1(4).)

5. There should be no other obligation of aliment by virtue of relationship.
   Paragraphs 2.8 to 2.12; 2.14 to 2.17; 2.29; 2.34 to 2.37; Clause 1.)

Conditions of liability: needs and resources

2.39 In the Memorandum we discussed at some length the question of the needs of one party and the resources of the other as conditions of liability.[77] We suggested that a person should be entitled to aliment only if he was unable to provide himself with such support as was reasonable in the circumstances[78] and that a person should be liable to provide aliment only if he had a superfluity of resources after providing for his own reasonable needs and those of any relative having a prior claim to aliment.[79] We also suggested that lack of earning capacity should not be expressly laid down as a condition of entitlement to aliment but that it should be taken into account in quantifying aliment.[80] These suggestions were supported on consultation. We think they should be reflected in the law. As a matter of legislative technique, however, we consider that there is no need for legislation to deal expressly with needs and resources as conditions of liability. In practice this question runs into the question of the measure and quantification of the obligation. If, as we propose below, the obligation of aliment is an obligation to provide such support as is reasonable in the circumstances[81] and if the courts are required to take needs and resources into account in deciding how much aliment, *if any*, to award[82] separate provision for needs and resources as conditions of liability is unnecessary.

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[77]See the Memorandum, paras. 2.91 to 2.118.
[78]Proposition 20 and para. 2.94.
[79]Proposition 24 and para. 2.111.
[80]Proposition 21 and paras. 2.97 and 2.198.
[81]Para. 2.46; Recommendation 7.
[82]Paras. 2.96 to 2.110; Recommendation 19.

Effect of conduct on obligation

Husband and wife: willingness to adhere

2.40 In the Memorandum we drew attention to some of the unfortunate consequences of the rule then in force that a spouse who was unwilling to adhere, without just cause, was not entitled to an award of separate aliment.[83] This meant, for example, that a wife who was separated from her husband by consent could not claim aliment from him.[84] She was not willing to adhere and the consensual separation was not regarded as just cause for non-adherence.

2.41 The law has now been changed by section 7(1) of the Divorce (Scotland) Act 1976 which provides as follows:

> "Without prejudice to its other powers to award aliment, it shall be competent for the court, in an action for interim aliment brought after the commencement of this Act, to grant decree therein if it is satisfied that—
>
> (*a*) the pursuer and the defender are not cohabiting with one another, and
>
> (*b*) the pursuer is unwilling to cohabit with the defender whether or not the pursuer has reasonable cause for not so cohabiting by virtue of the circumstances set out in paragraph (*a*), (*b*) or (*c*) of section 1(2) of this Act:[85]
>
> Provided that, where the pursuer does not have reasonable cause for not cohabiting as aforesaid, the court shall not grant decree if it is satisfied that the defender is willing to cohabit with the pursuer."

The effect of this provision is that a wife who is separated by consent can now recover aliment from her husband. However, a wife who has deserted her husband without reasonable cause (within the meaning of section 7(1)) cannot recover aliment from him in an action for interim aliment if he remains willing to cohabit with her. Other conduct (such as adultery or cruelty) does not automatically bar a claim to aliment but may be taken into account in quantifying it.

2.42 The present law involves distinctions between different types of conduct and between the pre-divorce and post-divorce situation which, at first sight, may not seem easy to justify. The adulterous or cruel wife can recover aliment: the deserting wife cannot. A wife who has deserted her husband cannot obtain aliment in the two-year run up to divorce, but is not automatically disentitled to a periodical allowance after divorce. It could be argued that the law would be more coherent if all conduct were taken into account only in relation to quantification. On the other hand it can be argued that a husband who is offering to support his wife in the home should not be compelled to pay aliment in money if she rejects his offer without good cause: he is not in fact refusing to support her: the position after divorce is different because the obligation of adherence is cancelled.

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[83]Paras. 2.120 to 2.125.

[84]*Beveridge* v. *Beveridge* 1963 S.C. 572.

[85]These circumstances are (*a*) adultery (*b*) behaviour by the defender such that the pursuer cannot reasonably be expected to cohabit with the defender and (*c*) desertion by the defender followed by two years' non-cohabitation during which the pursuer has not refused a genuine and reasonable offer to adhere.

2.43 To focus discussion on this question we put forward in the Memorandum the tentative proposition that it should no longer be a condition of entitlement to aliment as between spouses that the claimant was willing to adhere or had just cause for non-adherence.[86] There was a mixed reaction to this suggestion. Some agreed with it. Others disagreed with it and yet felt uneasy about a rule which made willingness to adhere a condition of entitlement to aliment in all cases. They pointed out that in some situations willingness to adhere did not in fact seem to be regarded as a condition of entitlement to aliment. The Society of Writers to Her Majesty's Signet thought that the existing law should be retained and suggested in response to another proposal[87] that a spouse faced with a claim for aliment should have a defence based on an offer to provide support in the home. The Faculty of Advocates also looked at the question partly from the point of view of a defence available to the spouse who was willing to adhere. They thought that it would be wrong if a spouse who had broken up a marriage could claim aliment from the other spouse, and if the latter's willingness to continue the marriage was irrelevant as a defence. They pointed out that section 7(1) of the Divorce (Scotland) Act 1976 preserved such a defence and thought that time should be allowed to see how this worked out in practice.

2.44 In the light of these valuable comments we have reconsidered this matter with some care. We think that the policy of the present law is sound. It would be wrong if a spouse who was offering to adhere had no defence to an action for aliment by a spouse who had walked out without good cause. We do not think, however, that willingness to adhere can properly be seen as a condition of *entitlement* to aliment. A cohabiting wife who has become unwilling to adhere but who has not yet put her intentions into effect is not disentitled to aliment. Even a deserting wife is not, strictly speaking, *disentitled* to aliment: she is merely unable to recover aliment in money. Her husband, in the typical case, is not denying that he is bound to support her as his wife: he is merely claiming that he is offering to support her in the home and that in these circumstances she is not entitled to a separate aliment in money. We are also inclined to look with suspicion on a rule of entitlement to aliment which purports to apply to only one alimentary relationship. We have concluded that while the policy of the present law is sound the logical place for a rule on willingness to adhere is in provisions dealing with the recovery of aliment by court action and that the best way of giving effect to the rule is by way of a defence which is available to the spouse who is willing to adhere. This, in effect, is the position under the present law on actions for interim aliment, as some of those who commented on the Memorandum pointed out. We consider, however, that the form of the present law could be considerably improved. Section 7(1) of the Divorce (Scotland) Act 1976 was a specific legislative response to a specific problem.[88] It was framed against the background of the previous law and is not easy to understand if the reader comes to it afresh without a knowledge of that background. It is limited to actions for interim aliment and it may be more restrictive than necessary in

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[86]Proposition 27 and para. 2.125.

[87]Proposition 31 (on an offer to provide support in the home as a defence to an action for aliment): see paras. 2.79 to 2.82 below.

[88]The introduction of divorce by consent after two years' non-cohabitation.

one type of situation.[89] We think that it should be replaced by a more general provision. We accordingly **recommend:**

6. It should continue to be the law that a spouse who is unwilling without just cause to adhere cannot recover an award of aliment from a spouse who is willing to adhere, but the present common law and statutory provisions to this effect should be replaced by a general rule expressed in the form of a defence to an action for aliment.

We consider below the form which such a defence should take.[90]

Parent and child

2.45 It would be possible to provide that certain types of conduct on the part of a child disentitled him to aliment. In general, however, those consulted agreed with our provisional proposal[91] that conduct should be taken into account only in quantifying aliment[92] and not in relation to entitlement. There is nothing to prevent a court from refusing an application altogether where the circumstances so demand. This is the existing law and we therefore make no recommendation for change on this point.

Measure of obligation

2.46 We suggested in the Memorandum that the obligation of aliment should be an obligation to provide such support as is reasonable in the circumstances.[93] We pointed out that the law had long departed from the idea that the obligation should be limited to support at subsistence level. All of those consulted agreed with this proposition. We therefore **recommend:**

7. The obligation of aliment should be defined as an obligation to provide such support as is reasonable in the circumstances.[94]

Order of liability

2.47 *As between father and mother.* Under the present law the father of a legitimate child has the primary liability for his support. Only if he is unable to provide it is the mother liable.[95] This rule can give rise to unjust results in cases where the father has modest means and the mother is wealthy. The parents of an illegitimate child are, however, equally liable in the first place to aliment the child, although in any action for aliment the court can modify this liability in the light of the parties' means and circumstances.[96] In the Memorandum we suggested that the liability of the father and mother of a legitimate child should likewise be equal in the first place, subject to modification in the light of their resources.[97] This was accepted by those consulted.

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[89]Under s.7 a husband's desertion does not give a wife reasonable cause for non-adherence until it is followed by two years' separation. Under the previous law it could do so. See *Stirling* v. *Stirling* 1971 S.L.T. 322.

[90]Paras. 2.79 to 2.82.

[91]Proposition 29 and para. 2.134.

[92]We return to this question at paras. 2.104 to 2.108 below.

[93]Proposition 30 and paras. 2.135 to 2.148.

[94]See Appendix A, clause 24.

[95]*Dickinson* v. *Dickinson* 1952 S.C. 27.

[96]Illegitimate Children (Scotland) Act 1930, s.1(2); *Mottram* v. *Butchart* 1939 S.C. 89.

[97]Proposition 14 and para. 2.74.

2.48 *As between parent and "accepting" parent.* In the Memorandum we suggested that the liability of a person who had accepted a child into his family should be postponed to that of the child's parents.[98] This would mean that a child would be unable to recover aliment from an "accepting" parent unless both actual parents were unable to pay or could not be traced. Although there was support for this suggestion on consultation we have come to the conclusion that a rigid rule on the order of liability as between parents and "accepting" parents is unnecessary. If aliment is claimed from an "accepting" parent the court in deciding how much aliment, if any, to award will be able to take the actual parent's liability into account, as is done under the present law.[99] We do not therefore recommend any express provision on the order of liability as between parents and accepting parents.

2.49 *As between other relatives.* Under the present law a person's relatives are liable to aliment him in a certain order which, in the case of relatives by blood in the legitimate line, is (1) descendants (2) father (3) mother (4) paternal grandfather (5) paternal grandmother and so on.[100] It is probably the case that a person's spouse comes before all these relatives in the order of liability.[101] Cases involving problems as to the order of liability seem to be virtually unknown in modern practice. The restriction in the list of alimentary relationships which we have recommended means that the question will be of even less importance in future and we think that it would be both unnecessary and undesirable to lay down any rigid hierarchy of obligants. If a question arose, say, as to whether a married student was entitled to aliment from his father when his wife was working and could support him, the court could readily resolve it by taking into account the whole circumstances of the case, including the wife's liability, in deciding how much aliment, if any, to award.

2.50 We therefore **recommend:**

8. Where two or more persons are liable to aliment another person there should be no legal order of liability but the court, in deciding how much aliment, if any, to award against any of those persons should have regard, among the other circumstances of the case, to the liability of any other person to provide aliment.
(Paragraphs 2.47 to 2.49; Clause 4(2).)

Order of entitlement

2.51 With the exception of one brief reference in Stair[102] (dealing with the priority of children's claims *inter se*), none of the Institutional writers or textbooks explicitly recognises the existence of any hierarchy of claimants. Nevertheless, some such hierarchy seems to be implicit in the law. For

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[98] *Ibid.*

[99] Matrimonial Proceedings (Children) Act 1958, s.7(2).

[100] See *Mackenzie's Tutrix* v. *Mackenzie* 1928 S.L.T. 649. The present law is discussed in more detail at para. 2.68 of the Memorandum.

[101] See *Inspector of Barony Parish* v. *Macfarlanes* (1886) 2 Sh. Ct. Rep. 152; *Macdonald* v. *Macdonald* (1956) 72 Sh. Ct. Rep. 171. See also the Memorandum, para. 2.68, and cases there cited.

[102] *Institutions* I, 5, 9 ("parents must first aliment their children in the family; and amongst those that are emancipated, the males are preferable to the females, who pass by marriage into other families").

example, a person's obligations to his spouse and children take priority over his other alimentary obligations.[103]

2.52 The restriction of the list of those entitled to aliment which we have recommended in this Report makes the problem of a hierarchy of claimants of minimal importance. We think that competing claims can be left to be dealt with by the courts as they arise. If, for example, a man is sued for aliment by both his separated wife and his student son the court dealing with either claim would be able to take the other claim into account in deciding how much aliment to award. We do not, therefore, recommend the creation of a statutory hierarchy of alimentary creditors.

Reimbursement of aliment

2.53 A person who has alimented someone else may wish in certain circumstances to claim reimbursement of the sums paid—either from the alimented person himself if he later acquires funds, or from a relative with a prior liability or from a relative with an equal liability. The present law turns on common law principles of unjustified enrichment. The person paying may, if he did not intend to make a donation, be able to recover the whole or part of the sums paid on the ground that someone else has been unjustifiably enriched at his expense. A shopkeeper, for example, who has supplied a wife with necessaries has a claim for reimbursement on this ground from her husband if the latter was not fulfilling his obligation to support her;[104] and a mother who has alone supported her illegitimate child has a claim against the father to recover his share of the aliment provided in the past.[105]

2.54 We discussed the existing law in detail in the Memorandum[106] and suggested for consideration that questions of reimbursement of aliment paid or provided might be left to depend on the common law of unjustified enrichment as they do at present. Such questions rarely arise in practice and it seemed to us that complex statutory provisions to deal with them would not be justified. This suggestion was supported by those who commented on our proposals. We therefore make no recommendations for any special rules on reimbursement of aliment.[107]

Termination of obligation

2.55 Under the present law the obligation of aliment terminates on the termination of the alimentary relationship in question, although in certain circumstances there may be an equitable claim against the estate of a

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[103]See *Hamilton* v. *Hamilton* (1877) 4 R. 688 per Lord President Inglis at p. 690 (children's liability to support father arises only if they "have a superfluity after providing for the maintenance of themselves *and their own families*") (emphasis added); *Palmer* v. *Palmer* (1886) 2 Sh. Ct. Rep. 55 (in awarding aliment to mother against son, account taken of his wife and six children); *Jack* v. *Jack* (1953) 69 Sh. Ct. Rep. 34 (man's responsibility to wife and children "must take precedence over his responsibility to his father") (pp. 36 to 37).

[104]See Clive and Wilson, *Husband and Wife* (1974), pp 263 to 265.

[105]See e.g. *Finlayson* v. *Gown* 7 July 1809 F.C.; *Thom* v. *Jardine* (1836) 14 S. 1004; *Reid* v. *Moir* (1866) 4 M. 1060 at 1065.

[106]Paras. 2.78 to 2.86.

[107]We deal later with two incidental matters related to the husband's liability for his wife's necessaries—namely (a) his liability after a decree of separation and (b) his liability for the expenses of consistorial litigation carried on by her: see paras. 2.146 to 2.152 below.

deceased relative or against those enriched by the succession to that relative.[108] We recommend no change in this rule. The draft Bill appended to this Report makes it clear that, without prejudice to the law on the liability of executors and those enriched by a succession, an obligation of aliment is owed by, *and only by,* a party to one of the relationships mentioned in clause 1. It follows that the obligation ceases on the termination of the relationship in question—for example, on the termination of a marriage by divorce. The obligation to a child will also terminate automatically when the child reaches the age of 18 or, if undergoing education or training, the age of 25.[109]

THE ACTION FOR ALIMENT

Definition

2.56 By an "action for aliment" in this Report we mean any crave or conclusion or application for aliment (other than an application for interim aliment *pendente lite* or an application for variation of aliment) made, on the basis of an alimentary relationship,[110] in any court proceedings, whether or not those proceedings contain an application for some other remedy. The term therefore includes not only an action for aliment alone but also the alimentary crave or conclusion in an action for separation and aliment, adherence and aliment, affiliation and aliment or custody and aliment. It also includes a conclusion for aliment for a child in a divorce action. It does not include an application for interim aliment *pendente lite.* Special considerations apply to such applications and they are considered later.[111]

Competence

2.57 The general rule at present is that an action for aliment is competent in either the Court of Session or the sheriff court. There is, however, one curious exception to this rule. An action for aliment between husband and wife is competent in the sheriff court only if it is an action "of separation and aliment, adherence and aliment, or interim aliment".[112] Originally an action for interim aliment meant one which concluded for aliment "until the rights of the parties shall be fixed by a competent court" or "so long as the defender shall refuse to receive and entertain the pursuer",[113] but there was never any compulsion on the pursuer to raise other proceedings in a "competent court" and recent changes in the law have made an action for interim aliment available to a pursuer who is not willing to adhere and has no grounds for judicial separation or divorce.[114] The distinction between interim aliment and so-called permanent aliment (awarded after the rights of the parties have

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[108]See para. 2.153 below.

[109]See para. 2.33 above.

[110]I.e. not based on a contract or unilateral voluntary obligation. See Appendix A, clause 24, definitions of "action for aliment" and "aliment"; and the separate clauses on variation or recall of decree for aliment (clause 5) and interim aliment (clause 6).

[111]See paras. 2.130 to 2.135 below.

[112]Sheriff Courts (Scotland) Act 1907, s.5(2) as amended by the Sheriff Courts (Scotland) Act 1913.

[113]See *Donnelly* v. *Donnelly* 1959 S.C. 97. For the development of the distinction between interim aliment and permanent aliment see Clive and Wilson, *Husband and Wife* (1974), pp. 186 to 190.

[114]Divorce (Scotland) Act 1976, s.7(1), superseding the Divorce (Scotland) Act 1964, s.6. For the previous law see *Jack* v. *Jack* 1962 S.C. 24.

been determined by a competent court in an action of separation or adherence) is now insubstantial: in both cases an award can continue so long as the marriage lasts, ceases to be effective if the parties resume cohabitation, and is subject to variation and recall.[115] The distinction can, however, still give rise to difficulty. If, for example, a wife has obtained a decree of separation but has not sought an award of aliment because her circumstances at the time made that unnecessary, she will probably not be able to raise an action for aliment alone in the sheriff court at a later stage. Such an action would probably be regarded as an action for permanent aliment and hence as incompetent.[116]

2.58 In the Memorandum we criticised the distinction between actions for interim aliment and actions for permanent aliment as unnecessary, because it corresponded to no real difference in the respective decrees; as confusing, because the term interim aliment is also used for aliment *pendente lite;* and as liable to produce injustice, because a wife might find herself without a remedy in the sheriff court in the very case where her entitlement to aliment was clearest.[117] We suggested that the distinction should be abolished.[118] As a corollary, we suggested amendments to section 5 of the Sheriff Courts (Scotland) Act 1907 to make it clear that the sheriff court has jurisdiction (a) in any action for aliment and (b) in any action of separation or adherence, whether or not it contains a crave for aliment.[119] These proposals were strongly supported on consultation.

2.59 We therefore **recommend:**

9. (*a*) It should be competent to bring an action for aliment in the Court of Session or the sheriff court;
   (*b*) the distinction between an action for interim aliment and an action for permanent aliment should be abolished; and
   (*c*) section 5 of the Sheriff Courts (Scotland) Act 1907 should be amended to make it clear that the sheriff court has jurisdiction (i) in any action for aliment and (ii) in any action of separation or adherence, whether or not it contains a crave for aliment. (Paragraphs 2.57 to 2.58; Clause 2(1) and Schedule 1.)

Title to sue

General rule

2.60 We have rejected the idea that there should be any legal order of liability among alimentary debtors. It follows that the general rule should be that any person to whom an alimentary obligation is owed should be able to bring an action for aliment against any person owing the obligation.[120]

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[115]See *Donnelly* v. *Donnelly supra.*

[116]This was the effect of the decision in *McLeish* v. *McLeish*, Edinburgh Sheriff Court 1975 (unreported).

[117]Paras. 2.164 to 2.166.

[118]Proposition 33 and para. 2.166.

[119]Proposition 34 and para. 2.167.

[120]See Appendix A, clauses 2(1) and (2), 4(2).

Actions on behalf of children

2.61 We drew attention in the Memorandum[121] to the incoherent nature of the present law on title to sue for aliment for a child. At common law the mother was recognised as having a title to sue for aliment for her legitimate or illegitimate pupil child, even if she was not the child's tutor.[122] The father was also recognised as having a title to sue for future aliment for his child, at least if he had the expense of bringing up the child and the child was legitimate.[123] Those with "no standing relation to the [child] which entitles them to assume that they will have a continuing duty to aliment" could not claim future aliment for the child.[124] These common law rules were supplemented by three distinct sets of statutory provisions. The first set conferred powers to award "maintenance" for children in connection with actions of divorce, nullity of marriage, separation and adherence.[125] These provisions impliedly confirmed the title of the parent of a legitimate child to claim aliment for the child in such proceedings and impliedly gave such title to sue to a party to a marriage who had accepted into his family a child of the other party to the marriage. In practice, aliment for a child is awarded only to a parent (or "accepting" parent) who has custody of the child, so that a parent seeking aliment invariably also seeks an award of custody.[126] Secondly, the provisions on aliment for illegitimate children not only impliedly confirm the mother's common law title to sue[127] but also give title to sue for aliment for the child to "any person who is entitled to the custody of [an] illegitimate child, whether such person is the father or the mother of the child or is a third party . . .".[128] Thirdly, there are provisions in the Guardianship of Children (Scotland) Acts 1886 to 1973 which enable "any person (whether or not one of the parents)" who has been awarded custody of a child to be awarded aliment for the child payable by "the parent or either of the parents excluded from having that custody".[129] The Guardianship of Children (Scotland) Acts also contain

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[121]Paras. 2.169 to 2.171.

[122]See e.g. *McKenzie* v. *Glendinning* (1899) 15 Sh. Ct. Rep. 224 at p. 226 (mother of illegitimate child, "by long usage, allowed to sue in her own name on the girl's behalf"); *Hay* v. *Hay* (1882) 9 R. 667 (action by mother of legitimate child against separated father for aliment for child). Numerous other examples could be given. Under the Guardianship Act 1973, s.10, the mother of a legitimate child is now the child's tutor (along with the father) but her claim for aliment for the child appears still to be made as mother or custodier rather than as tutor.

[123]*Scott Petr.* (1870) 8 S.L.R. 260; *Duke of Sutherland Petr.* (1901) 3 F. 761, (1905) 13 S.L.T. 104 (legitimate children).

[124]*Den* v. *Lumsden* (1891) 19 R. 77 at p. 78. See also *Duncan* v. *Forbes* (1878) 15 S.L.R. 371.

[125]Conjugal Rights (Scotland) Amendment Act 1861, s.9; Custody of Children (Scotland) Act 1939, s.1(1) (extending court's powers to children under 16); Matrimonial Proceedings (Children) Act 1958, s.7 (extending court's powers to certain children "accepted as one of the family"), s.9 (extending court's powers when action dismissed or when decree of adherence not obeyed), s.14 (extending court's powers to actions for declarator of nullity of marriage). For the powers of the sheriff courts to deal with custody and aliment under the Sheriff Courts (Scotland) Acts 1907 and 1913 see *O'Brien* v. *O'Brien* (1957) 73 Sh. Ct. Rep. 129. See also Maintenance Orders Act 1950, s.6.

[126]See the form of conclusion in R. C. App. Form 2, No. 20—"for payment by the defender to the pursuer of (specify rate of aliment) as aliment for each child while in the custody of the pursuer and unable to earn a livelihood . . .".

[127]Illegitimate Children (Scotland) Act 1930, s.1; Maintenance Orders Act 1950, s.8.

[128]Illegitimate Children (Scotland) Act 1930, s.1(3).

[129]Guardianship of Infants Act 1886, s.5, as extended by the Guardianship of Infants Act 1925, s.3 and the Administration of Justice Act 1928, s.16; and as amended by the Guardianship Act 1973, Sch. 4.

provisions enabling the court to deal with disputes between joint tutors and, where one of them is a parent, to order the parent to pay to the other tutor a periodical sum "towards the maintenance of the infant".[130] The common law rules and the earlier statutory provisions related to pupil children, but the Custody of Children (Scotland) Act 1939, section 1(1), provided that:

> "The powers of any court whether at common law or under any enactment to make orders as to the custody, maintenance or education of . . . pupil children shall extend to minor children under the age of sixteen . . . ."[131]

2.62 We suggested in the Memorandum that the present common law rules and scattered statutory provisions on the recovery of aliment for children should be replaced by a general provision that any person entitled to, or claiming, the custody of a child should be entitled to conclude for aliment for the child from anyone bound to provide such aliment.[132] There was general agreement with this proposal. We think, however, that it was in some respects too narrow. It might have precluded a claim by a grandmother who was bringing up her grandchild but had no wish to claim custody, or a claim by a tutor appointed by a deceased parent to act for a child who was in an institution. It might also have caused unnecessary problems in cases where a court awarded custody to one person and care to another.[133] We recommend, therefore, that a person ("the applicant") should be able to bring an action for aliment on behalf of a child against any person who owes an obligation of aliment to the child if the applicant is the child's parent, or the child's tutor, or a person entitled to, or seeking, custody of the child or a person who in fact has, or is seeking to have, care of the child.[134]

2.63 An advantage of widening title to sue for aliment for children is that it breaks the link between sole legal custody and aliment. Under the present law many applications by wives for custody or interim custody are made only to enable aliment to be claimed.[135] The wives in question already have a legal right to custody[136] (jointly with the fathers) and already have the children in their care. They do not need an award of custody for its own sake and gain nothing from such an award except the exclusion of the fathers' rights to custody. We think that unnecessary applications for custody are undesirable. Not only is there a risk of sparking off a dispute which might never have arisen but also it is undesirable to cut off a father's rights where this is neither required nor desired. Our proposals would make it unnecessary for an application for custody to be made in such circumstances. The wife could claim aliment (as mother or as tutrix, or as the person having care of the child) without having to seek an award of custody. We do not overestimate

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[130]Guardianship of Infants Act 1925, ss. 5 and 6, as extended by the Children and Young Persons (Scotland) Act 1932, s.73.

[131]See also the Illegitimate Children (Scotland) Act 1930, s.1; Guardianship Act 1973, s.11(3).

[132]Proposition 36 and para. 2.174.

[133]Cf. *Robertson* v. *Robertson* 1981 S.L.T. (Notes) 7.

[134]See Appendix A, clause 2(2).

[135]See Eekelaar and Clive, *Custody after Divorce* (Oxford Centre for Socio-Legal Studies, 1977).

[136]Under the Guardianship Act 1973, s.10. This section gives the parents of a legitimate child equal parental rights. In the absence of a court decree, therefore, they have equal rights to legal custody of the child.

the likely effect of our proposals. No doubt many wives will continue to claim sole custody for the feeling of security that that provides. We think, however, that flexibility would be desirable, particularly in cases where the parties are agreed that they should continue to have equal parental rights and where they do not need or desire any court decree on custody. Where there *is* a dispute over the actual custody or care of the child then, of course, this will have to be resolved before the question of aliment can finally be settled.

2.64 We do not think that any serious problem will be caused by giving title to sue to more than one person. The court will not award aliment unless the applicant has an interest to claim it, and in any event the aliment will be *for the child,* so that there is no risk that a defender would be required to pay more aliment than would be appropriate to the child's needs in the circumstances.

2.65 Our proposals are intended to apply equally to legitimate and illegitimate children, but are intended to be without prejudice (a) to any right possessed by the child himself to claim aliment[137] and (b) to any right possessed by any public or local authority to recover contributions from liable relatives in relation to children being supported out of public funds.[138]

2.66 We discussed in the Memorandum the nature of a claim for future aliment for a child.[139] We noted that under the present law it is unclear whether the true creditor is the child or the person who claims aliment for the child.[140] We pointed out that it would be undesirable to make the legal position depend on such technicalities as whether a mother sued as tutrix or custodier, and suggested that a claim for future aliment for a child should be regarded as being made on behalf of the child.[141] There was unanimous agreement with this suggestion which, indeed, is merely a recognition that the child is the true creditor in the alimentary obligation. We have considered whether any consequential provision is required to regulate the position of the payee. We think that it would be desirable to provide, for the avoidance of doubt, that the payee, whether or not the tutor of the child, can give a good receipt for the aliment on behalf of the child.[142] We do not think that any

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[137]If the child is a minor he can raise an action for aliment with the consent and concurrence of his curator, if any. If need be (e.g. if the curator has a contrary interest) a curator *ad litem* can be appointed: see e.g. *Mizel* v. *Mizel* 1970 S.L.T. (Sh. Ct.) 50.

[138]See Supplementary Benefits Act 1976, ss.18 and 19; Social Work (Scotland) Act 1968, ss.78 to 82.

[139]Para. 2.171.

[140]To the cases cited in the Memorandum may now be added *Bell* v. *McCurdie* 1981 S.L.T. 159 where the Second Division held that aliment for an illegitimate child was for the child and not for the mother and could not therefore be reduced on the ground that the mother had been guilty of "contributory negligence" in allowing the child to be conceived. For discussion of the tax position in relation to aliment for a child, see the Journal of the Law Society of Scotland, Nov. 1980, p. 466 and Jan. 1981 p. 17. Under the present law it is possible to obtain a decree in such a form that the aliment will be treated as the child's income for tax purposes: cf. *Mackay* v. *Mackay* 1953 S.L.T. (Notes) 69; *Huggins* v. *Huggins* 1981 S.L.T. 179.

[141]Proposition 37 and para. 2.175. In Proposition 37 we also suggested that the custodier's claim on behalf of the child should have priority over other claims. We now think that legislation on the priority of claims is unnecessary and that this problem can be left to be solved by reference to interest to sue.

[142]See Appendix A, clause 2(7).

further provision (e.g. deeming the payee to be a trustee for the child) is necessary. In many cases the payee will be subject to the laws on tutors. The sums awarded as aliment for children are usually small and intended for current consumption. The parent paying aliment has an interest to ensure that the aliment is spent on the child's behalf. If the child is being adequately looked after but surplus aliment is being spent, for example, on luxuries for the parent with custody, the remedy is either an application for reduction of the aliment or some other arrangement for payment of part of the aliment (for example, payment of school fees or similar fees direct to the establishment in question). If the child is being neglected to the injury of his health there are remedies under the criminal law and under the Social Work (Scotland) Act 1968.

2.67 Once a child attains a certain age it is inappropriate for a claim for aliment to be made by someone else on his behalf. The general effect of the present law is that the parent can claim aliment for the child until the child attains the age of 16.[143] Thereafter, if the child continues to be in need of aliment (as will often be the case when education continues) he or she must raise a separate action.[144] The age of 16 seems to us to be too low. There are many cases where children above that age are still at school and still dependent on a parent. On the other hand anything above the age of 18 seems to us to be too high. The child attains majority at that age and should, for this purpose as for other legal purposes, be regarded as an independent adult. We think that after the age of 18 a person claiming aliment can reasonably be expected to claim it on his own account. It becomes, moreover, increasingly unrealistic and, some might say, objectionable to talk of someone over the age of 18 as being in the "care" of someone else and to give that other person the right to receive aliment and give good receipts on behalf of another adult. We therefore recommend that the age limit for this purpose, whether the child is legitimate or illegitimate, should be 18.[145] This does not, of course, mean that all awards of aliment for children need be expressed to last until the child attains the age of 18. We envisage that the normal practice will continue to be to award aliment, in the first place, until the child attains the age of 16 unless the circumstances suggest otherwise. This is a matter which can be regulated, if regulation is necessary, by Rules of Court or practice notes. Our recommendation does mean that the age limits in relation to aliment will be different from the age limits in relation to custody and access. This does not disturb us. Our previous recommendation means that the question of aliment will no longer depend on the question of custody, and we think that while an award of aliment for a child of 17 will often be appropriate an award of custody or access in relation to a child of that age rarely will be.

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[143]See the Memorandum, paras. 2.184 to 2.185; Custody of Children (Scotland) Act 1939, s.1(1); Illegitimate Children (Scotland) Act 1930, s.1(1); *Shields* v. *Murray* (1934) 50 Sh. Ct. Rep. 323; *Cape* v. *McLure* (1935) 51 Sh. Ct. Rep. 52. Under the Affiliation Orders Act 1952, s.3 an award of aliment for an illegitimate child can be continued by up to two years at a time until the child is 21 if the child "is or will be engaged in a course of education or training".

[144]See e.g. *Watsons* v. *Watson* (1896) 4 S.L.T. 39; *Mizel* v. *Mizel* 1970 S.L.T. (Sh. Ct.) 50.

[145]See Appendix A, clause 2(2) and (8). We suggested in the Memorandum that the age limits for legitimate and illegitimate children should be the same: Proposition 41 and para. 2.185. This was accepted unanimously by those consulted.

2.68 In the Memorandum we suggested that where aliment had been awarded to an adult on behalf of a child in any action (e.g. a divorce action) the child should be empowered, after the termination of the period for which aliment was awarded but not later than attaining a prescribed age, say majority, to intervene in the action to claim a continuation of aliment.[146] We had in mind interventions by children between the ages of 16 and 18. Our previous recommendation solves this problem. In relation to claims by children above the age of 18 we do not think that the arguments for allowing intervention by a child by minute in what may, by this time, be a very stale divorce process are very strong. The argument that it is desirable to keep all the family's affairs in one process in one court becomes weaker as the child grows older. We therefore make no recommendation on this point.

2.69 Under section 3 of the Illegitimate Children (Scotland) Act 1930 an unmarried woman can raise an action of affiliation and aliment before the birth of the child. No proof is taken and no decree can be granted until after the birth of the child, except that if paternity is admitted or the action is undefended, the court can order a payment to account of inlying expenses, and can grant decree for aliment to begin on the birth of the child. The woman must produce a sworn declaration that the defender is the father of the child and a medical certificate stating the expected date of the birth; moreover, she cannot raise her action more than three months before that date.[147] The advantages of raising an action before the child's birth are (a) that it may enable the mother to establish jurisdiction against a father who is about to decamp, and (b) that it may enable her to obtain aliment more quickly. In the Memorandum we noted that the same problems might arise in relation to a legitimate child. A wife might be deserted by her husband while pregnant. She might have no need for aliment herself but might wish to raise an action for aliment for her expected child before the husband left the jurisdiction. A problem might also arise in a divorce or other consistorial action. The wife in such an action might be pregnant with a child of the marriage and might wish to claim aliment for the child in the action. In the Memorandum we suggested that section 3 of the Illegitimate Children (Scotland) Act 1930 should be replaced by a more general provision, applying to all children, which would enable an action for aliment for a child to be brought while the child was in the womb; we suggested that the action should not be disposed of until after the birth.[148] This suggestion was generally agreed to on consultation, although one commentator thought that the requirement that the mother should be six months pregnant should be retained. We have given careful consideration to this point and have concluded that there should be no restriction to cases of advanced pregnancy. Provided that the mother has to prove pregnancy and that the court cannot dispose of the action until after the birth of the child we can see no good reason for this rule, nor for the other restrictions in section 3(2) of the 1930 Act. We recommend therefore that a woman should be able to bring an action for aliment in respect of her unborn child as if the child were already born, but that no such action should be heard or disposed of prior to the birth of the child.[149] The court's general power to

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[146]Proposition 40 and para. 2.185.
[147]S.3(2).
[148]Proposition 43 and para. 2.189.
[149]See Appendix A, clause 2(3).

award interim aliment *pendente lite* and to backdate awards of aliment[150] will be sufficient to cover the period before the action is disposed of.

Actions on behalf of incapacitated persons

2.70 There is little authority on title to sue for aliment for adult persons or minors who are incapable of managing their affairs. It seems clear, however, that a curator bonis has a title to claim aliment for his ward.[151] We think that this should continue to be the case and that it should be made clear that the curator of a minor incapax has a title to sue for aliment for the minor.[152]

2.71 In the Memorandum we discussed the question whether an action for aliment could be raised in the name of a mentally incapacitated person with a view to the appointment of a curator *ad litem* to continue the action.[153] We noted that this procedure had been allowed in one case[154] but had been criticised and disallowed in others.[155] We invited views. There was no comment on consultation and it seems likely that this is not a problem of great practical importance. In any event the question of actions in the name of incapacitated persons with no curators is not confined to the law of aliment. We make no recommendation on this point.

2.72 Our **recommendations** on title to sue are, therefore, as follows:

10. A person to whom an alimentary obligation is owed should be able to bring an action for aliment against any person by whom that obligation is owed.
    (Paragraph 2.60; Clauses 2(1) and (2), 4(2).)
11. A person ("the applicant") should be able to bring an action for aliment on behalf of a child under the age of majority (whether legitimate or illegitimate) against any person by whom an obligation of aliment is owed to the child, if the applicant is the child's parent; or the child's tutor; or a person entitled to, or seeking, custody of the child; or a person who in fact has, or is seeking to have, care of the child.
    (Paragraphs 2.61 to 2.65; 2.67 to 2.68; Clause 2(2) and (8).)
12. A person who successfully brings an action for aliment on behalf of a child should be empowered, whether or not he is the child's tutor, to give a good receipt on behalf of the child for aliment paid under the decree.
    (Paragraph 2.66; Clause 2(7).)
13. A pregnant woman should be able to bring an action for aliment in respect of her unborn child as if the child were already born (whether the child would be legitimate or illegitimate) but no such action should be heard or disposed of prior to the birth of the child.
    (Paragraph 2.69; Clause 2(3).)

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[150]See paras. 2.87 and 2.130 to 2.135 below.

[151]*Howard's Exr.* v. *Howard's Curator Bonis* (1894) 21 R. 787; *Edinburgh Parish Council* v. *Aitchison* (1919) 35 Sh. Ct. Rep. 195.

[152]See Appendix A, clause 2(2).

[153]Para. 2.204.

[154]*Pringle* v. *Pringle* (1824) 3 S. 248; see also *Thomson* v. *Thomson* (1887) 14 R. 634 at p. 636.

[155]*Reid* v. *Reid* (1839) 1 D. 400; *Mackenzie* (1845) 7 D. 283.

14. The curator bonis of an incapacitated person and the curator of an incapacitated minor should be able to bring an action for aliment on behalf of the incapax.
(Paragraph 2.70; Clause 2(2).)

Ground of action

2.73 It is implicit in what has been said so far that the only ground of action should be that an obligation of aliment is owed. In practice this means that the person bringing the action for aliment will have to aver the alimentary relationship and facts tending to establish that the amount claimed is reasonable in the circumstances. We do not think that the pursuer should have to aver that the parties are living apart. There may be circumstances where a remedy is required although the parties are cohabiting. We deal below with the question whether the defender should have a defence in this situation.[156]

Defences

2.74 It will be a defence to an action for aliment for the defender to prove that there is no alimentary relationship between himself and the person for whom aliment is claimed. In this section of the Report we consider whether it should be a defence for him to prove that he is in fact fulfilling or offering to fulfil his alimentary obligation by providing support in the home. The question arises only in relation to support in the home. The fact that a separated defender is voluntarily paying aliment in money should not prevent the pursuer from obtaining a court decree for his or her greater security.

Cohabitation and support in the home

2.75 Under the present law the accepted view is that an action by a spouse for aliment for herself or for her children is available only if the spouses are living apart.[157] There is a limited statutory exception to this general rule in the case of aliment for children. The court can make an order for custody and aliment under the Guardianship of Children (Scotland) Acts even although the parents are residing together, but the order is not enforceable by one parent against the other while they are residing together and it ceases to have effect if they continue to reside together for three months after it is made.[158] There are no special restrictions on applications for aliment for an illegitimate child, and it seems that an action for affiliation and aliment could be brought and decree granted even although the parents were living together.

2.76 In the Memorandum we noted[159] that in English law there was no requirement, in relation to proceedings in the High Court, that spouses should be separated before maintenance could be awarded and an order enforced,[160] but that in the magistrates' courts an order made while the parties were cohabiting could not be enforced and did not give rise to liability until

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[156]At paras. 2.75 to 2.78.

[157]See Clive and Wilson, *Husband and Wife* (1974), p. 193; *McDonald* v. *McDonald* (1875) 2 R. 705. See also Divorce (Scotland) Act 1976, s.7(1).

[158]Guardianship of Infants Act 1925, s.3, as amended by Guardianship Act 1973, Sch. 4.

[159]At para. 2.180.

[160]Matrimonial Causes Act 1973, s.27.

the parties ceased to cohabit. We noted that the Morton Commission had recommended that a maintenance order should be enforceable even although the spouses were cohabiting.[161] The Law Commission have since considered, and consulted on, this question.[162] The majority of those consulted favoured a change in the law to make an order obtained by a cohabiting wife enforceable for a period of six months, after which it would cease to have effect. The Law Commission agreed with this view and recommended accordingly.[163] The recommendation has now been implemented.[164]

2.77 We suggested in the Memorandum that a spouse should be able to obtain and enforce a decree for aliment for himself or herself, and for any children entitled to aliment from the other spouse, notwithstanding that the spouses were cohabiting.[165] There was general agreement with this proposition. Some of those consulted, while not dissenting, expressed the view that it was not desirable to encourage litigation between cohabiting spouses and that there might be a danger of actions by wives simply to have the level of a housekeeping allowance fixed. We share the view that unnecessary litigation between cohabiting spouses should not be encouraged. On the other hand we think that there is something seriously wrong with the law if it recognises a right to aliment but refuses a remedy in cases where a remedy may be most needed: supplementary benefit will not normally be available to the cohabiting wife.[166]

2.78 If the matter is approached from the point of view of defences to an action for aliment, the question at issue is whether it should be a good defence for the defender to prove simply that he is cohabiting with the spouse or other person for whom aliment is claimed. For the reasons explained above we do not think that it should be, and we therefore adhere to the suggestion made in the Memorandum. A defence of this nature should be available to a defender in all cases, no matter who the alimentary claimant may be. It should also be available in the case of an action to recover aliment due under an agreement.[167] We have no doubt that the courts in deciding whether cohabiting defenders are fulfilling, and will continue to fulfil, their obligations will do nothing to encourage frivolous applications. We have also no doubt that the courts, in the face of evidence of persistent and extreme failure by the defender to fulfil his obligations, will not necessarily accept assurances from him that he has mended his ways. In short, we think that the solution recommended will enable the courts to deal with extreme cases of obstinate defenders but will not give rise to vexatious litigation. We therefore **recommend:**

15. It should be a defence to an action for aliment that the defender is living in the same household as the person for whom aliment is

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[161] *Report of the Royal Commission on Marriage and Divorce 1951–55* (Cmd. 9678), paras. 1042 to 1050.

[162] Working Paper No. 53, para. 66.

[163] *Family Law: Report on Matrimonial Proceedings in Magistrates' Courts* (Law Com. No. 77, 1976), paras. 2.58 to 2.65.

[164] Domestic Proceedings and Magistrates' Courts Act 1978, s.25.

[165] Proposition 39 and para. 2.182.

[166] Supplementary Benefits Act 1976, Sch. 1.

[167] See Appendix A, clause 7(3).

claimed and that he is fulfilling, and will continue to fulfil, his alimentary obligation to that person.[168]

Offer to provide support in the home

2.79 *Husband and wife.* Under the present law a spouse who is rejecting, without reasonable cause, an offer to provide support in the home is not entitled to aliment. This result is achieved in a very roundabout way, using the concept of willingness to adhere, and we have recommended above[169] that the present provisions should be replaced by a more general provision. We think that such a provision can most usefully be expressed in the form of a defence to a claim for aliment. The onus should not be on the pursuer to establish that the defender is *not* holding out a reasonable offer to provide support in the home, but rather on the defender to establish that he is. One advantage of this approach is that it avoids express reference to willingness to adhere—a concept which has given rise to considerable difficulty in Scots law.[170] Another advantage is that it enables the same rule to be applied to independent actions for aliment for a spouse and to applications for aliment *pendente lite.* In all cases a wife will be able to claim aliment simply by virtue of her status as wife, without averring any special grounds. We think therefore that the common law rules on willingness to adhere as a condition of entitlement to aliment between spouses and the statutory rules in section 7(1) of the Divorce (Scotland) Act 1976 should be replaced by a general provision to the effect that it is a defence to an action for aliment that the defender, although not cohabiting with the other party to the marriage, is holding out a genuine and reasonable offer to receive that person into his home and to fulfil his alimentary obligation there. There are various circumstances in which an offer could not be regarded as reasonable. One would be where the defender has been guilty of adultery, behaviour or desertion such as to justify a decree of judicial separation. Another would be where the defender was suffering from some condition, such as an infectious disease, which made it unreasonable to expect the pursuer to cohabit with him. Another would be where either spouse had obtained a decree of judicial separation. Yet another would be where the defender was living in a remote or dangerous part of the world. We suggest therefore that an offer should not be regarded as reasonable if, by virtue of any conduct, condition or circumstances (including any relevant court decree) it is unreasonable to expect the other party to cohabit with the defender. The mere fact that the parties have voluntarily agreed to live apart should not, however, by itself be a circumstance making it unreasonable to expect the parties to cohabit. As under the present law,[171] it should be open to either party to revoke an agreement to live apart and, if there is no other circumstance justifying non-adherence, to call upon the other to return.

2.80 *Parent and child.* Under the present law the parent of a legitimate child above the age of 16 has a good defence to an action for aliment by the child if he offers to receive and support the child in his home, provided that this

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[168] *Ibid.*, clause 2(4).
[169] Para. 2.44.
[170] See Clive and Wilson, *op. cit.*, pp. 190 to 192, 425 to 427, 484 to 489.
[171] *Ibid.*, 407 to 411.

would not be detrimental to the child's health.[172] Although there is no authority on the question the position would presumably be the same in relation to an action for aliment by an illegitimate child over the age of 16. In the case of a legitimate child under the age of 16 any dispute arising out of an offer by one parent to meet his obligation of aliment by taking the child into his home would in practice be dealt with in custody proceedings. Custody would be dealt with first and aliment would be regulated accordingly. In the case of an illegitimate child it was at one time the law that the father could meet a claim by the mother for aliment, once the child attained the age of seven (if a boy) or ten (if a girl), by offering to assume custody of the child.[173] This right was abolished by section 2(2) of the Illegitimate Children (Scotland) Act 1930 which provided that:

> "The father of an illegitimate child shall not be entitled to meet a claim for aliment by the mother of such child by an offer to assume custody of such child and his liability for aliment shall not be affected by such offer".

2.81 The present law on this subject seems to be substantially satisfactory and we received no suggestions for radical alteration.[174] We think, however, that the law could usefully be restated in a clearer and more general form applying to legitimate and illegitimate children alike. We suggest that it should be a defence to an action for aliment for a child over the age of 16 that the defender is holding out a genuine and reasonable offer to receive the child into his home and to fulfil his alimentary obligation there. In deciding whether an offer is reasonable the same factors should be taken into account as in the case of a spouse. In other words, an offer should not be regarded as reasonable if by virtue of any conduct, condition or circumstances (including any relevant court decree) it is unreasonable to expect the child to live in the same household as the defender. We do not think that this defence should apply in relation to a child under the age of 16. There should be no suggestion that a claim for aliment for such a child could be defeated by an offer from the other parent to take the child into his home. In relation to a child under the age of 16 any dispute about where the child should live should be settled, as under the present law, in custody proceedings before the question of aliment is decided.

2.82 We therefore **recommend:**

16. It should be a defence to an action for aliment[175] that the defender is holding out a genuine and reasonable offer to receive the person for whom aliment is claimed (not being a child under the age of 16) into his home and to fulfil his alimentary obligation there. An offer should not be regarded as reasonable if, by virtue of any conduct, condition or other circumstances (including any relevant court decree), it would be unreasonable to expect the person for whom aliment is claimed to live in the same household as the defender. A

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[172]See the Memorandum, para. 2.151; *McKay* v. *McKay* 1980 S.L.T. (Sh. Ct.) 111.

[173]See *Corrie* v. *Adair* (1860) 22 D. 897; *Moncrieff* v. *Langlands* (1900) 2 F. 1111; *Macdonald* v. *Denoon* 1929 S.C. 172.

[174]In response to Proposition 31 of the Memorandum (para. 2.156).

[175]Including aliment due under an agreement: see Appendix A, clause 7(3).

voluntary agreement to live apart should not by itself be regarded as a sufficient reason for rejecting an offer.
(Paragraphs 2.79 to 2.81; Clause 2(5) and (6).)

Powers of court

2.83 In this section of the Report we discuss the powers which the court should have in an action for aliment. We do not consider that the court should necessarily have the same powers as it has in relation to financial provision on divorce. The two situations are different. In an action for aliment the court is merely quantifying and regulating a subsisting legal obligation between the parties to a continuing relationship. On divorce the court is winding up a terminated legal relationship. It could be argued that judicial separation is so akin to divorce that the court's powers to deal with the parties' financial arrangements in separation actions should be the same as in divorce actions. To focus debate we put forward a tentative proposal to this effect in the Memorandum.[176] There was strong dissent on consultation. The view was taken that to give the court powers, for example, to award large capital sums or to order transfers of property in separation actions would be undesirable. The powers would be too wide, and the results of exercising them too irremediable, where the marriage still subsists. In the light of these comments we make no recommendations in this Report,[177] which would confer on the court, in actions for separation and aliment, powers similar to those available in actions of divorce.

To award periodical payments of aliment

2.84 At present the usual form of award in actions for aliment is an award of periodical payments of aliment. The decree may provide for aliment to be payable indefinitely or only for a time.[178] There are no general limitations in the present law on the amount of aliment which can be awarded. We suggested in the Memorandum that this should continue to be the case[179] and this was strongly supported on consultation. We also suggested that there should be no maximum duration or maximum initial duration of decrees for aliment.[180] This too was strongly supported on consultation. There was also general support[181] for the view that an award of periodical payments of money was the most appropriate form of award in an action for aliment. We think that the courts, in actions for aliment, should continue to have power to award periodical payments of aliment and that it should be made clear that the award may be for an indefinite or definite period or until the happening of a specified event.[182] We think that it would be generally advantageous if terminating events were specified precisely in the decree so that the parties

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[176]Proposition 46 and para. 2.196.

[177]We shall be giving further consideration to property rights and remedies during marriage in a projected memorandum on matrimonial property.

[178]E.g. "until the rights of the parties shall be fixed by a competent court" or "so long as the defender shall refuse to receive and entertain the pursuer" or "for each child while in the custody of the pursuer and unable to earn a livelihood" or "until [the child] attains the age of sixteen years".

[179]Proposition 49 and para. 2.199.

[180]Proposition 63 and para. 2.225.

[181]In response to Proposition 31, at para. 2.156 (on the method of fulfilling the alimentary obligation); and Proposition 45, at para. 2.195 (on lump sum awards).

[182]See Appendix A, clause 3(1)(*a*).

were left in no doubt as to the circumstances in which payments ceased to be due,[183] but this is not a matter on which legislation is required.

To award lump sums to cover special needs

2.85 In the Memorandum we invited views on the question whether the courts should be given power to award lump sums.[184] We did not favour a power to award substantial capital sums but considered that there might be circumstances where a power to award a small lump sum might be useful to enable a pursuer to meet special needs. It is of interest to note that such a power has now been conferred on the magistrates' courts in England.[185] There was no support on consultation for any power which would allow capital sums to be awarded instead of aliment but some support for a strictly limited power for use in exceptional cases.

2.86 We recommend in the next paragraph that the courts should be given power to backdate awards of aliment. This power would enable the courts to deal with some cases where a small lump sum might be useful. For the rest we think that the court should be given power to order the payment of sums to meet alimentary needs of an occasional or special nature, such as inlying expenses, medical expenses or educational expenses. We would draw a distinction between a lump sum which is designed to enable a particular alimentary expense to be met and a lump sum which is a substitute for a continuing liability: the former should be recoverable as aliment, but not the latter.[186] If this distinction is made clear in legislation we think it will be unnecessary to provide for any financial limit on the amounts which can be awarded. We propose that this power should replace the court's existing powers to order payment of inlying expenses and funeral expenses in relation to an illegitimate child.[187]

To backdate awards

2.87 In the Memorandum we suggested for consideration that the courts should be given power to award aliment for a period which has already elapsed.[188] This power could be useful in cases where, for example, a wife had had to incur debts or support herself at a very low level after being deserted by her husband and before being able to discover his whereabouts.[189] The majority of those consulted agreed with this proposal, although some suggested that backdating should be limited to a certain time prior to the raising of the action and some pointed out that there should be no suggestion that backdating would be normal or automatic. We think that the appropriate

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[183]See the Memorandum, paras. 2.221 to 2.224.

[184]Proposition 45 and paras. 2.193 to 2.195.

[185]Domestic Proceedings and Magistrates' Courts Act 1978, s.2(1). The lump sums may, in particular, be ordered "for the purpose of enabling any liability or expenses reasonably incurred in maintaining the applicant, or any child of the family to whom the application relates, before the making of the order to be met" (s.2(2)). The amount of a lump sum is not to exceed £500 or such larger amount as the Secretary of State may fix by order (s.2(3)).

[186]See Appendix A, clause 3(1)(*b*) and (2).

[187]Illegitimate Children (Scotland) Act 1930, ss.1(2) and 5.

[188]Proposition 44 and paras. 2.190 to 2.192.

[189]The courts in England now have power to award lump sums in such cases: see Matrimonial Causes Act 1973, s.23(3); Domestic Proceedings and Magistrates' Courts Act 1978, s.2. See also Law. Com. No. 25, para. 10; Law Com. No. 77, para. 2.34.

solution is to confer power on the courts, in all cases, to award aliment from the date of raising the action and power, *on special cause shown,* to award aliment for any earlier period.[190] The "cause" might, for example, be the pursuer's inability to trace an absconding defender. If the pursuer has to show special cause and if the court has to take into account the parties' means and circumstances in deciding how much aliment, if any, to award, we think that a time limit on the period of backdating is unnecessary. This power to backdate is intended to be without prejudice to any claim a person may have to recover a contribution towards the past aliment of any other person on principles of unjustified enrichment.[191]

To order security to be provided

2.88 In the Memorandum we also enquired whether the court should be given power to order security to be provided for the payment of aliment.[192] We considered how a power to order aliment to be secured might operate in Scotland, and whether its introduction would be possible or desirable. In England the superior courts,[193] but not the magistrates' courts,[194] have powers to award secured periodical payments. The normal technique involves the preparation of a trust deed;[195] the court has power to direct the matter to be referred to one of the conveyancing counsel of the court for him to settle a proper instrument to be executed by all necessary parties.[196] If it were felt to be necessary or desirable, appropriate techniques could be developed in Scotland. Nevertheless we hesitated to recommend the introduction of a similar system in Scotland. The interest of the alimentary creditor must be balanced against the interests of the alimentary debtor and of his ordinary creditors. Until now the accepted view has been that a man's dependants follow his fortunes, and we are not satisfied that this should be changed under the guise of a simple extension of the court's powers. Moreover, a power to order security to be provided by means of a transfer of money or property to trustees would run counter to the views which were expressed on consultation, to the effect that transfers of capital or property are inappropriate in relation to an award of aliment. For these reasons we make no recommendation for the introduction of such a power.

To counteract avoidance transactions

2.89 Where an application for aliment or for variation of an award of aliment has been made in certain types of proceedings the Court of Session has powers to counteract transactions designed to defeat the applicant's claim.[197] We deal with these powers in Part III of this Report in relation to financial provision on divorce and make various recommendations for changes in the law.[198] The question which arises in relation to aliment is

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[190]See Appendix A, clause 3(1)(*c*).

[191]See paras. 2.53 to 2.54 above.

[192]Proposition 45 and para. 2.195.

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

[194]Domestic Proceedings and Magistrates' Courts Act 1978, s.2. See Law Com. No. 77 para. 2.31.

[195]See Jackson, *Matrimonial Finance and Taxation,* pp. 105 to 115 (1st edn.); Law Com. No. 25 p. 7 n. 26.

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

[197]Divorce (Scotland) Act 1976, ss.6 and 13.

[198]See paras. 3.147 to 3.151 and Appendix A, clause 18.

whether these powers should be available at all and if so in relation to what actions. At present they are available in relation to "an action for separation and aliment, adherence and aliment or interim aliment which has been brought by either party to the marriage".[199] They are not available in relation to a claim for aliment for a child in a divorce action, nor an action for custody and aliment, nor an action for affiliation and aliment, nor an action for aliment by a child against his parent.

2.90 The powers to set aside or interdict avoidance transactions are less necessary in relation to applications for aliment than in relation to applications for capital sums on divorce but could still be useful on occasion. As the powers have been recently introduced we would not feel justified in recommending their repeal. If the powers are to be available in relation to aliment, however, we can see no good reason why they should not be available in relation to all claims for aliment. It would seem to be anomalous, for example, to allow a wife claiming aliment for herself to invoke these powers but not a wife claiming aliment only for her children. We therefore suggest that the Court of Session should continue to have powers to counteract transactions designed to defeat claims for aliment but that these powers should be available in relation to any application for aliment.

To grant warrant for inhibition or arrestment on the dependence

2.91 An inhibition or arrestment on the dependence of an action ensures that the debtor's heritable property, or moveable property held for him by a third party, cannot be disposed of pending the outcome of the action and is therefore available for satisfaction of any amounts found due under the decree. Under the present law inhibition or arrestment on the dependence of an action for aliment can be used only in strictly limited circumstances.[200] The same applies in relation to financial provision on divorce where the matter is of much greater practical importance. In Part III of this Report we recommend, in relation to financial provision on divorce, certain extensions of the courts' powers in this respect, including power to grant inhibitions or arrestments limited to particular items of property or to funds not exceeding a certain amount.[201] We think that the same rules should apply in relation to actions for aliment.

To award less than the amount claimed

2.92 In the Memorandum we pointed out that in some actions for aliment[202] the court has a discretion as to the amount awarded and will not necessarily grant decree for the amount claimed, even if the action is undefended. In others,[203] however, the proceedings are regarded as ordinary actions for

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[199]Divorce (Scotland) Act 1976, s.6(1)(*b*). The powers are also available in relation to an application for variation of an award of aliment (other than an interim award) in such an action which has been made by the pursuer in the action.

[200]See Clive and Wilson, *op. cit.*, p. 207.

[201]See paras. 3.152 to 3.155 and Appendix A, clause 19.

[202]E.g. actions of separation and aliment or adherence and aliment: see *Terry* v. *Murray* 1947 S.C. 10.

[203]E.g. actions of affiliation and aliment. Probably the same rule applies to actions for aliment by a legitimate child against a parent and to actions for aliment alone between husband and wife. Such actions proceed as ordinary actions for debt.

payment of money with the result that, if the defender does not defend and the pursuer requests decree in the appropriate way, the court is bound to grant decree for the sum sued for.[204] We invited views on the question whether the courts should have power, in an undisputed claim for aliment, to award less than the amount claimed.[205] We regarded it as axiomatic that they should not have power to award more. Views were mixed, but there was hardly any support for a simple denial of discretion to the court. One commentator thought that such a solution would be acceptable only in cases where the defender's address was known and personal service had been effected. Another suggested that such a solution would be acceptable only if the defender had the right to apply immediately for a variation in the amount awarded without having to show any change of circumstances. Other commentators argued strongly for a discretion, pointing out that many claims for aliment were inflated and yet defenders still did not defend, and that it could not be assumed that defenders who did not defend could afford to pay the sums claimed. On the whole there was a fairly strong view that the courts should have a discretion to award less than the amount claimed, and we so recommend.[206] This is consistent with our general approach to the alimentary obligation. A claim for aliment is different from a claim for damages or for ordinary debt. The obligation is only to provide such support as is reasonable in the circumstances and it can only be quantified by the court. It will, of course, be for the court in each case to decide whether to exercise its discretion to award less than the amount claimed, but it would presumably be unlikely to do so in an undefended case if the defender's address was known, if he had had notice of the proceedings, and if the claim was not manifestly exorbitant.

To order the parties to furnish details of their means

2.93 From comments made to us, both on consultation and in subsequent correspondence, it would appear that many members of the public are dissatisfied with the way in which the courts reach decisions on the amount of aliment to be awarded. It is said that the courts are too ready to grant applications for aliment without having sufficient information of the needs or resources of either party. The problem is evidently at its most serious when the court is asked to make an award of interim aliment pending the disposal of an action, but it is not confined to this situation. We refer later to various suggestions which have been made to deal with this problem, none of which is entirely satisfactory.[207] In the present context we wish to consider whether the court hearing an action for aliment should be given a statutory power to order a party to furnish details of his or her financial position. In many cases this would simply be a question of supplying a pay slip. It is true that remedies are available under the present law. The pursuer can claim an exorbitant amount in order to force the defender to furnish information. The pursuer can seek a commission and diligence for the recovery of documents.[208] Where the complaint is that the pursuer is not making a full disclosure the court can

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[204]For a more detailed discussion of the present law, see para. 2.208 of the Memorandum.

[205]Proposition 51 and para. 2.208.

[206]See Appendix A, clause 3(1)(*d*).

[207]See paras. 2.121 to 2.122 below.

[208]This can, however, be expensive and has been discouraged by the courts in cases where it is not clearly justified: see *Gould* v. *Gould* 1966 S.C. 88; *Savage* v. *Savage* 1981 S.L.T. (Notes) 17.

simply decline to make an award until further information is produced. It seems to us, however, that there is a strong argument for allowing the court to do in a simple and direct way what can only be done at present in a cumbersome or indirect way. We therefore suggest that in an action for aliment the court should have power at any stage to order either party to furnish specified information about his or her financial position or about the financial position of a child on whose behalf he is acting.[209] We recommend later [210] that the court should have a similar power in relation to aliment *pendente lite* and financial provision on divorce.

2.94 We accordingly **recommend:**

17. The court should have power in an action for aliment
    (*a*) to award periodical payments of aliment, whether for an indefinite or definite period or until the happening of a specified event;
    (Paragraph 2.84; Clause 3(1)(*a*))
    (*b*) to order the payment of sums to meet alimentary needs of an occasional or special nature;
    (Paragraphs 2.85; 2.86; Clause 3(1)(*b*) and (2))
    (*c*) to backdate awards to the date of bringing the action or, on special cause shown, to an earlier date;
    (Paragraph 2.87; Clause 3(1)(*c*))
    (*d*) to award less than the amount claimed, even if the claim is undisputed;
    (Paragraph 2.92; Clause 3(1)(*d*))
    (*e*) to order either party to furnish information about his or her financial affairs or those of a child on whose behalf he is acting.
    (Paragraph 2.93; Clause 20).

2.95 We also **recommend:**

18. In an action for aliment the court should have the same powers to counteract avoidance transactions and to grant warrants for inhibition and arrestment on the dependence as it has in an action for divorce.
    (Paragraphs 2.89 to 2.91; Clauses 18 and 19).

Quantification

2.96 By quantification of aliment we mean the process whereby a court decides how much aliment, *if any,* is due. In relation to the discretionary powers of the courts in this area we can see no useful purpose in distinguishing between liability and quantum. So long as the courts have power to make no award in an appropriate case the two merge into each other in practice. In the Memorandum we suggested that in quantifying aliment the court should have regard to the whole circumstances of the case, subject to legislative guidance on certain points.[211] We suggested that there should be

[209]See Appendix A, clause 20.
[210]Paras. 2.131 and 2.133; 3.140.
[211]Proposition 48 (first part) and para. 2.198.

no general maximum limits on the amount of aliment which could be awarded.[212] There was general agreement with these suggestions. We proceed to consider certain specific points which are relevant to the quantification of aliment.

Needs and resources of the parties

2.97 We have already suggested[213] that the needs of the person claiming aliment and the resources of the person from whom it is claimed should be taken into account in quantifying aliment. We discussed in the Memorandum various aspects of needs and resources which might give rise to doubt or difficulty.[214] We discussed, for example, the relevance of social security and similar payments, [215] of charitable aid,[216] of educational needs[217] and of the possession of capital.[218] Our general approach was that no change in the law was required in this area and that the matter would be adequately catered for if the courts were given a sufficiently wide discretion to take into account the needs and resources of the parties and all the circumstances of the case. Consultation has confirmed us in this general approach. We deal below with cases which require further discussion.

Needs and resources of third parties

2.98 The needs and resources of third parties are, as such, irrelevant to the quantification of aliment. They are extraneous factors and not part of the circumstances *of the case*. In the Memorandum we suggested, as a possible exception to this general rule, that in assessing the needs of a child, account might be taken of the needs of a person who was looking after the child and living with him in the same household.[219] This suggestion was criticised on consultation on the grounds that it was too vague and might require someone to support indirectly a person whom he had no legal obligation to support directly. We accept these criticisms and make no recommendation on this point. It is implicit in the legislation which we are recommending that the needs and resources of third parties would be left out of account in an action for aliment.[220] There would, for example, be no justification under our proposals for a commission and diligence to recover evidence of the total resources of the employer or best friend or lover of a party to an action for aliment. These resources would not as such be part of the needs and resources *of the parties* or the circumstances *of the case*. What might be relevant would be the extent to which a party to the action for aliment derived economic advantages or suffered economic disadvantages as a result of a relationship with a third party. This is a separate problem to which we now turn.

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[212]Proposition 49 and para. 2.199.

[213]Para. 2.39 above.

[214]Paras. 2.92 to 2.119.

[215]Paras. 2.98, 2.109, 2.113 and 2.117.

[216]Para. 2.99

[217]Para. 2.102.

[218]Paras 2.100 and 2.115.

[219]Proposition 22 and para. 2.108.

[220]See Appendix A, clause 4(1)(*a*) ("needs and resources *of the parties*") and clause 4(1)(*c*) ("circumstances *of the case*"). This is subject to clause 4(2) (court to take into account obligation owed by any other alimentary debtor—e.g. other parent of child).

Unenforceable advantages and responsibilities

2.99 Under the existing law the court in assessing the resources of a party to an action for aliment may take into account advantages which he or she in fact enjoys even if they are not legally enforceable. If, for example, a man receives an allowance from a wealthy parent that may be taken into account, even if it is purely voluntary and not part of his income for tax purposes.[221] This seems to us to be reasonable. Similarly, it would seem to be reasonable to take into account the fact that the excess of a man's resources over his needs was greater because he enjoyed full accommodation in a house provided by a wealthy brother or a benevolent employer. In the Memorandum we suggested that this question of unenforceable advantages was a matter which could be left to the discretion of the court. [222] With one qualification, there was no dissent on consultation. The qualification related to the position of the cohabitee of the alimentary debtor. It was said that if the court took into account advantages derived from her[223] the effect might be that she would be required to contribute out of her own earnings or capital to the support of the separated wife. The solution to this difficulty is, we think, implicit in the legislation we are recommending. It is that the courts should not take into account the resources of the cohabitee as such, but may properly take into account unenforceable economic advantages derived by the alimentary debtor from his association with the cohabitee. We can see no good reason for distinguishing between the cohabitee and other third parties in this respect. We therefore recommend no legislative restriction on the extent to which the court can have regard to unenforceable advantages enjoyed by either party to the alimentary relationship.

2.100 In general we think that the extent to which the responsibilities of a party to an action for aliment can be taken into acount is a matter which can be left to the discretion of the court. If the existing law is any guide the court would be unlikely to say that an alimentary creditor should receive an increased aliment because of his responsibilities to someone whom he had no obligation to support. A student son, for example, would be unlikely to be awarded increased aliment from his father to enable him to support a woman with whom he was cohabiting. We think, however, that there are convincing practical reasons for drawing a distinction in this respect between the situation of the person claiming aliment and that of the person from whom aliment is claimed. Under the existing law the court will have regard to the obligations of the latter towards other members of his household only if the obligations are legally enforceable. A husband, for example, who is sued for aliment by his wife can claim that his legal obligations to support his children can be taken into account, but cannot successfully argue that his factual support of another woman and her children should be taken into account.[224]

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[221] *Syme* v. *Syme* (1833) 11 S. 305; *Alexander* v. *Alexander* 1957 S.L.T. 298 at 303.

[222] Para. 2.114

[223] There is little authority on this question in Scots law. In *Boyd* v. *Boyd* 1978 S.L.T. (Notes) 55 and *Craig* v. *Craig* 1978 S.L.T. (Notes) 61 the Lord Ordinary referred to the cohabitee's earnings in fixing a periodical allowance on divorce, but it is not clear whether they affected the amounts awarded (£5 a week in each case). In *Forbes* v. *Forbes* 1978 S.L.T. (Notes) 80 the Lord Ordinary expressly left a cohabitee's earnings out of account.

[224] See *Hope* v. *Hope* (1956) 72 Sh. Ct. Rep. 244; *McCarrol* v. *McCarrol* 1966 S.L.T. (Sh. Ct.) 45; *Hawthorne* v. *Hawthorne* 1966 S.L.T. (Sh. Ct.) 47; *McAuley* v. *McAuley* 1968 S.L.T. (Sh. Ct.) 81; *Henry* v. *Henry* 1972 S.L.T. (Notes) 26.

This can give rise to unfortunate results, particularly as for supplementary benefit purposes a man's requirements include those of a woman with whom he is living as husband and wife and those of children under the age of 16 who are in his household.[225] The difficulties which may arise in practice are illustrated by the case of *Henry* v. *Henry*.[226] A divorced man was living with a married woman, her child by him, and her child by another man. His wage was just sufficient to support this household, and he applied for a decrease in the amounts of periodical allowance and aliment which he had been ordered to pay for his former wife and legitimate children. For supplementary benefit purposes, he had virtually no superfluity of resources and so, although he had been failing to support his old family and they had been living on supplementary benefit, the Supplementary Benefits Commission had made no attempt to recover from him. The position, therefore, was that the old family was supported by the State and the new family was supported by Mr. Henry. Lord Fraser, though recognising that the supplementary benefit rule was convenient and sensible, felt obliged by the existing law to disregard the cost of maintaining the paramour and her child by another man and refused to vary the amounts of periodical allowance and aliment payable. He reached this result with some misgivings, as he had little doubt that the amounts due would not be paid: Mr. Henry would continue to support his new family: Mrs. Henry and her children would continue to be supported by the State: the Supplementary Benefits Commission would not take action against Mr. Henry who, on their rules, had no surplus resources: Mrs. Henry, who was receiving regular payments of supplementary benefit, would have no incentive to enforce the decree in her favour.

2.101 It is unsatisfactory if the courts feel compelled to pronounce decrees which they know are unrealistic and will not be enforced. In the Memorandum we suggested that the courts should be given a specific discretion to take into account the requirements of members of an obligant's household who are in fact dependent on him, even if they have no legal right to aliment from him.[227] This suggestion was strongly supported on consultation and we recommend that effect should be given to it. We think, however, that the rule should be formulated in a different way. The reference to the requirements of other family members is potentially misleading. The relevant question relates not to the requirements of third parties but to the effect, if any, which those requirements have on the economic position of the alimentary debtor. We therefore recommend that it should be made clear that in having regard to all the circumstances of the case the court should be able, if it thinks fit, to take into account the responsibilities of the alimentary debtor to any dependent member of his household whether or not that person is legally entitled to aliment from him.

2.102 We make this recommendation in order to remove a restriction on the court's discretion. It is intended to be without prejudice to the court's general power to have regard to the needs and resources of the parties and all the

[225]Supplementary Benefits Act 1976, Sch. 1 as amended by Social Security Act 1980, Sch. 2.

[226]1972 S.L.T. (Notes) 26. Although this was a divorce case it involved *inter alia* aliment for children and the problems raised could also be raised in a straightforward action for aliment.

[227]Proposition 25 and para. 2.116. If any children have been accepted by the obligant into his family there will be a legal obligation—see paras. 2.18 to 2.30 above.

circumstances of the case. We are not, we need hardly add, recommending that a man's new family should always come before his old, but merely that the court should have a discretion to take his responsibilities to his new family into account.[228] This should enable unrealistic results to be avoided.

Earning capacity

2.103 A person's actual earnings will be included within his resources. His earning capacity might not, however, be regarded as falling under that head. It is a factor of some importance in the quantification of aliment[229] but is not one on which rigid rules can be laid down. The assessment of earning capacity in any case will depend on factors such as the age, health and previous experience of the person concerned as well as on the availability of suitable employment. We think that earning capacity should be specified as a factor to be taken into account by the court, but that the way in which it is taken into account in any particular case should be left to the discretion of the court.

Conduct

2.104 The present law is not entirely consistent as to the effect of conduct on aliment.[230] The traditional view was that it did not affect the obligation between parent and child[231] and, probably, that it did not affect the obligation of a husband to support his wife, so long as she was willing to adhere.[232] Under section 7(2) of the Divorce (Scotland) Act 1976, however, the court, in determining the amount of aliment, if any, to be awarded in a decree of separation and aliment, adherence and aliment or interim aliment, is directed to have regard to the same factors as in relation to an award of financial provision on divorce. These factors include the conduct of the parties.[233] The present law, therefore, is that conduct may be taken into account in quantifying aliment for a spouse.

2.105 In the Memorandum we examined the approaches taken by various other countries to this question.[234] We noted that in French law, which had originally been similar to Scots law in ignoring conduct, recent changes had enabled the courts to discharge the alimentary obligant of the whole or part of his liability if the person claiming aliment had seriously failed in his duties towards the alimentary obligant.[235] We also noted that the matter was under consideration by the Law Commission in relation to the award of mainte-

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[228]This is already the position in England: see *Roberts* v. *Roberts* [1970] P. 1. See also the Finer Report, paras. 4.48 and 4.203 to 4.205.

[229]See the Memorandum, paras. 2.95 to 2.97 and 2.112. See also the Morton Report, para. 493—"the court should . . . have regard in every case to what may be termed the wife's potential earning capacity . . .".

[230]In relation to financial provision on divorce, however, it is clear that conduct can be taken into account by the court in deciding what award, if any, to make: see para. 3.172 below.

[231]See Fraser, *Parent and Child* (3rd edn.), p. 107; *A.B.* v. *C.D.* (1848) 10 D. 895; *Maule* v. *Maule* (1825) 1 W. & S. 266.

[232]Thus a cruel or adulterous wife could recover aliment from her husband: see *Nisbet* v. *Nisbet* (1896) 4 S.L.T. 142; *Milne* v. *Milne* (1901) 8 S.L.T. 375; *Donnelly* v. *Donnelly* 1959 S.C. 97; *Beveridge* v. *Beveridge* 1963 S.C. 572 at p. 582; *Malcolm* v. *Malcolm* 1976 S.L.T. (Sh. Ct.) 10. But cf. *Taylor* v. *Taylor* (1903) 11 S.L.T. 487.

[233]See para. 3.172 below.

[234]Paras. 2.121 to 2.123 and 2.133.

[235]*Code civil* Art. 207 (parent and child—as amended by law of Jan. 3, 1972); Art 303 (husband and wife—as amended by law of July 11, 1975).

nance in the English magistrates' courts.[236] Since then the Law Commission have reported on this question[237] and their recommendations have been implemented in the Domestic Proceedings and Magistrates' Courts Act 1978. The Law Commission's recommendation, made after extensive consultation, was that

> "in deciding whether to order one party to a marriage to make financial provision for the other, and if so what provision to order, magistrates should be required to have regard to the conduct in relation to the marriage of the parties to the extent to which it is just to do so".[238]

The Law Commission did not recommend that conduct should be taken into account in relation to financial provision for children and there is no express reference to this situation in the 1978 Act.[239]

2.106 The arguments for leaving conduct out of account altogether in deciding how much aliment, if any, should be awarded are (a) that it simplifies the proceedings and precludes an unpleasant investigation into the whole history of the parties' relationship and (b) that it prevents variations between cases due solely to the views which different judges have on different types of conduct. The argument against leaving conduct out of account altogether is that in certain cases this would be widely regarded as unfair. Is the unemployed husband who has brutally ill-treated his working wife for years and driven her from the home to be entitled to aliment from her as if nothing had happened?

2.107 In the Memorandum we invited views on the relevance of conduct but, to focus discussion, adopted the preliminary position that conduct should be relevant in quantifying aliment in any case in which it would clearly lead to injustice to leave it out of account.[240] The overwhelming majority of those consulted thought that the court should be able to have regard to conduct. Within this group some favoured a restriction to extreme or "gross and obvious" cases while others favoured giving the courts an unfettered discretion.

2.108 The results of our consultations, of the Law Commission's consultations, and of recent considerations of the question by Parliament[241] all suggest that the courts should not be precluded entirely from taking conduct into account in actions for aliment between spouses. On the other hand the arguments in favour of some limitation on the role of conduct are strong ones. We think the appropriate solution is to provide that in an action for aliment between husband and wife the court should take account of conduct only if it

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[236]Working Paper No. 53 (1973), para. 45.

[237]Law Com No. 77, 1976.

[238]*Ibid.*, para. 2.25. See also Domestic Proceedings and Magistrates' Courts Act 1978, s.3(1)(*g*) (court to have regard to "any other matter which in the circumstances of the case the court may consider relevant, including, so far as it is just to take it into account, the conduct of each of the parties in relation to the marriage").

[239]Conduct could presumably be considered under the heading of "all the circumstances of the case": see 1978 Act, s.3(2).

[240]Proposition 48 and para. 2.198.

[241]Divorce (Scotland) Act 1976, s.7(2); Domestic Proceedings and Magistrates' Courts Act 1978, s.3.

is satisfied that it would be manifestly inequitable not to do so. This formula seems to us to be equally suitable in relation to other actions for aliment, such as an action by a student son against a parent.

Other factors

2.109 We have considered whether legislation to give effect to the proposals made in this section of the Report should contain a detailed list of factors which might be relevant to the quantification of aliment or should simply list the more important factors, along with any limitations on the court's discretion, and for the rest direct the court to have regard to all the circumstances of the case. No list of factors can be exhaustive, so that a general reference to "all the circumstances of the case" or some such formula will always be necessary. This being so, we can see little value in a lengthy list of factors which might be relevant in certain cases. Such a list would merely give an air of spurious precision to a provision which was inherently imprecise. Our preference is for a fairly brief statutory provision.

2.110 We therefore **recommend:**

19. The court should be directed, in deciding how much aliment, if any, to award, to have regard to the needs, resources and earning capacities of the parties and to all the circumstances of the case. In having regard to all the circumstances of the case the court should be empowered, if it thinks fit, to take into account the responsibilities of the alimentary obligant towards any member of his household who is in fact dependent on him, whether or not legally entitled to aliment from him, and should be directed to have regard to the conduct of any party only if it is satisfied that it would be manifestly inequitable not to do so.
(Paragraphs 2.96 to 2.109; Clause 4).

Variation, recall and expiry of decrees

General power to vary or recall

2.111 The statutes conferring jurisdiction to award aliment have usually also conferred power to vary or recall any order made.[242] Curiously, however, this was not done by section 9 of the Conjugal Rights (Scotland) Amendment Act 1861, so that there is no express power to vary an award of aliment for a child in a divorce action.[243] In practice this defect is surmounted by reserving leave to apply for variation in the interlocutor awarding aliment. In the Memorandum we suggested that the statutory position should be rationalised and that there should be a general statutory provision making it clear that a decree for aliment would be subject to variation or recall on a change of circumstances.[244] There was unanimous support for this suggestion on consultation. We therefore **recommend:**

20. A decree for periodical payments of aliment should always be capable of variation or recall on a change of circumstances.[245]

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[242]Guardianship of Infants Act 1925, s.3; Illegitimate Children (Scotland) Act 1930, s.1(4); Children and Young Persons (Scotland) Act 1932, s.73; Matrimonial Proceedings (Children) Act 1958, s.14(3).

[243]*Sanderson* v. *Sanderson* 1921 S.C. 686; *Bain* v. *Douglas* 1936 S.L.T. 418.

[244]Proposition 56 and para. 2.215.

[245]See Appendix A, clause 5(1).

Interim orders

2.112 In the Memorandum we proposed that it be made clear that the courts always have power to make interim orders pending the disposal of an application for the variation of aliment payable under a court decree.[246] This was strongly supported on consultation. Until 1977 there was some doubt as to the competence of interim orders in the sheriff court, although the position in the Court of Session was reasonably clear.[247] The sheriff has now been given express power to make interim orders in relation to an application for variation of aliment.[248] The problem identified in the Memorandum has therefore been dealt with. For the sake of completeness, however, we **recommend:**

21. The statutory powers of the court in relation to an application for variation or recall of a decree for aliment should include power to make interim orders.[249]

Retrospective variation and other powers

2.113 It is not clear whether it is possible to backdate a variation of a decree for aliment. In one sheriff court case[250] a variation downwards was backdated, so as to relieve the husband retrospectively of liability for a period when the wife's needs had diminished. It may easily happen that an application for variation is not made until some time after a relevant change of circumstances, either because the applicant is ignorant of the true position or because he trusts the other party to comply with an informal readjustment of the amounts payable, and we suggested in the Memorandum that a power to backdate a variation might be useful.[251] We also suggested that a power to order reimbursement of past payments of aliment might be useful, for example where a wife had continued to receive her full entitlement of aliment without disclosing that she had taken up full-time employment.[252] There was a mixed reaction to these suggestions on consultation. Some commentators agreed with them. Others thought that they could encourage delay in applying for a variation and that retrospective variation could be unjust. It was suggested that cases where a backdated variation would be desirable could be dealt with by making the current award at a suitably higher or lower rate. We deal with these arguments in turn.

2.114 Whether a power to backdate variations would encourage delay in applying for a variation would depend on how the power was exercised. We would be very surprised if courts exercised it in such a way as to encourage delay. An applicant could never be sure that the court's discretion would be exercised in his favour and would therefore still have a strong incentive to make an early application. We find it hard to imagine that any solicitor would

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[246]Proposition 59 and para. 2.219.

[247]See the Memorandum, para. 2.219.

[248]Act of Sederunt (Interim Orders for Aliment etc.) 1977 (S.I. 1977/1723). Cf. Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976 (S.I. 1976/476), rule 79: applications for variation or recall are to be made by summons.

[249]See Appendix A, clause 5(3).

[250]*A.M.* v. *H.M.* (1955) 71 Sh. Ct. Rep. 242.

[251]Proposition 57 and para. 2.217. See also Proposition 61 and para. 2.221 (on retrospective recall).

[252]*Ibid.*, para 2.217.

advise a client that there was no need to apply promptly for a variation because the court could always backdate. The argument that backdating could be unjust has some force. It is, however, equally true that failure to backdate could be unjust. The advantage of conferring a discretion on the court is that it would be able to exercise the discretion in cases where justice so required, and to decline to exercise it in other cases. The argument that the situation could be met by an increased or decreased current award rather than by retrospective variation is not, we think, a very strong one. This technique would be a crude one because there would be no way of knowing how long the distorted award would continue. The result might often be that no reasonably fair or accurate allowance or discount could be arrived at in order to cater for a past change of circumstances. In particular the technique would not be appropriate in all cases where a retrospective variation downwards might be called for. It may happen, for example, that a husband is seriously injured and taken to hospital. On his discharge, still unfit for work, he may wish to apply for a variation of an award of aliment against him and may wish to have it backdated so as to reduce the arrears which have accumulated against him while he was in hospital. This seems to us to be a more appropriate solution than to allow the wife to do diligence for the arrears of aliment, and to reduce still further any future payments.

2.115 We remain of the view that a power to backdate a variation could be useful. The courts should, we think, be able to adjust the amount of aliment to changing circumstances, and to do this effectively they require a limited power to make retrospective variations. We agree, however, that any power to backdate a variation to before the date of application for variation should be exercised only on special cause shown. It should be an exceptional measure rather than a routine one. As a corollary of its power to backdate a variation the court should also have power to order reimbursement of sums overpaid. This would help to remove the incentive which the present law gives to the alimentary creditor to conceal improvements in his or her financial circumstances. Again we envisage that this power would be used only exceptionally and only in cases where justice so required.

2.116 In short, we think that the court should have powers to backdate a variation and to order reimbursement of sums paid similar to those which it has in relation to the original award. In addition to these powers the court should also, we suggest, have the same powers *mutatis mutandis* in relation to an application for variation of aliment as it has in relation to the original action, and should have regard to the same factors in quantifying the aliment due. This means that the court would have power to award sums to meet alimentary needs of an occasional or special nature, to award less than the amount claimed, to order disclosure of financial information and to counteract avoidance transactions.

2.117 We therefore **recommend:**

22. In an application for variation or recall of a decree for aliment (other than interim aliment *pendente lite*) the court should have the same powers, and should have regard to the same factors, in

deciding how much aliment, if any, to award, as in an action for aliment.[253]

Automatic variation or index-linking

2.118 In a time of rapidly changing money values, the question arises whether there should be any provision for automatic variation of awards of aliment to take account of inflation.[254] Such provision is not unknown in other countries.[255] While the idea of automatic revaluation is superficially attractive, we consider that there are compelling reasons why it should not be introduced.[256] While it may cater for an increase in the needs of the creditor, it ignores the position of the debtor. Most wages may have gone up but his may not. The change in circumstances of either party may bear no relation to whatever arbitrary rate of increase may be selected for revaluation (such as the retail price index). There was no suggestion on consultation that there should be any provision for index-linking of alimentary awards[257] and we therefore make no recommendation on this matter.

Variation of Court of Session decrees in sheriff court

2.119 The Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 gave the sheriff court certain powers to vary or recall alimentary orders made in consistorial actions in the Court of Session.[258] The procedure is regulated by Act of Sederunt.[259] An application for variation is made by initial writ and proceeds as an ordinary action. A certified copy of the initial writ is lodged in the Court of Session process. In defended cases, the various steps of the Court of Session process (or certified copies of those which cannot be borrowed) must be lodged in the sheriff court process. Any party other than the applicant can require the application to be remitted to the Court of Session. We sought views on the efficacy of this procedure in practice.[260] Some commentators, including the Law Society of Scotland and the Society of Writers to Her Majesty's Signet, thought that some simplification of the procedure was required. We endorse these comments and draw them to the attention of the Court of Session and Sheriff Court Rules Councils.

Expiry

2.120 A decree for aliment will expire on the occurrence of an event specified in the decree, such as the attainment of a specified age by a child. It

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[253]See Appendix A, clause 5(2) and (4).

[254]See the Memorandum, para. 2.218.

[255]In West Germany, for example, aliment for an illegitimate child is awarded in terms of a "standard aliment" (Regelunterhalt) which is the amount deemed to be necessary for support of a child living a simple mode of life in the care of its mother: see B.G.B. s.1615f. The amount may vary according to the age of the child and regional variations in the cost of living. The "standard aliment" may be altered by the Government to take account of changes in the cost of living.

[256]An attempt to introduce automatic revaluation was made in the 1979–80 Session of Parliament (the Affiliation Orders and Aliments (Annual Up-Rating) Bill, later renamed the Child Maintenance Orders (Annual up-rating and exemption) Bill). This Bill, which did not become law, was rejected by the Government for substantially similar reasons to those advanced in this Report.

[257]We had provisionally suggested in Proposition 58 and para. 2.218 that there should be none.

[258]S.8.

[259]Act of Sederunt (Variation and Recall of Orders in Consistorial Causes) 1970 (S.I. 1970/720).

[260]Proposition 60 and para. 2.220.

is implicit in our earlier proposals[261] that events other than those specified in the decree or those which bring about termination of the alimentary relationship in question will not automatically terminate the obligation to pay under the decree, but will merely justify an application for variation or recall.[262] This result was accepted on consultation. The power to backdate variations should prevent hardship in cases where, for example, the parties' means or needs have changed drastically but the interested party has been unable for some good reason to seek a variation, or where spouses have resumed cohabitation for a period in an unsuccessful attempt at reconciliation and have not bothered to apply for variation or recall of the decree.

Procedural questions

Ascertainment of means

2.121 In the Memorandum we referred to suggestions that the defender in an action for aliment should be bound to provide details of his means whether or not he intended to defend.[263] We doubted the value of these suggestions. If the sanction for non-compliance was merely to be that decree might be awarded against the defender for the amount claimed, then there would be no advance on the present law. If the sanction was to be imprisonment, then an over-powerful weapon would have been placed in the hands of wives and children. Consultation[264] has confirmed us in these views. There was general opposition to the suggestion that defenders should be under a duty to disclose their financial circumstances whether or not they intended to defend and we think that no such rule should be introduced.[265]

2.122 There has been much discussion in England on the use of means questionnaires,[266] possibly supplemented by enquiries carried out by means assessment officers attached to the courts.[267] A suggested form of affidavit of means, including a questionnaire, is in use in English divorce proceedings but its use is optional.[268] The Law Commission have discussed the use of means questionnaires in relation to both interim orders[269] and other maintenance proceedings[270] in magistrates' courts; they have concluded that neither the

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[261]I.e. our proposals that needs and resources should not be regarded as conditions of entitlement but simply as factors relevant to quantification, and that support in the home and offers of support in the home should merely be defences to an action for aliment. See paras. 2.39 to 2.45; 2.74 to 2.82.

[262]Propostion 62 in the Memorandum (at para. 2.224) was to this effect.

[263]Para. 2.209; see also the Finer Report, para 4.447.

[264]On Proposition 52 of the Memorandum, para. 2.209.

[265]But see our recommendation in para. 2.93 above on the powers of the court to order information to be provided.

[266]See *Report of the Committee on Statutory Maintenance Limits* (1968) Cmnd. 3587, paras. 214 to 222; *Report of the Committee on the Enforcement of Judgment Debts* (The Payne Report) (1969) Cmnd. 3909, para. 1273; The Law Commission's Working Paper No. 53 (1973); Finer Report, para. 4.117.

[267]*Report of the Departmental Committee on Imprisonment by Courts of Summary Jurisdiction in Default of Payment of Fines and Other Sums of Money* (1934) Cmd. 4649, paras. 256, 258 and 259; *Report of the Committee on Statutory Maintenance Limits* (1968) Cmnd. 3587, para. 217. The Finer Committee envisaged that its proposed family courts would be able to obtain assistance from ancillary services "by way of investigation or expert assessment of circumstances": para. 4.405.

[268]Practice Note (Family Division: Affidavit of Means), 22 Dec. 1972, [1973] 1 W.L.R. 72.

[269]Working Paper No. 53 (1973), para 101; see also paras. 87 to 90.

[270]*Ibid.*, para. 101.

applicant nor the respondent should be compelled to fill up such a questionnaire.[271] To a large extent the suggestions on this point in England have been designed to remedy the unstructured proceedings in magistrates' courts, which may well result in the parties turning up at a hearing with no clear idea of what information will be expected of them and with inadequate evidence of means. To this extent these recommendations have little application in Scotland, where the procedure is structured so that the parties and their advisers realise what is required at the proof: the pursuer will include averments of her means in the summons and the defender has an opportunity to counter with his own averments. To require this information to be embodied in a means questionnaire would be a minor change of form. We are therefore content merely to refer to this possibility, without making any formal recommendation.

Procedure for contesting amount of aliment

2.123 We discussed in the Memorandum whether a defender should be obliged to lodge defences if he wished to contest only the amount of aliment.[272] The Grant Committee on the Sheriff Court had recommended[273] that, as in the Court of Session procedure in consistorial actions at that time, a defender who was not contesting the substantive grounds of action should be able to lodge a minute showing that he proposed to defend only on the amount of aliment or alternatively indicate this intention in his notice of appearance. The Court of Session practice, however, has now been changed: procedure by way of minute in consistorial actions defended only on aliment and financial provision has been replaced by procedure by way of defences.[274] This is essentially a detailed matter of procedure on which we wish to make no recommendation.

Summary cause procedure

2.124 The Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963, as amended in 1976, provides:

> "(1) An action of interim aliment by one party to a marriage against the other may competently be brought before the sheriff as a summary cause if the aliment claimed in the action does not exceed—
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> (i) the sum of £25 per week in respect of the pursuer; and
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> (ii) the sum of £7.50 in respect of each child (if any) of the marriage; . . . "[275]

These amounts may be varied by order of the Lord Advocate.[276]

2.125 This provision will require amendment if effect is given to our recommendation that the distinction between actions for interim aliment and actions for permanent aliment should be abolished.[277] The simplest way of

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[271]Law Com. No. 77 (1976), para. 4.26.

[272]Para. 2.210.

[273](1967) Cmnd. 3248, para. 609.

[274]Rules of Court, rule 170D(5) as substituted by S.I. 1976/1994.

[275]S.3, as amended by s.8 of the Divorce (Scotland) Act 1976. The 1963 Act followed on recommendations in the *Seventh Report of the Law Reform Committee for Scotland* (1959) Cmnd. 907.

[276]S.3(2A).

[277]Para. 2.59 above.

amending it would be to strike out the word "interim". We suggested in the Memorandum, however, that there was a case for making summary cause procedure available for any action for aliment alone in which the amounts claimed were under the statutory limits.[278] The practical effect, under our proposals, would be to extend the procedure to actions for aliment by a child against a parent. There was general agreement with this suggestion. We also suggested that summary cause procedure might be made available for actions of affiliation and aliment, with power being given to the sheriff to remit the case to his ordinary roll if paternity were denied. There was objection to this on consultation, on the ground that actions of affiliation and aliment would never be appropriate for summary cause procedure. We accept this and now confine our proposal to actions in which the conclusion is for aliment alone—it would exclude, therefore, actions for separation and aliment, adherence and aliment, and affiliation and aliment. If the relationship giving rise to the alimentary obligation is denied then, as under the present law, the action can be sisted to enable the question to be decided by an action for declarator.[279]

2.126 We therefore **recommend:**

23. It should be competent to raise any action for aliment alone as a summary cause if the aliment claimed in the action does not exceed an appropriate figure which should be variable by order of the Lord Advocate.[280]

The figures should initially be the same as those currently applying to actions of interim aliment in terms of section 3(1) of the Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963.

Interest on arrears

2.127 The forms of crave for aliment in common use in the sheriff courts include a request for interest on each payment from the date when it falls due until payment.[281] The older styles for actions for aliment in the Court of Session also included a conclusion for interest on each instalment.[282] However, in concluding for aliment for children in divorce actions it is not now customary to ask for interest. Even in the absence of a decree awarding interest on arrears of aliment, it is probable that interest is due *ex lege* on arrears due but unpaid.[283]

2.128 In the Memorandum we suggested for consideration that interest should no longer run on arrears of aliment.[284] We pointed out that the

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[278]Proposition 50 and para. 2.203.

[279]*Benson* v. *Benson* (1854) 16 D. 555; *Casey* v. *Casey* (1925) 41 Sh. Ct. Rep. 300; *Campbell* v. *Campbell* (1932) 48 Sh. Ct. Rep. 40.

[280]See Appendix A, clause 23.

[281]See Lees, *Sheriff Court Styles* (4th edn., 1922), p. 78; Lewis, *Sheriff Court Practice* (8th edn., 1939), pp. 496 to 499; Dobie, *Sheriff Court Styles* (1951), pp. 24 to 27.

[282]See *Encyclopaedia of Scottish Legal Styles* (1935) Vol. 1, pp. 181 to 182. Cf. the decrees in *Dunn* v. *Matthews* (1842) 4 D. 454 and *Macnaughton* v. *Macnaughton* (1850) 12 D. 703.

[283]Cf. *Hill* v. *Gilroy* (1821) 1 S. 33; *Pott* v. *Pott* (1833) 12 S. 183; *Moncrieff* v. *Waugh* (1859) 21 D. 216; *Dunnet* v. *Campbell* (1883) 11 R. 280. The rate of interest exigible under a decree is, unless otherwise stated in the decree, the rate laid down from time to time by Act of Sederunt: see Rules of Court, rule 66 as amended.

[284]Proposition 55 and para. 2.214.

calculation of arrears may be difficult if the interest on small weekly payments has to be included. This is not important if the creditor is collecting his own aliment: he can simply forget about interest. It would, however, be important if a system of collecting officers were introduced. If interest on arrears had to be calculated the system would become much more cumbersome and expensive. There was, however, a mixed reaction to our proposal on consultation and in these circumstances we do not feel justified in recommending any change at the present time. The matter can be reviewed in the context of the collection and enforcement of aliment.

Time limits in actions of affiliation and aliment

2.129 In Scots law, unlike some other systems,[285] there is no time limit after the birth of an illegitimate child within which an action of affiliation and aliment must be brought. In the Memorandum we suggested that there should be no change in the law on this point.[286] Most of those consulted agreed but a few thought that there should be some time limit. One suggestion was for a time limit of five years from the child's birth. Another was that the right to seek to establish paternity should not be extinguished by prescription but that the right of the pursuer to aliment from the date of the child's birth, where there is long delay in raising the action, should be subject to the discretion of the court. We have given careful consideration to these views. There are three questions at issue. The first relates to a finding of paternity. We agree that this should not be subject to any time limit. The second relates to the mother's right to recover the father's share of the *past* aliment for the child. This claim is based on principles of unjustified enrichment. It is not an alimentary claim at all but a claim by the mother, on her own account, to recover from the father money which she has spent, which has benefited him without any intention of donation on her part, and which he is liable to reimburse. It would be affected by the five year prescription contained in the Prescription and Limitation (Scotland) Act 1973.[287] The third question, and the one which mainly concerns us here, relates to an action for future aliment for the child. We remain of the view that any special time limit on raising such an action is unnecessary and might produce injustice, particularly in cases where the parents had been cohabiting for some years after the child's birth, or where the father had been paying aliment voluntarily, or where the father had gone abroad. More fundamentally, we remain of the view that it is the child's aliment which is in question and that the child should not be prejudiced by delay or lethargy on the part of anyone else. We received no evidence of any practical difficulties caused by the present law. For these reasons we make no recommendation for any change in the law on this point.

INTERIM ALIMENT PENDENTE LITE

2.130 The court hearing an action of divorce, separation, adherence, declarator of marriage, declarator of nullity of marriage, or aliment

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[285]See e.g. in England the Affiliation Proceedings Act 1957, ss. 1 and 2 (criticised in Lasok, "Time Factor in Affiliation Proceedings" 120 N.L.J. 679 (1970)); the French *Code civil,* Arts. 340 to 344; the New Zealand Domestic Proceedings Act 1968. There is, however, no time limit in West German law.

[286]Proposition 42 and para. 2.186.

[287]S.6 and Sch. 1, para. 1(*b*).

(including an action for interim aliment between husband and wife, and an action of affiliation and aliment) may, under the present law, award interim aliment *pendente lite,* i.e. pending disposal of the action.[288] Inevitably, as interim aliment pending disposal can be applied for at the earliest stage of an action on the basis of a *prima facie* case, the court has a wide discretion as to its award. It may, for example, be refused if the defender denies the existence of the alimentary relationship.[289] In the Memorandum we asked whether the law on interim aliment *pendente lite* was satisfactory.[290] There was general agreement that it was, although one commentator thought that the present law could be "distilled" into a simpler form. There was also some criticism to the effect that the courts tended to make awards on the basis of inadequate information and that such awards could then be used as the basis of subsequent awards in the action.

2.131 The fundamental difficulty in relation to interim aliment *pendente lite* is that awards have to be made before the facts have been properly established. For this reason the normal rules on entitlement, defences, quantification and the powers of the courts cannot apply without qualification. This is why we have expressed our recommendations on these matters in terms of "actions for aliment" and have defined that term in such a way as to exclude applications for interim aliment *pendente lite.* It is clear that in relation to aliment *pendente lite* the court must have a wide discretion. It must be able to award aliment to someone who may in the end of the day turn out not to be entitled to aliment. It must be able to order aliment to be paid on an interim basis by someone who may in the end of the day turn out to have a good defence. It must be able to quantify an interim award in a rough and ready way on the basis of incomplete information: any other solution would result in delay which would frustrate the whole purpose of an interim award. On the other hand the court does not need, and arguably should not have, in relation to an application for interim aliment *pendente lite,* the full range of powers available at the stage of a final award when the facts have been ascertained. We do not think, in particular, that the court should have, in relation to interim aliment *pendente lite,* power to order lump sums to meet alimentary needs of an occasional or special nature, or the power to backdate awards, or the power to counteract avoidance transactions.[291] This leaves, as appropriate to an interim award, the power to order periodical payments of aliment until a date not later than the date of disposal of the action, the power to award less than the amount claimed (clearly necessary in this situation) and the power to order either party to furnish information about his or her financial affairs. The court should also have power to vary or recall a decree for interim aliment *pendente lite* on a change of circumstances. It is not unknown for such interim decrees to regulate the position for many months. Within that time the parties' financial circumstances can change radically.

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[288]See Clive and Wilson, *Husband and Wife* (1974), pp. 211 to 216; *Ballard* v. *Campbell* (1953) 69 Sh. Ct. Rep. 127 (interim aliment awarded in action of affiliation and aliment where defender's admissions made some liability an inevitable result); *Pott* v. *Pott* (1833) 12 S. 183.

[289]*Murison* v. *Murison* 1923 S.C. 40; cf. *Boyle* v. *Boyle* 1977 S.L.T. (Notes) 69.

[290]Proposition 38 and para. 2.176.

[291]If, however, there is a claim for aliment (other than aliment *pendente lite*) or for financial provision on divorce the anti-avoidance powers will be available at the earliest stage: see Appendix A, clause 18. Cf. Divorce (Scotland) Act 1976 s.6; *Johnstone* v. *Johnstone* 1967 S.C. 143.

2.132 It is not entirely clear under the present law whether a person who is averring that no marriage exists (e.g. in an action for declarator of nullity of marriage, or in defence to an action for divorce or declarator of marriage) can nonetheless successfully claim interim aliment *pendente lite*.[292] On principle we think that a person should not be able to deny a relationship and at the same time claim aliment on the strength of it.

2.133 We therefore **recommend:**

24. It should be competent for a party to an action for aliment or a consistorial action to apply for an award of interim aliment *pendente lite* against the other party to that action if, but only if, on his own averments there is an alimentary obligation between himself (or any person on whose behalf he seeks aliment) and the other party to the action. In relation to such an application the court should have power to order periodical payments of aliment until such date, not later than the date of disposal of the action, as it may specify, and to vary or recall any such order. It should have power, as under the present law, to award less than the amount claimed, or to make no award, even if the claim is undisputed. It should also have power to order either party to provide information about his financial position.[293]

2.134 If implemented this recommendation would change the law in three respects. First, it would make it clear that a person who denies the existence of a marriage cannot claim aliment on the strength of it. Second, it would mean that an application for interim aliment in a divorce action is technically competent even if there are manifestly no grounds for the divorce.[294] This is theoretically justifiable: the fact that there is no possibility of a divorce does not mean that there is no obligation of aliment. It may be supposed, however, that in such circumstances an award would often be regarded as inappropriate.[295] Third, it would give the court power, in divorce actions and other actions between husband and wife not covered by our earlier recommendation,[296] to order financial information to be provided. The comments made to us suggest that it is at the stage of interim aliment that such a power could be most useful. We would stress that what we are recommending is the conferment of discretionary powers. The courts would remain free to decline to exercise these powers where that seemed appropriate.

2.135 In their comments on the Memorandum the Law Society of Scotland suggested that consideration should be given to introducing into the sheriff courts the Court of Session practice of seven days' minimum intimation of

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[292]See Clive and Wilson, *op. cit.*, pp. 215 to 216.

[293]See Appendix A, clauses 6 and 20.

[294]In *Boyle* v. *Boyle* 1977 S.L.T. (Notes) 69 Lord Maxwell was of the opinion that, under the present law, an application was incompetent if the divorce was based on two years' separation plus the defender's consent and if the defender did not consent. Lord Maxwell considered that in any event an award was inappropriate in such circumstances.

[295]*Ibid.*

[296]See para. 2.93 above.

motions for interim aliment.[297] We endorse this proposal, which can be given effect by rules of court.

AGREEMENTS ON ALIMENT

Husband and wife

2.136 Agreements on aliment between husband and wife are often contained in separation agreements. Under the present law a separation agreement is not invalid, but is revocable by either party if the revoking spouse is willing to adhere and has not given the other spouse just cause for living apart.[298] Until 1977 a spouse separated by consent had no right to aliment apart from any right conferred by the voluntary obligation of the other spouse. There was no statutory power to vary agreements as to aliment and, although there were suggestions in some cases that the courts had such a power at common law, there was no clear authority to that effect.[299] The result was that if a separated wife wished to obtain more aliment than was provided for under a separation agreement, and if she had no grounds for separation (such as cruelty or adultery), her only remedy was to revoke the agreement and call upon her husband to adhere. If he refused, without just cause, to do so she could then seek a decree of adherence and aliment or interim aliment. Any provision in the agreement purporting to exclude recourse to the courts was possibly contrary to public policy and hence ineffective.[300] A husband who wished to have his payments of aliment varied downwards, and who had not protected himself by a suitable formula in the agreement, had likewise to revoke the agreement and call upon his wife to adhere.[301] If she refused without just cause she lost her right to aliment.

2.137 The position since 1977 is the same in some respects but in others has been altered by the Divorce (Scotland) Act 1976. The law on the revocability of separation agreements is unaltered, as is the law, or lack of it, on the powers of the courts to vary such agreements. It is still the case that a provision excluding recourse to the courts altogether would probably be regarded as contrary to public policy. However, it is no longer the case that a spouse separated by consent has no right to recover aliment except under an agreement or other voluntary obligation. Section 7(1) of the Divorce (Scotland) Act 1976, as we have seen,[302] enables a spouse separated by consent to obtain an award of aliment in such an action. A wife who thinks that the aliment due under a separation agreement is inadequate can now, therefore, raise an action of interim aliment. Her husband will still have a good defence if he has not given her just cause for non-adherence and if he establishes that he is willing to adhere, but otherwise the court will be able to award the wife a supplementary aliment to "top up" the amounts payable under the agreement. The position of the husband who, because of changed circumstances, is paying too much under an agreement is not quite so clear. In

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[297]Plus two extra days for enrolment.
[298]See Clive and Wilson, *Husband and Wife* (1974), pp. 407 to 411.
[299]*Ibid.*, pp. 411 to 414.
[300]See *Beaton* v. *Beaton's Trs.* 1935 S.C. 187, 195; cf. *Hyman* v. *Hyman* [1929] A.C. 601.
[301]Cf. *Peggie* v. *Peggie* (1949) 65 Sh. Ct. Rep. 76.
[302]See para. 2.41 above.

certain extreme cases he might be able to raise an action for interim aliment against his wife which he could then set off against the payments due by him under the separation agreement. As, however, a wife is liable to aliment her husband, under the present law, only if he is unable to maintain himself, there is a real danger that some husbands would be left without any means of escape from their obligations under an agreement made in different circumstances.

2.138 Under our proposals the obligation of aliment between husband and wife would be fully reciprocal so that a husband in the above situation could always seek a decree for aliment. Let us consider an example. A husband in prosperous circumstances agrees to pay his wife £100 a week until their marriage is dissolved by divorce or death. He foolishly includes no provision for changes in circumstances. A year later his business crashes and he is left with £100 a week for his own needs. His wife has in the meantime taken a job at £50 a week. In these circumstances he could bring an action for aliment against his wife. The court would take into account that, after the payments under the agreement had been made, the husband had nothing and the wife had £150 a week. It might award the husband aliment of, say, £75 a week. He could then set off this sum against the amount due under the agreement and pay his wife £25 a week. The result would be, in effect, a variation downwards of the sum due under the agreement. The position under our proposals will, therefore, be more satisfactory than it has been. Either party will be able to apply to the court, and the court will be able to take the agreement into account in deciding how much aliment, if any, to award. This will be the case whether the agreement is a separation agreement or simply an agreement for the payment of aliment without any reference to separation. Exactly the same considerations apply to a binding unilateral voluntary obligation, such as a bond of annuity by a husband in favour of his separated wife. Whether the position is so satisfactory that no further provision is required is a question which we consider later after dealing with agreements between parent and child.

Parent and child

2.139 There is no statutory provision and no case law on the variation of agreements for the payment of aliment to or for children. On the other hand there is authority for the proposition that attempts by a parent to obtain a discharge of all future claims for aliment against him (in exchange, for example, for a lump sum) are ineffectual.[303] The position is, therefore, that if the amount payable under an alimentary agreement to, or for the benefit of, a child becomes inadequate, the child can bring an action for aliment and obtain a supplementary award. Nothing in our proposals would prevent this. On the other hand the position of a parent who finds that he is paying too much in the changed circumstances is not so happy. If the obligation between parent and child is reciprocal he could, in theory, bring an action for aliment against the child in order to recover the excess. If, however, as we have recommended, the obligation is not reciprocal he has no such remedy.

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[303] *Beaton* v. *Beaton's Trs.* 1935 S.C. 187; *Pott* v. *Pott* (1833) 12 S. 183; *A.B.* v. *C.D.* (1842) 4 D. 670.

Power to vary

2.140 If there is a defect in the present law it is that, while it is a straightforward matter for the alimentary creditor to bring an action for extra aliment to "top up" a contractual provision which has proved inadequate, it is not so straightforward for the alimentary debtor to obtain a reduction in the amount payable. At best he has the theoretical remedy, where the alimentary obligation is reciprocal, of seeking a decree for aliment which he can then set off against the payments due under the agreement. There is something artificial and indirect about this process, and we know of no case in which it has been used in practice. The result is that the alimentary creditor is in a better position than the alimentary debtor. Whether this is unfair is debatable. It can be said that the debtor has only himself to blame if he has foolishly undertaken an obligation which leaves him no escape in changed circumstances. On the other hand people do not necessarily seek legal advice when they make agreements on aliment and they may act foolishly out of generous impulses. The present law favours the calculating and penalises the generous. It applies the standards of the market-place to family relationships. It is also arguable that it is anomalous if aliment due under a contract is any less variable than aliment due under a court decree.

2.141 In the Memorandum we pointed out that English, French and West German law all recognise that maintenance agreements can be varied by the courts.[304] We suggested for consideration that the courts should be given express power to vary, on a material change of circumstances, provisions for aliment in separation agreements and alimentary agreements.[305] Most of those consulted agreed with this proposition although there was a minority view to the effect that the courts should have no power to vary unless the agreement so provided.

2.142 We have no doubt that separation agreements serve a useful function and should not be made invalid. Nor should they be a barrier to reconciliation. A spouse should be free at any time to call on the other to resume cohabitation without being open to the answer that he or she was legally bound to live apart. We likewise have no doubt that other alimentary agreements, such as those between a parent and an adult child, should be valid and enforceable. There is everything to be said for encouraging the parties to resolve questions of aliment by agreement rather than recourse to the courts. We think, however, that the law could and should be improved in two respects. First, it should be provided that any provision in any agreement which purports to discharge an alimentary debtor of future liability for aliment or to restrict any right of an alimentary creditor to bring an action for aliment should have no effect unless it was fair and reasonable at the time when the agreement was entered into.[306] This formula would leave it open to

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[304]Para. 2.159. The English provisions are in ss.34 to 36 of the Matrimonial Causes Act 1973.

[305]Proposition 32 and para. 2.162. We suggested that the same rule should apply to unilateral voluntary obligations.

[306]Cf. the Unfair Contract Terms Act 1977, ss.16 to 18, 20, 21 and 24. Under the present law such provisions are probably void. See *Beaton* v. *Beaton's Trs.* 1935 S.C. 187; *Hyman* v. *Hyman* [1929] A.C. 601 (which, however, was an English case concerned with divorce and turning at least partly on English statutory provisions).

the alimentary debtor to establish that the discharge or restriction was a reasonable part of a settlement of the parties' financial relationship. It is not difficult to imagine cases where a final settlement and discharge might be perfectly fair and reasonable. A father might, for example, prefer to transfer a capital sum to his 19-year-old son to see him through university rather than be liable for continuing aliment. Similarly, separated spouses might agree that the husband's interest in the matrimonial home should be transferred to the wife rather than that there should be a continuing obligation of aliment. We can see no objection to reasonable settlements of this nature even if they do involve a discharge of future claims. On the other hand, we consider that the courts should be able to disregard any discharge if it was not fair and reasonable when granted. A person in need of aliment may not be in a strong bargaining position and should, we think, be protected to this extent. Our recommendations on this point relate to the position as between the parties to the alimentary obligation. They do not affect, and are not intended to affect, the rights of the State to recover from a liable relative in respect of supplementary benefit. For the purposes of the Supplementary Benefits Act 1976 a person has a statutory liability to maintain his or her spouse and his or her children under the age of 16: this liability would not be affected by any agreement between the parties.[307] Second, the courts should be given power to vary amounts payable under an alimentary agreement. It could be argued that this is the present law. There are certainly dicta to that effect.[308] The question is, however, one of doubt and we think that it should be resolved by legislation. The procedure for applying for a variation would be a matter for regulation by rules of court. We think that applications should be competent in the Court of Session or the sheriff court and that a court should have jurisdiction to deal with an application for variation if it would have had jurisdiction in an action for aliment between the parties.[309]

2.143 We accordingly **recommend:**

25. Any provision in an agreement which purports to discharge an alimentary debtor of future liability for aliment or to restrict any right of an alimentary creditor to bring an action for aliment should have no effect unless it was fair and reasonable at the time when the agreement was entered into.
(Paragraphs 2.136 to 2.142; Clause 7(1).)

26. The courts should be given power to vary or terminate, on an application made by or on behalf of either party on a change of circumstances, the amounts payable under an agreement, or unilateral voluntary obligation, whereby one party to an alimentary

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[307]Supplementary Benefits Act 1976, s.17; *National Assistance Board* v. *Parkes* [1955] 2 Q.B. 506; *Hulley* v. *Thompson* [1981] 1 All E.R. 1128. In deciding how much the liable relative should be ordered to pay the court has regard to "all the circumstances" (1976 Act, s.18). These could include the circumstances of and surrounding the agreement between the parties.

[308]See e.g. *McKeddie* v. *McKeddie* (1902) 9 S.L.T. 381; *Campbell* v. *Campbell* 1923 S.L.T. 670; *Peggie* v. *Peggie* (1949) 65 Sh. Ct. Rep. 76; *Soles* v. *Soles* (1953) 69 Sh. Ct. Rep. 224. See also *Campbell* v. *Campbell* 1976 S.L.T. (Sh. Ct.) 69 (where the agreement was held to be revoked).

[309]The question of jurisdiction in actions for aliment generally is under review as a result of the *Report of the Scottish Committee on Jurisdiction and Enforcement (1980)* and we make no recommendations on this subject in this Report.

relationship has bound himself to pay aliment to or for the benefit of the other party to the relationship.
(Paragraphs 2.136 to 2.142; Clause 7(2).)

MISCELLANEOUS AND SUPPLEMENTAL

Award of aliment or custody where decree in consistorial action refused

2.144 Under the present law, the Court of Session has a statutory power to deal with custody, maintenance and education of children where "an action for divorce, nullity of marriage or separation is dismissed at any stage after proof on the merits of the action has been allowed or decree of absolvitor is granted therein".[310] The power can be exercised "either forthwith or within a reasonable time after" the decree of dismissal or absolvitor.[311] This same provision applies also to the sheriff court,[312] though it can there affect only actions of separation. It is based on recommendations of the Morton Commission who clearly had in mind primarily the situation where the judge had considered the circumstances of the parties and of the children.[313] The equivalent English provision confers power where the proceedings are dismissed "after the beginning of the trial".[314]

2.145 We expressed the view in the Memorandum that the court's powers might be too narrow. In *Gall* v. *Gall,*[315] an action for nullity of marriage, the court held that the pursuer's averments were irrelevant and dismissed the action. The pursuer claimed custody of the child of the marriage. The Lord Justice-Clerk said that he would gladly have dealt with custody had he had jurisdiction to do so but that, as the action had been dismissed as irrelevant, he had no such jurisdiction. We suggested in the Memorandum that this should be remedied. We noted that in the sheriff court craves for custody and aliment of children in actions for separation were independent of the craves for the main remedies, and that the court could deal with them on refusing decree of separation at any stage.[316] We saw no reason why the same principle should not apply in the Court of Session and in relation to a party to the marriage. A wife defending an action of divorce for desertion might, for example, wish to claim aliment in the event of decree of divorce being refused. We suggested, therefore, a general power to deal with custody or aliment or both on refusing decree in a consistorial action.[317] There was general agreement with this suggestion on consultation. We therefore **recommend:**

27. Where the court refuses a decree of divorce, nullity of marriage or separation it should not, by virtue of such refusal, be prevented from making an order for aliment or an order regulating custody, education or access.[318]

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[310]Matrimonial Proceedings (Children) Act 1958, s.9(1); cf. *Gall* v. *Gall* 1968 S.C. 332; *Driffel* v. *Driffel* 1971 S.L.T. (Notes) 60.
[311]1958 Act, s.9(1).
[312]*Ibid.*, s.15 (defining "the court").
[313]Morton Report, paras. 402 and 417.
[314]Matrimonial Causes Act 1973, ss.23(2) and 42(1).
[315]1968 S.C. 332.
[316]*O'Brien* v. *O'Brien* (1957) 73 Sh. Ct. Rep. 129.
[317]Proposition 47 and para. 2.197.
[318]See Appendix A, clause 21.

Expenses of litigation as necessaries

2.146 Expenses incurred by a wife in conducting or contesting an action of divorce or other consistorial action[319] are regarded as "necessaries" for which her husband may be liable by virtue of his obligation to aliment her.[320] The effect of this rule is to restrict the freedom of the court in awarding expenses in divorce actions where the wife is not legally aided[321] and to reinforce the rule of practice that the husband will usually pay, win or lose. Even if the court does not award expenses against the husband it is still possible for the wife's solicitors to raise an action against him for recovery of the expenses. The legal theory is that they are in the same position as a grocer who has supplied an indigent wife with "necessaries" and who is entitled to recover from the husband.

2.147 The "necessaries" rule is not limited to consistorial actions. In principle a husband may be liable for his wife's expenses in non-consistorial litigation (against third parties, for example);[322] a wife may be liable for her husband's expenses if she is liable to, but failing to, aliment him;[323] and similarly a father may be liable for his son's expenses if these are regarded as necessaries. In the Memorandum we discussed this question in broad terms, and suggested that the expenses of consistorial or other litigation should not be treated as necessaries for which any alimentary obligant would be liable.[324]

2.148 We now consider that there is no need for any change in relation to the expenses of non-consistorial litigation. There is no evidence that there is any problem in relation to such expenses and we think that they can be left to be dealt with by the general rules on alimentary needs. It would be a rare case, we think, where an alimentary creditor could convince a court nowadays that the expenses of non-consistorial litigation constituted an alimentary expense for which the alimentary debtor should be liable.

2.149 In relation to the expenses of consistorial litigation there is a real problem because of the well-established rule that such expenses are regarded as necessaries. The advent of legal aid has meant that the compelling social reasons for making the husband liable have disappeared: wives do not now need to rely on their husbands' credit in order to obtain consistorial remedies.[325] The Morton Commission concluded that with regard to expenses a husband and wife should be treated on exactly the same footing, and recommended that the wife's expenses of bringing or defending matrimonial

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[319]The term "consistorial" includes actions of divorce and separation; actions of declarator of marriage and nullity of marriage; and actions of adherence.

[320]See Clive and Wilson, *Husband and Wife* (1974), pp. 597 to 611; and cases cited, especially *Sharp* v. *Sharp* 1946 S.L.T. 116.

[321]For the situation where the wife is legally aided see *Craigie* v. *Craigie* 1979 S.L.T. (Notes) 60 and *Nelson* v. *Nelson* 1969 S.L.T. 323.

[322]Clive and Wilson, *op. cit.*, p. 366.

[323]As a result of the Married Women's Property (Scotland) Act 1920, s.4.

[324]Proposition 23, para. 2.110. This was subject to a proposed exception for the case of cohabiting spouses with no contrary interest in the dispute. On the view which we now take this exception is irrelevant.

[325]See *Wilson* v. *Wilson* 1969 S.L.T. 100; *Nelson* v. *Nelson* 1969 S.L.T. 323; *Dawson* v. *Dawson* 1975 S.L.T. (Notes) 37; *Campbell* v. *Campbell* 1975 S.L.T. (Notes) 47; *Craigie* v. *Craigie, supra.*

proceedings should no longer be regarded as necessaries for the provision of which her husband is liable.[326] More recently the Law Commission, having described the rule as "an unnecessary and embarrassing anachronism",[327] vigorously endorsed this recommendation.[328] We agree with these views and so did those consulted.

2.150 We therefore **recommend:**

28. The expenses of a spouse in conducting or contesting consistorial litigation should no longer be regarded as necessaries for which the other spouse is liable.[329]

Husband's liability for other necessaries

2.151 We have already recommended[330] no change in the common law rules whereby a third party who has supplied the needs of a person who is entitled to aliment can recover, on principles of unjustified enrichment, from the other party to the alimentary obligation. These rules are non-discriminatory and are based on general principles of justice. There is, however, one statutory provision on the husband's liability for his wife's necessaries which is unnecessary, discriminatory and anomalous. It is contained in section 6 of the Conjugal Rights (Scotland) Amendment Act 1861 which, after dealing with various property consequences of a decree of separation obtained by a wife, continues

> "and her husband shall not be liable in respect of any obligation or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as pursuer or defender of any action, after the date of such decree of separation and during the subsistence thereof; provided, that where upon any such separation aliment has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use".

The words quoted are unnecessary because (a) a husband is not liable for his separated wife's obligations by operation of law in any event,[331] apart from any liability based on unjustified enrichment, and (b) his liability based on unjustified enrichment will arise, quite apart from the statute, if he is not paying any aliment due. The words quoted therefore add nothing to the existing law. The provision is discriminatory because it applies only to a decree obtained by a wife and only to the husband's liability. It is anomalous because it applies only to a decree of separation and not to a decree of adherence and aliment or interim aliment. In the Memorandum we suggested the repeal of the part of section 6 quoted above.[332] This was supported by those consulted.

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[326]Morton Report, para. 458.

[327]Working Paper No. 9 (1967), para. 108, extracts of which appear in Appendix II in Law Com. No. 25 (1969).

[328]Law Com. No. 25 (1969), para. 110. English law was altered by the Matrimonial Proceedings and Property Act 1970, s.41.

[329]See Appendix A, clause 22.

[330]Para. 2.54 above.

[331]A separated wife has no *praepositura:* see Clive and Wilson, *op. cit.*, p. 260.

[332]Proposition 18 and para. 2.87.

2.152 We therefore **recommend:**

29. The provision in section 6 of the Conjugal Rights (Scotland) Amendment Act 1861 dealing with the husband's liability for his separated wife's obligations and necessaries (i.e. from the words "and her husband" to the end of the section) should be repealed.[333]

Aliment and mournings out of estate of deceased relative

2.153 Under our proposals, as under the present law, the obligation of aliment ceases on the death of either party. Under the present law, however, an alimentary creditor who has not been properly provided for on the death of a liable relative may have an equitable claim to aliment out of the estate of that relative or against those who have benefited from the succession.[334] In the Memorandum we noted that this rule could provide a safety net for a spouse or child who was left without any rights in the estate of a deceased person. Such cases will be rare because of the Scottish system of legal rights, but could still occur. We therefore suggested that, pending a review of the law of succession and legal rights of inheritance, the existing law on aliment out of the estate of a deceased person should be retained.[335] There was general agreement with this proposition and we therefore make no recommendation for change in this area for the time being.[336]

2.154 We also discussed in the Memorandum the widow's right to mournings out of the estate of her deceased husband, and suggested that this right (and any similar rights enjoyed by other relatives) should be abolished.[337] There was some support for this on consultation but the question is one which relates to the law of succession rather than to the law of aliment and we think it would be better dealt with in that context.

Repeals

2.155 Our recommendations will make possible the repeal of references to aliment or maintenance in a number of statutory provisions.[338] Unfortunately the total repeal of these provisions is often impossible in the context of this Report because they also deal with custody or guardianship. The excision of the references to aliment will, however, pave the way for reform and consolidation of the law on custody and guardianship at a later stage.

Transitional provisions

2.156 Our recommendations on the parties liable for aliment should apply as from the date when the Act which implements them comes into force: as from that date there should, for example, be no further obligation of aliment between grandparents and grandchildren. Any decree quantifying such an obligation should to that extent cease automatically to have effect. Most of our recommendations have the effect of restricting existing obligations. There will, however, be cases where mothers, who have been free from liability only

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[333]See Appendix A, Sch. 2.

[334]The present law is discussed in some detail in paras. 4.1 to 4.16 of the Memorandum.

[335]Proposition 99 and para. 4.18.

[336]See Appendix A, clause 1(3).

[337]Proposition 100 and para. 4.19.

[338]See Appendix A, Sch. 2.

because of the rule that the father is primarily liable, become liable for the first time to contribute to a child's maintenance. One result of our proposals may therefore be a certain number of applications by fathers for variation.

2.157 We have considered whether there should be a period of grace of, say, five years before existing decrees (in favour, say, of parents or adult children) cease to have effect. There will not be many such decrees and, given that a decree of aliment merely gives effect to an underlying and continuing obligation, we have concluded that such a period of grace could not be justified. An alimentary creditor takes the risk of changes in the circumstances of the alimentary debtor and can also be expected to take the risk of changes in the law.

2.158 Our recommendations on actions for aliment should in general apply to actions brought after the commencement of the Act. This principle covers our recommendations on competence (including the competence of bringing certain actions as summary causes), on title to sue, on awards of aliment for children, on defences to actions for aliment, on the determination of aliment, on the powers of the court and on interim aliment *pendente lite*. Our recommendations on variation and recall of decrees for aliment should apply to applications for variation and recall made after the commencement of the Act. Our recommendation on the "necessaries rule" in relation to the expenses of consistorial litigation should apply to the expenses of any such litigation commenced after the Act comes into force, including applications for variation or recall of decrees or orders already in existence at that date. Our recommendations on agreements for aliment, being designed merely to clarify the present law, should apply to agreements whenever executed.

PART III FINANCIAL PROVISION ON DIVORCE

INTRODUCTION

Scope of Part III

3.1 In this part of the Report we trace the development of the law relating to financial provision on divorce;[1] we consider what the objectives of the law should be; and we discuss the range of powers which should be available to the court in attaining those objectives. We are concerned only with the right of one spouse to seek financial provision from the other. We are not concerned with the rights of children. Their rights depend on the law of aliment, and exist independently of any action of divorce to which their parents may be parties. In particular, we make no proposals to confer on the court power to order capital payments to be made to or for the benefit of children when granting decree of divorce.[2] The legal link between parent and child is not broken by divorce. The child retains his succession rights in relation to both parents. In the Memorandum we questioned whether divorce justified any acceleration of these rights and suggested that financial provision for children on divorce should continue to be dealt with by means of their continuing right to aliment.[3] There was almost unanimous support for this view on consultation. It is, of course, always open to parents to transfer property to, or for the benefit of, their children at any time if they so wish.

3.2 We are not concerned in this Report with matrimonial property rights during the subsistence of a marriage. We are concerned, among other things, with the discretionary powers of the courts to order a redistribution of property on divorce. In the context of these powers we make use of certain ideas familiar in matrimonial property systems in many countries—notably the idea of equal sharing of assets acquired during the marriage—but we wish to stress that we are not in this Report recommending the introduction of any system of community property. We are not dealing with property rights, we are not dealing with the position while the marriage subsists, and we are not dealing with the position on the dissolution of the marriage by death. We are concerned only with the powers of the courts on divorce and with the principles on which those powers should be exercised.

3.3 In accordance with our usual practice we have examined the provisions in force in many other jurisdictions, including England, Australia, the United States of America, France and West Germany. Some of these provisions were described in detail in the Memorandum. We have also derived much assistance from more recent legislation in Canada and New Zealand.[4] For

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[1]We recommend in para. 3.203 below that the courts should have the same powers in actions for declarator of nullity of marriage as in divorce actions. We are not concerned in this Part with actions for judicial separation—see para. 2.83.

[2]Such powers exist in England and Australia, but in these systems a child has no independent right to aliment.

[3]Proposition 65 and paras. 3.15 to 3.18.

[4]The Matrimonial Property Act 1976 (New Zealand); the Family Law Reform Act 1975 (Ontario); the Family Law Reform Act 1978 (Prince Edward Island); the Family Relations Act 1978 (British Columbia); the Matrimonial Property Act 1979 (Newfoundland); the Marital Property Act 1980 (New Brunswick); The Family Proceedings Act 1980 (New Zealand). For a description of the new law in West Germany, introduced since the Memorandum was published, see W. Müller-Freienfels, "The Marriage Law Reform of 1976 in the Federal Republic of Germany" [1979] I.C.L.Q. 184.

reasons of space we have decided not to include accounts of foreign laws in this Report. We have been fortified, however, by the knowledge that our main proposals are in line with some of the general trends in recent foreign legislation—notably the trends towards equal sharing on divorce of "matrimonial property" or "family property" (however defined), towards a restriction of continuing maintenance after divorce and towards a restriction of the role of conduct in the assessment of financial provision on divorce.[5]

Development of the law

Prior to 1964

3.4 In actions for divorce commenced before 10 September 1964[6] no financial provision of any kind could be awarded to the "guilty" spouse. For the purposes of financial provision the law regarded the guilty spouse as having died at the date of decree, and the innocent spouse became entitled to claim legal rights and any marriage contract provisions. An innocent wife's legal rights were the *jus relictae*—a third of her husband's net moveable estate if there were children of the marriage, a half if there were not—and terce—the liferent of one-third of her husband's heritable estate. An innocent husband was not, however, entitled to the *jus relicti* (the counterpart of his wife's *jus relictae*) because the statute which introduced it in 1881 granted the right to a husband only on his wife's death and not on divorce.[7] The only legal right available to an innocent husband was the right of courtesy—the liferent of the whole of his wife's heritable estate.

3.5 There was an exception to this rule if divorce was granted on the ground of incurable insanity. The court had power to make an order for payment by the pursuer, or his executors, of a capital sum or periodical allowance to or for the benefit of the defender and any children of the marriage.[8]

3.6 By equating the position on divorce with death the law had the merit of simplicity, but it was capable of working injustice. The financial position on divorce depended on whether the parties' wealth was in the form of capital or income. It also depended on who was technically the guilty party and on the composition of that party's assets as between moveable and heritable estate. The law was simple but crude. The main criticism made of it at the time was that it made no provision for the award of a periodical allowance after divorce. Thus the wife of a wealthy husband could obtain a substantial capital sum from him but the wife of a wage or salary earner with no capital could obtain nothing. The Mackintosh Committee[9] accepted that under the old law "a wronged wife" was often prevented from seeking a divorce "because she would be left entirely unprovided for". The Committee accordingly recommended the abolition of the old system and its replacement by a discretionary power to order the guilty spouse to pay to the innocent spouse a capital sum, an annual allowance, or both.

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[5]See generally Gray, *Reallocation of Property on Divorce* (1977).

[6]Other than on the ground of incurable insanity—see para. 3.5 below.

[7]Married Women's Property (Scotland) Act 1881, s.6, as interpreted in *Eddington* v. *Robertson* (1895) 22 R.430.

[8]Divorce (Scotland) Act 1938, s.2(2). Incurable insanity is no longer a separate ground of divorce.

[9]*Report of the Departmental Committee on the Law of Succession in Scotland* (1950) Cmd. 8144, pp. 20 to 21.

3.7 The Morton Commission[10] endorsed these proposals and made a number of additional suggestions. These included recommendations that if a spouse remarried he or she should cease to have any claim for financial provision; that the court should have power to vary provisions of a marriage settlement; that on the subsequent death of the payer the surviving spouse should be able to apply to the court for a provision to be made out of the deceased's estate; and that the court be given certain powers to counteract avoidance transactions.

3.8 Neither the Mackintosh Committee nor the Morton Commission gave extensive consideration to the purpose of financial provision on divorce. The Mackintosh Committee assumed, without debating the matter, that only the innocent spouse should have a claim. It seemed to regard the purpose of an award as "relief" for an innocent spouse. The Morton Commission regarded the object as being, in the case of a wife, to provide a substitute for the support which, but for the divorce, she would have continued to receive, and to prevent her from being thrown upon the community for support. The Commission took a similar view in relation to the husband.

The Succession (Scotland) Act 1964

3.9 These proposals were implemented by Part V of the Succession (Scotland) Act 1964. The right to claim legal rights was abolished[11] and in their place the court was given a broad discretion to award to the pursuer a capital sum or a periodical allowance or both.[12] If no application for a periodical allowance was made before the divorce, or if an application was withdrawn or refused, the pursuer could apply at any future date on a change of circumstances of either party to the marriage.[13] No such right, however, was accorded to the pursuer to seek a capital sum after the date of decree. Similarly, either party could apply for variation or recall of a periodical allowance on a change of circumstances.[14] An order for payment of a periodical allowance ceased to have effect on the remarriage or death of the payee, but survived the death of the payer.[15] The court was also given power to reduce or vary any settlement or disposition of property made in favour of a third party within three years before the date of application, or to interdict the defender from making any such settlement or disposition, if it was satisfied that the transaction was primarily for the purpose of defeating the claim in whole or in part.[16]

3.10 The 1964 Act omitted any statement of the purpose of financial provision. While the old system of legal rights was deliberately discarded, it remained relevant for the court to consider what an innocent spouse would have received by way of legal rights if the marriage had terminated on death.

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[10]*Report of the Royal Commission on Marriage and Divorce 1951–55* (Cmd. 9678), paras. 553 to 559.

[11]S.25.

[12]S.26.

[13]S.26(3).

[14]S.26(4).

[15]S.26(5). There was some doubt on this point which was expressly removed by s.5 of the Divorce (Scotland) Act 1976.

[16]S.27.

This is perhaps the explanation for the tendency, discernible in the cases reported after 1964, to award a wife between a third and a half of her husband's capital.

The Divorce (Scotland) Act 1976

3.11 The principal change made in the law by the Divorce (Scotland) Act 1976 was to remove the disqualification of the "guilty" spouse from seeking an award of financial provision. Thus by section 5 the court can make an order for the payment of a periodical allowance or a capital sum or both by either party to the marriage to the other. This change was necessitated by the radical alteration in the grounds of divorce made by section 1 of the Act, which made the irretrievable breakdown of the marriage the sole ground of divorce, and provided that such breakdown should be taken to be established not only by adultery, behaviour of a particular sort or desertion, but also by two years' separation coupled with the consent of the defender to decree or by five years' separation even without such consent. As an "innocent" spouse could be divorced against his or her will, it was necessary to give either spouse the right to apply for financial provision. No other changes of any substance were made by the 1976 Act, which otherwise with minor modifications repealed and re-enacted the provisions of the 1964 Act on financial provision.

3.12 It is worth stressing two features of the above development. First, a redistribution of property on divorce by means of accelerated legal rights or a capital sum has always been an accepted feature of Scots law. Second, it has always been the case in Scots law that the obligation of aliment between spouses ceases on divorce. Before 1964 there was no possibility of a periodical allowance after divorce. Since 1964 there has been at best the prospect of a periodical allowance at the discretion of the court. No-one has ever married under Scots law in the legally justified expectation that he or she would be supported for life even after divorce. People may have married before 1976 in the legally justified expectation that if they did not commit any matrimonial offence, and if the law was not changed, they could not be divorced against their will, but that is a different matter.

Background to the present law

Divorce

3.13 Actions for divorce are at present competent only in the Court of Session, although there have been suggestions[17] that they should be competent in the sheriff courts. The judges in the Outer House of the Court of Session, sitting singly, deal with divorce actions, including the financial aspects, at first instance. Most undefended actions are dealt with on affidavit evidence. There are very few reclaiming motions or appeals in divorce cases.[18]

3.14 Under the Divorce (Scotland) Act 1976, as we have seen, the sole ground of divorce is that the marriage has irretrievably broken down, but this

[17]Most recently in the *Report of the Royal Commission on Legal Services in Scotland* (1980) Cmnd. 7846, Vol. I, paras. 10.17 to 10.18.

[18]In 1979 only 12 divorce actions were ended by final judgment in the Inner House. *Civil Judicial Statistics 1979* (Cmnd. 8111), Table 2.5.

ground can be established only if one or other of five facts is established. These facts are (a) adultery (b) behaviour such that the pursuer cannot reasonably be expected to cohabit with the defender (c) desertion followed by two years' separation (d) two years' separation plus the consent of the defender to decree or (e) five years' separation even without such consent. The following table shows the use made of these facts in 1979.[19]

Table 1

Divorce actions under 1976 Act ended by final judgment 1979

	Adultery	Desertion	Behaviour	2 years' separation	5 years' separation	Total
Brought	1,533	243	3,638	1,964	1,587	8,965
Granted	1,486	235	3,454	1,934	1,572	8,681

About 75% of the actions were brought by wives and about 95% were undefended.[20] The duration of the marriages varied greatly. The average duration of those ended by divorce for adultery, desertion or behaviour was about 11 years: for those ended by divorce by consent after 2 years' separation, about 12 years; and for those ended by divorce on the basis of 5 years' separation, about 20 years.[21] There were children under the age of 16 in over two-thirds of the marriages ended by divorce for adultery, desertion or behaviour; in about half of those ended by divorce by consent after 2 years' separation; and in about a third of those ended by divorce on the basis of 5 years' separation.[22]

3.15 It is obvious from the figures in Table 1 that many divorce actions are brought when the parties have already been separated for some years. A corollary of this is that the length of the functioning or *de facto* marriage is often very much less than the length of the legal marriage. Mitchell found that in her sample of Edinburgh divorces (which excluded divorces granted after more than 5 years' separation):

> "The mean *de facto* length of the 77 marriages was just under seven years, ranging from two weeks to 21 years. For the childless couples the mean was four years, but this included many of the shortest *de facto* marriages. For six couples (8 per cent) the *de facto* marriage had lasted for one year or less; for one quarter of the sample it had lasted for two years or less, and for one half of the sample for four years or less."[23]

3.16 Research in 1976 showed that of the children under the age of 16 referred to in Scottish divorce actions over 80% were under 12 years of age; in over 80% of cases involving children the children were living with the wife at the commencement of the divorce action and would continue to live with her

[19]Source, *Civil Judicial Statistics 1979*, Table 2.6.
[20]*Ibid.*
[21]*Ibid.*, para. 2.14 and Figure 2.3.
[22]*Ibid.*
[23]Ann K. Mitchell, *Someone to Turn To* (1981), p. 22.

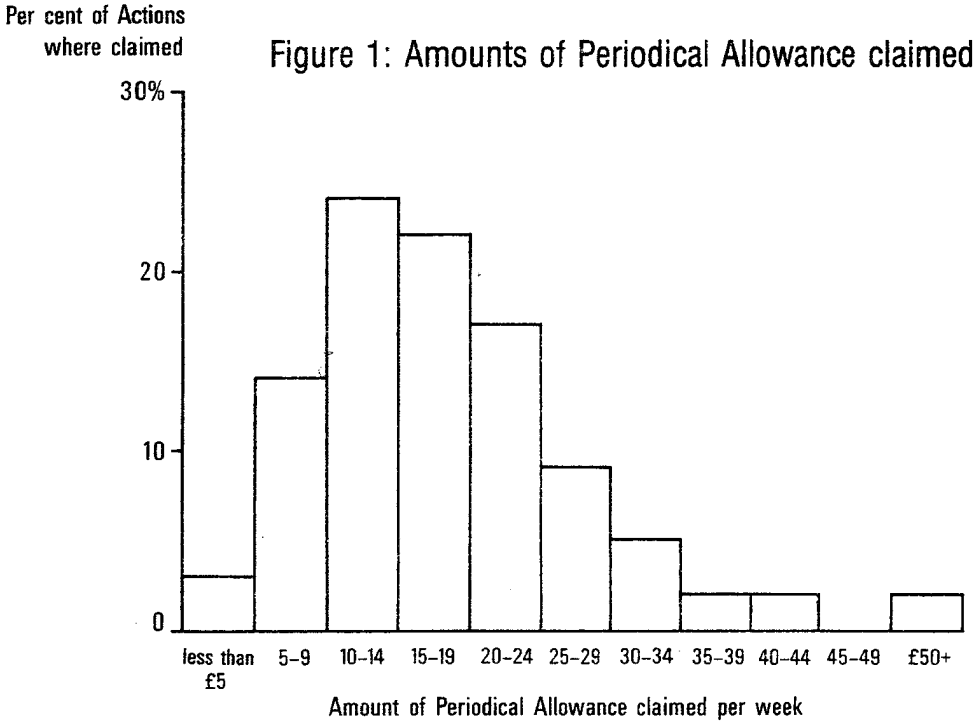
after it was over.[24] Where there were children of the marriage under the age of 16 and the wife was the pursuer in a divorce action she would seek custody in about 98% of cases and, where she sought custody, would nearly always seek an interim award of aliment for the children.[25] About 93% of wives who obtained an award of custody also obtained an award of aliment.[26]

Financial provision

3.17 Until recently there has been a remarkable lack of reliable information about the amounts being sought and awarded in Scotland[27] by way of aliment and financial provision on divorce. To assist us with our work on this subject, and also with our work on the collection and enforcement of alimentary debt, the Central Research Unit of the Scottish Office undertook a study of this subject early in 1981. The research involved an examination of a sample of 1 in 8 divorce actions decided in Scotland in 1980. The information collected included the amounts claimed for aliment and financial provision, claims for custody of children, the incidence of settlements by joint minute, interim orders and judgments, the dates of marriage, separation and divorce, the ages of children and, where available, the age, income and employment status of each party. A report of this research will be published in due course. The information which follows is based on preliminary results.

3.18 A periodical allowance was claimed in about 33% of all divorce actions but in only 16% of actions where no children were involved. In the cases examined there were no examples of claims by husbands. Figure 1 shows the

Figure 1: Amounts of Periodical Allowance claimed



[24]Eekelaar and Clive, *Custody after Divorce* (Oxford Centre for Socio-Legal Studies, 1977), paras. 8.8, 8.9, 12.3.

[25]*Ibid.*, paras. 9.5 and 9.7. See para. 3.19 below for more recent statistics.

[26]*Ibid.*, para. 12.9. The amounts (in 1975) varied from £1 to £9 per week per child, the average being £4.07.

[27]For the practices of English registrars, see Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (Oxford Centre for Socio-Legal Studies, 1977).

amounts claimed by wives. In 90% of actions where periodical allowance was claimed the amount per week claimed was less than £30, and in 47% it was between £10 and £20 per week. There were only a few cases where the amount claimed was £50 or more per week. The average amount of periodical allowance claimed was nearly £17 per week. The average amount claimed by pursuers without children was greater than that claimed by pursuers with children (£23 compared to £15 per week). This is perhaps not surprising. In many cases there is little enough money to provide for both aliment for children and periodical allowance for the person with care of them. To enable a complete picture to be obtained the study therefore also examined the amounts claimed as aliment for children.

3.19 Aliment for children was claimed in 66% of all actions involving children and in 81% of such actions brought by wives. There were only one or two instances, in the cases examined, of aliment for children being claimed by husbands from wives. Figure 2 shows the amount claimed per child per week and Figure 3 shows the total amount claimed per week for all the children involved in a single divorce action: In 96% of cases where aliment was claimed the amount was under £20 per child per week. In 43% of cases the amount was between £5 and £9.99 per child per week and in 36% of cases the amount was between £10 and £14.99 per week. The average amount claimed per child per week was £8.50. In 91% of cases involving children the total amount of aliment claimed per case was less than £25 per week. The average amount was nearly £15 per week.

Figure 2: Amounts of Aliment claimed: per child

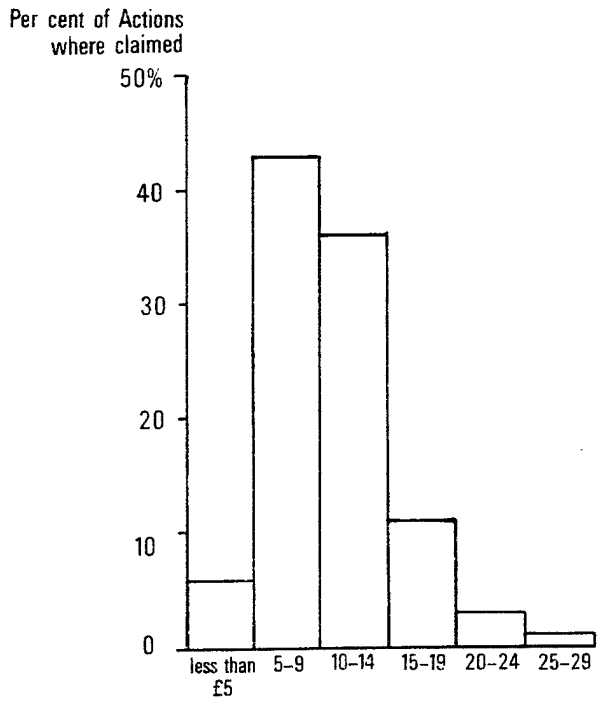
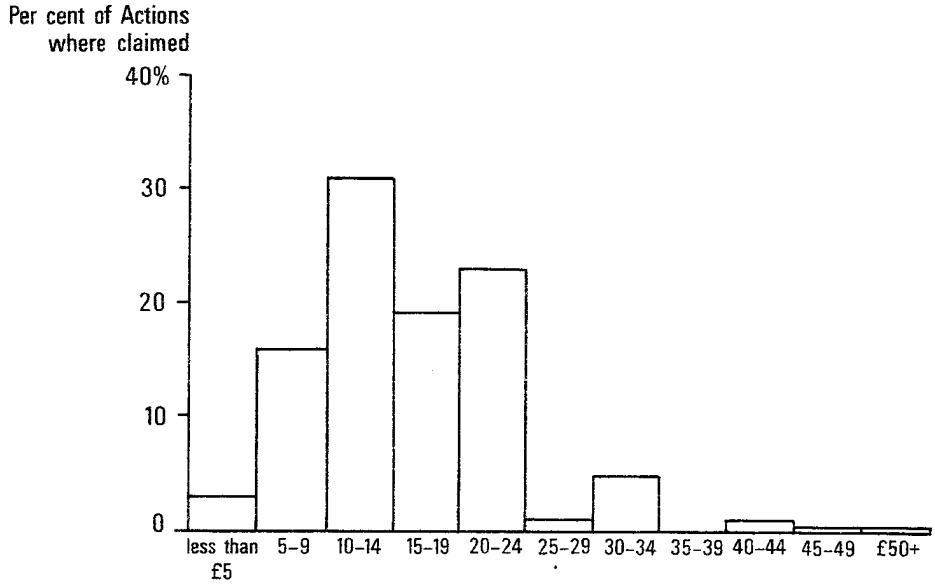


Figure 3: Amounts of aliment claimed: per case



3.20 Preliminary results indicate that a capital sum was claimed in less than 10% of divorce actions. In over 50% of these actions the sum claimed was less than £5,000. In only one or two of the cases examined was the claim for more than £20,000, although it is known from other sources that claims far in excess of this figure are sometimes made. In almost 18 per cent of divorce actions there was a joint minute embodying an agreement between the parties on such matters as arrangements for children and financial provision. There were joint minutes in 53% of defended actions. Financial arrangements were dealt with in 91% of joint minutes.

3.21 The amounts awarded did not differ substantially, over the whole sample, from the amounts claimed. An attempt was made by the researchers to identify cases where it seemed that the amounts awarded were unlikely to be paid. This involved noting cases where the whereabouts of the defender were unknown, where there had been a record of non-payment of aliment before the divorce, or where there were other indications that an award was unlikely to be paid. The process was necessarily subjective to some extent and the results must be treated with great caution, but it seemed questionable, on the basis of the limited information available in the documents, whether payment would be made in something like a third of the cases where aliment or a periodical allowance was awarded. It should not be inferred from this that payment would be made, or made regularly, in the remaining two thirds of the cases. Further research would be necessary to ascertain the actual extent of compliance with decrees for aliment and periodical allowance.[28]

[28]There are obvious technical difficulties in conducting a large scale follow-up study where, as in Scotland, there are no court collecting officers and no court records of payments made in compliance with the relevant decrees. Research in other countries suggests that the rate of non-compliance with maintenance orders is high. See the Finer Report, Vol. 2, Appendix 7 and the recent report on *Matrimonial Support Failures* prepared by the Canadian Institute for Research for the Alberta Institute of Law Research and Reform (1981).

3.22 The following tables show the extent to which pursuers and defenders in divorce actions were in employment or dependent on State benefits at the time of the divorce proceedings. The information was derived from the summons, affidavits or defences and is necessarily incomplete. In many cases, as we have seen, there is no claim for financial provision and no information on the parties' financial position, particularly that of the defender.

Table 2

Employment Status

Employment Status	Pursuer %	Defender %
In paid full-time employment	42.0	48.2
In paid part-time employment	14.6	1.7
Self-employed	1.7	4.0
Out of paid employment e.g. housewife, retired, unemployed	36.7	12.5
In prison	0	0.8
Not available	4.9	32.9

Table 3

Dependence on State Benefits

Dependency	Pursuer %	Defender %
Dependent on Benefits	29.7	7.7
Independent of Benefits	57.2	54.6
Information not available	13.2	37.7

3.23 More detailed information on all the above points will be available in the final research report. It is clear, however, that the scale of financial provision on divorce is less than is sometimes supposed. In about two thirds of all divorce actions there is no claim for periodical allowance and in about 90% there is no claim for a capital sum.[29] There are various possible reasons for the low incidence of claims for financial provision, including a lack of means on the part of both parties, the self-sufficiency of both parties, an intention to remarry, and the existence of voluntary arrangements. The nature of the research was such that it provides little information on parties' reasons for not claiming financial provision. It was noted, however, that in 8% of cases where there was no award of regular financial payments there was mention of informal financial arrangements.

[29]In only a few cases was there a claim for a capital sum and no claim for a periodical allowance. Overall, therefore, there was no claim for any financial provision in about 66% of cases.

Family property

3.24 A survey of family property in Scotland, carried out at our request by the Office of Population Censuses and Surveys in 1979,[30] showed that the forms of property owned by married couples in Scotland were:

(*a*) household furniture and equipment (virtually all couples owned some);

(*b*) rights under life insurance policies or pension schemes (89% of couples had at least one life insurance policy: in 56% of couples at least one spouse was a contributor to, or recipient from, a private pension scheme);

(*c*) savings (88% of couples had some savings in various kinds of savings accounts or savings schemes; 51% had at least one current account at a bank or Post Office);

(*d*) a car (52% of couples);

(*e*) the matrimonial home (37% of couples owned their home);

(*f*) financial investments (12% had units in unit trusts, stocks and shares, or other financial investments);

(*g*) businesses (8% of couples had at least one business or a share in a business);

(*h*) other property (4% of couples owned heritable property other than the matrimonial home; less than 2% mentioned other property which they regarded as an investment for the future, e.g. caravans and boats).[31]

3.25 Only 3% of married informants had owned heritable property at the date of the marriage. However, 22% of husbands and 3% of wives had owned a car at the time of the marriage, and 43% of informants had had some personal savings at the time of the marriage. Most informants regarded these items as jointly owned after the marriage.[32]

3.26 So far as the value of property was concerned the O.P.C.S. survey showed that where the matrimonial home was owned it was usually the couple's major asset. Well over half of the married owner-occupiers estimated the current market value of their home (in 1979) as between £15,000 and £30,000; 16% estimated its value as over £30,000.[33] The proportion of couples with substantial savings or financial investments was fairly small. Only 8% had over £10,000; 15% had over £5,000 and 45% had under £500.[34] It was not feasible to obtain reasonably accurate valuations of furniture, rights under insurance policies, pension schemes, or business interests.

3.27 The titles to assets were held in various ways. Fifty-seven per cent of married owner-occupiers held the matrimonial home in their joint names;

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[30]Manners and Rauta, *Family Property in Scotland* (1981).
[31]See e.g. Tables 2.1, 2.9 and 2.13, and para. 2.3 c to g.
[32]Para. 2.6.
[33]Table 2.15.
[34]Table 2.16.

37% had the title in the husband's name; 5% in the wife's name; and 1% in some other way.[35] The more recently the spouses had purchased their home, the more likely it was to be in joint names: of the houses bought by respondents in 1977-79 as many as 78% were in joint names.[36] The reasons given for taking title in joint names included—"automatic transfer to a surviving partner" (47%); "general belief in equality in marriage" (36%); "joint financial contribution" (30%); "protects both partners on divorce" (14%).[37] The way in which the title was held did not, however, greatly affect the way in which the spouses regarded the house. Of those spouses who had their home in one name alone 85% said that they thought of the house as owned jointly.[38] The legal owner was as likely to take this view as the non-owner.[39] These attitudes were not significantly affected by the sex of the informant. The titles to savings and investments were fairly evenly spread between the spouses.[40] Thus 27% of married couples had deposit accounts in joint names, 17% in the husband's name and 18% in the wife's name.[41]

3.28 There was no evidence that in the case of those who had had a previous marriage the forms of ownership adopted or the views as to the "real" ownership of family property differed from those set out above.[42] The numbers of such people in the sample were, however, small (particularly in the case of owner-occupiers).

Family income and contributions

3.29 In almost two thirds of marriages in the O.P.C.S. survey both partners had had full-time work at some time during the marriage; in about a third the wife had not.[43] In 88% of the marriages the husband's net income had been higher than the wife's over the preceding year: in 8% of cases the spouses' income was in the same range: in only 4% of cases was the wife's income higher.[44] Spouses were asked in the O.P.C.S. survey about their respective contributions to setting up and maintaining the home. Most (71%) said that the husband's financial contributions were greater; 24% said that financial contributions were the same by both partners; and 5% said that the wife's financial contributions were greater.[45] So far as unpaid work at home was concerned, 50% said that the contributions were the same by both partners; 45% said they were greater by the wife and 5% said they were greater by the husband.[46]

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[35]Table 2.4.
[36]*Ibid.*
[37]Table 2.5.
[38]Table 2.6. Spouses also generally regarded furniture and equipment as owned jointly, the actual proportions holding this view being as follows: furniture 95%; refrigerator 93%; television 92%; cooker 91%; vacuum cleaner 90%; washing machine 85%; record player 84%. Cars were regarded as joint property by 74% of respondents.
[39]Text accompanying Table 2.6.
[40]Tables 2.10 to 2.12.
[41]Table 2.10.
[42]Paras. 2.8 and 2.9.
[43]Para. 2.6.
[44]*Ibid.*
[45]Table 2.18.
[46]*Ibid.*

Position of one-parent families

3.30 The Finer Report[47] made it abundantly clear that the position of one-parent families, particularly fatherless families, is often extremely impoverished. For many of them, supplementary benefit is the main source of income.[48] Their standard of living is often "that which obtains at, or only a little above, supplementary benefit level, and for a substantial number this remains the position for long periods of time".[49] They have difficulties in relation to housing and child-care and in other areas of life.[50] We think that the presence of dependent children in a family is a factor of great importance in relation to financial provision on divorce, and we try to take it fully into account in our recommendations. It is only realistic to recognise, however, that where both parties have limited resources the law of financial provision on divorce is often irrelevant. As the Finer Committee put it, the law cannot extract "more than a pint from a pint pot".[51] Any hope of improving the general condition of families in this position cannot to any material extent depend on improvements in the law on financial provision on divorce.

Employment situation

3.31 There is also abundant evidence that, although married women are increasingly in paid employment outside the home, and although the policy of the law is firmly against discrimination on grounds of sex or marriage, it remains the case that women, and married women in particular, have not as a general rule gained anything like complete equality in the employment market.[52] Their employment is often part-time and their earnings are often low. In so far as employment difficulties, of women or men, flow from marriage or the need to care for children of a marriage they are relevant to financial provision on divorce, and we take them into account later in the appropriate contexts. In so far as they do not, they are in our view irrelevant to the policy on financial provision. The fact that a person belongs to a section of the population which is at a disadvantage in the labour market is not by itself a reason to impose a financial obligation on someone with whom he or she was formerly connected.

Attitudes to financial provision

3.32 Informants in the survey of family property in Scotland were asked for their views on how the most common types of family property should be divided on the breakdown of the marriage. We discuss the findings later in the context of specific proposals for reform. It is sufficient to note here that the survey revealed strong support for three propositions—first, that property acquired during the marriage, other than by gift or inheritance, should be shared equally between the spouses;[53] second, that contributions by work in the home should be taken into account in allocating property on marital

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[47] *Report of the Committee on One-Parent Families* (Cmnd. 5629, 1974).
[48] *Ibid.*, para. 5.6 and Table 5.1.
[49] *Ibid.*, para. 5.36.
[50] *Ibid.*, Parts 6 to 8.
[51] *Ibid.*, para. 4.59.
[52] *Ibid.*, Part 7; see also the Law Commission's Discussion Paper on *The Financial Consequences of Divorce: The Basic Policy* (Law Com. No. 103, 1980, Cmnd. 8041), paras. 45 to 57.
[53] Tables 3.2 to 3.11.

breakdown;[54] and third, that the presence of dependent children may justify a preference being given to the spouse with custody of them.[55]

3.33 There is some evidence that divorced spouses are often uninterested in, or simply realistic about, a periodical allowance after divorce. A study in Aberdeen in 1965 showed that many separated or divorced wives preferred to rely on supplementary benefit (or national assistance as it then was) rather than on periodical payments from their husbands or former husbands.[56] Mitchell, in her recent research, found that divorced wives were sometimes remarkably uninterested in the possibilities of obtaining a supplement to their income in the form of payments by the other spouse.[57] Several legal practitioners who commented on our proposals also pointed out that it was often of no importance to a wife whether or not she obtained a periodical allowance. She would often be on supplementary benefit and any payments received from her husband would simply reduce the amount received from the State. We were told that in a number of cases conclusions for a periodical allowance were inserted on the suggestion of the wife's solicitor rather than at the insistence of the wife herself.[58]

Need for financial provision

3.34 It would be theoretically possible to make no provision at all for financial provision on divorce. The parties could be left to go their own ways financially and economically after divorce. We have no doubt that in some cases this would be a fair and appropriate result and we consider that a useful starting point for any discussion of financial provision on divorce is to assume that the parties should be economically independent after divorce unless there is some justification for some other solution. In many cases, however, the parties' property and income will be distributed between them in a more or less haphazard way at the end of their marriage—and certainly not in the way which they would have agreed had they been planning for the post-divorce situation since the beginning of their marriage. To let matters rest as they are in such cases would produce avoidable injustice. None of those whom we consulted suggested that the courts should have no power to make orders for financial provision on divorce. Indeed, we received many suggestions that the courts should have wider powers—including power to transfer property on divorce—than they have at present. There can be no question of reverting to the pre-1976 Act rule that only the pursuer can apply for financial provision on divorce. That would be totally inconsistent with the idea of non-fault divorce which underlies the present law. Either party must be able to invoke the court's powers. We have, therefore, no hesitation in **recommending**, as an essential introduction to our discussion of this topic:

30. In an action for divorce the court should have power, on the application of either party, to make an order for financial provision.[59]

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[54]Table 3.1.

[55]Tables 3.12 to 3.15.

[56]Edwards and Thompson, "Who are the Fatherless?" New Society No. 436, Feb. 4, 1971 p. 192 ("These women welcomed the security of National Assistance (as it was then). They infinitely preferred this to the erratic contributions from the fathers.")

[57]Mitchell, *op. cit.*, pp. 37 to 38.

[58]Cf. the case referred to in Mitchell, *op. cit.*, at p. 38.

[59]See Appendix A, clause 8.

We discuss later the range of powers which we think the courts should have. It is sufficient at this point to note that by an order for financial provision we mean not only an order for payment of a capital sum or periodical allowance but also an order for the transfer of property and any incidental order.

OBJECTIVE OF FINANCIAL PROVISION

The present law

3.35 The Divorce (Scotland) Act 1976 provides no guidance as to the objective of financial provision on divorce. It merely enables either party to the marriage to apply for financial provision by way of a periodical allowance or capital sum or both and directs the court to make "with respect to the application such order, if any, as it thinks fit".[60] The reported cases do not make matters any clearer. They are generally concerned with factors which may be taken into account and with the amounts of awards. In none of them is any general objective spelled out. In *McRae* v. *McRae*[61] the Second Division of the Court of Session stressed that the amount, if any, to be awarded was "essentially a matter for the discretion of the Court which grants the decree of divorce" and that it was not for the Inner House to seek to fetter "the wide discretion given by statute to the judge of first instance".[62]

Advantages and disadvantages of the present law

3.36 The present law has the advantage of flexibility. The court can take all the circumstances into account and can make an award which, in its view, is just. It is not constrained by any limited objective which, however appropriate in some cases, might well be inappropriate in others. In this respect, the present position in Scotland can be contrasted with that in England where the courts are directed to have regard to various factors and so to exercise their powers

> "as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other".[63]

The fact that the Scottish courts have no such statutory objective means that the arguments for and against change in the *status quo* are not the same in Scotland as in England.[64]

3.37 The present law has, however, serious disadvantages. It can be said to involve not only "an abdication of responsibility by Parliament in favour of

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[60]S.5(2).

[61]1979 S.L.T. (Notes) 45.

[62]*Ibid.*, at pp. 45 and 46. This does not mean that there is no appeal at all against the decision of a judge of first instance. The Inner House will interfere with the award, however, only in extreme cases—e.g. if the "Lord Ordinary has failed to take into account matters relevant and necessary to his consideration or has taken into account irrelevant or improper considerations or has misdirected himself in law", or has awarded an amount which "is so unreasonable . . . as to take it outside the field of discretion altogether:" *Gray* v. *Gray* 1968 S.C. 185 per Lord Cameron at p. 197.

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

[64]For a full discussion of the English position see the Law Commission's Discussion Paper on *The Financial Consequences of Divorce: The Basic Policy* (Law Com. No. 103, 1980 (Cmnd. 8041)).

the judiciary"[65] but also an abdication of all collective responsibility in favour of the conscience of the single judge. In a society which tolerates different views on moral issues the consciences of judges can lead them in different directions. Some may wish to penalise matrimonial misconduct;[66] others may not, or at least not to the same extent.[67] Some may stress a spouse's past contributions or the lack of them;[68] others may stress a husband's "prospective liability to support".[69] In short, what one judge thinks fit, another may think unfit. We have been told that there are certain rules of thumb which are applied by most Outer House judges and which lead to a measure of predictability.[70] Even if rules of thumb are thought to exist at present, it must be noted, first, that the Inner House has refused to give its approval to any such "rules"[71] and, second, that no-one claims that *all* judges have the same approach to all questions affecting financial provision on divorce. Moreover, any rules of thumb which do exist would not necessarily survive changes in the judiciary or the conferring of divorce jurisdiction on the sheriff courts.[72] In addition it does not seem satisfactory that questions of social policy, which have very important financial consequences for individuals,[73] should turn on informal understandings and somewhat arbitrary rules of thumb based on no ascertainable principle and known only to a small circle of court practitioners. It seems to us that any solicitor in any part of Scotland, even if not a divorce specialist, should be able to turn to a statute on financial provision on divorce and find some clear statement of the underlying principles on the basis of which he could advise his client and seek to negotiate a settlement. That is not possible under the present law. The result of a system based on unfettered discretion is that lawyers cannot easily give reliable advice to their clients. Clients in turn feel dissatisfied with the law and lawyers. The system encourages a process of haggling in which one side makes an inflated claim and the other tries to beat it down. A battle of nerves ensues, sometimes right up to the morning of the proof. By that time it is known which judge will be dealing with the case, and this may become a factor affecting last-minute and hurried negotiations. Such a system does nothing to help the parties to arrange their affairs in a mature and amicable way. It is calculated to increase animosity and bitterness.

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[65] *Ibid.*, para. 69 (commenting on the merits and demerits of a solution which would simply direct the court to make whatever order it considered appropriate in the light of all the circumstances).

[66] See e.g. *McKay* v. *McKay* 1978 S.L.T. (Notes) 36; *Craig* v. *Craig* 1978 S.L.T. (Notes) 61; *Lambert* v. *Lambert* (Inner House, 17 June 1981, unreported).

[67] See e.g. *Lambert* v. *Lambert* 1980 S.L.T. (Notes) 77 (Outer House).

[68] See e.g. *McLean* v. *McLean* 1979 S.L.T. (Notes) 82.

[69] See e.g. *Forbes* v. *Forbes* 1978 S.L.T. (Notes) 80. It is only in a loose sense that such a liability can be referred to. There is no legal obligation of support between ex-spouses after divorce. The only obligation is to pay whatever the court orders to be paid.

[70] In *McRae* v. *McRae* 1979 S.L.T. (Notes) 45 it was claimed by counsel that the normal award of a capital sum to a wife on divorce was in the range of a third to a half of the husband's capital, and in *Lambert* v. *Lambert* 1980 S.L.T. (Notes) 77 it was claimed by counsel that the normal award of a periodical allowance to a wife on divorce was in the range of a quarter to a third of the joint gross incomes.

[71] *McRae* v. *McRae, supra.*

[72] The great divergences which can exist among scattered decision-makers are amply illustrated in Barrington Baker, Eekelaar, Gibson and Raikes, *op. cit.*

[73] The financial consequences of divorce are often more serious for the individuals concerned than the financial consequences of an action for reparation, because the latter are often covered by insurance.

3.38 We have concentrated so far on the nature of the process by which questions of financial provision on divorce are decided. Once these questions are decided the parties at least know where they stand, but it is clear from the submissions and letters we have received that many of them do not like where they stand or know why they stand there. We received strong criticism, in particular, of life-long periodical allowances after divorce. Men and second wives often regard such an allowance to an ex-wife, who has no young children in her care and who is not incapacitated in any way, as an unjustified and intolerable burden on their finances. Many former wives do not like the system either, partly on the ground that "it is particularly odious for a woman who has ended her marriage to be obliged to remain financially dependent on her husband when she has expressed her wish to be free of him altogether" and partly on the ground that where a periodical allowance has to be relied on it is "grossly abused by the majority of obligants with payments insufficient and irregular, if made at all".[74] It may be added that awards of periodical payments rapidly lose their value in a period of inflation.[75] We also received complaints directed against current practices in relation to short marriages and inherited property. We were told that it was quite normal for wives to claim up to a half of their husbands' property even if the marriage had been very short or the property had been inherited by the husband late in the marriage. Husbands who felt that such claims were totally unjustified nevertheless felt obliged to settle for substantial amounts.

3.39 Some of those who commented on the Memorandum favoured the retention of the existing system, on the ground that it was more likely to achieve justice in the infinite variety of cases coming before the courts than any system which attempted to limit the courts' discretion by reference to a defined objective. We accept that the courts must have a large measure of discretion to enable them to deal with the great variety of cases coming before them. We also accept that an inappropriate or too limited objective could be worse than none at all. We are convinced, however, that the disadvantages of the present system are such that an attempt must be made to provide some more specific guidance to the courts, the legal profession and the public on the purpose or purposes of financial provision on divorce, and on the principles to be applied and the factors to be taken into consideration in connection therewith.

3.40 In the following paragraphs we examine various possible objectives of financial provision on divorce. We conclude that none of these is adequate standing by itself and that a satisfactory system has to be based on a combination of objectives or principles.

Possible objectives of financial provision

3.41 In the Memorandum[76] we set out various possible views on the purpose of financial provision on divorce. Other possible objectives have been

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[74]One comment on the Memorandum, made in the context of a forceful argument for increased State aid for divorced women who were unable to work because of their children.

[75]A variation can be applied for but ex-wives may not wish to go through the ordeal of fresh court proceedings and may not wish to further alienate their ex-husbands.

[76]Para. 3.2.

suggested in the Law Commission's Discussion Paper[77] and in comments we have received.

3.42 *Penalty for fault.* Financial provision could be seen as a penalty for fault. If a spouse committed a matrimonial offence and broke up the matrimonial home then, on this view, he or she should pay damages under another name. The damages might well include reparation for the loss of alimentary rights and succession rights. This view is difficult to reconcile with the policy of the present non-fault divorce law and has serious practical disadvantages. Responsibility for the breakdown of a marriage is often extremely difficult to ascertain and to concentrate on this element would be to foster vindictive and destructive disputes. There was no support whatsoever on consultation for the view that the general purpose of financial provision on divorce should be to penalise fault and we reject it without hesitation. This is not to say, however, that we think that conduct is always irrelevant to financial provision on divorce.[78]

3.43 *Continuing support.* Financial provision on divorce could be seen as a continuation of the obligation of support which existed during the marriage.[79] This view is inconsistent with the idea that divorce terminates a marriage. In certain cases it would lead to results which we regard as unjustifiable. We can see no reason, for example, why there should be any continuing obligation of support after a short childless marriage which has caused no irremediable alteration in the circumstances of either party. Nor can we see any reason why a man who has been divorced for twenty years should be able to claim support from his former wife if he becomes ill or unemployed at the age of 50. In these respects the continuing support objective goes too far. In another respect it does not go far enough. It makes no provision for a fair division of property on divorce. In many cases the property built up by the spouses' joint efforts during the marriage stands in the name of one of them alone. Nevertheless, it appears that at the present day most spouses regard such property as belonging to both of them jointly notwithstanding the name in which it is held.[80] We think that in such cases some adjustment of property rights is required on divorce whether or not there is any case for continuing maintenance. With one qualified exception,[81] those consulted expressed no support for the view that the objective of financial provision on divorce should be the continuation of the obligation of life-long support which existed during the marriage. Some thought, however, that the law should be sufficiently flexible to provide for such support in some cases. We return to this question later.[82] In the meantime we have no difficulty in rejecting the

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[77]Law Com. No. 103.

[78]See paras. 3.172 *et seq.*

[79]Arguments for and against this view are set out in the Law Commission's Discussion Paper (Law Com. No. 103) especially in Part III, where there is a very useful analysis, to which for the sake of brevity we simply refer, of the changing economic role of women.

[80]See para. 3.27 above.

[81]One commentator strongly advocated an improved system of State aid for divorced women so that they could be financially independent of their ex-husbands, but nevertheless approved of "the theory underlying the view which favours continuation of alimentary relationships after divorce".

[82]See paras. 3.110 *et seq.*

view that the sole purpose of financial provision on divorce should be the continuation of the obligation of support which existed during the marriage.

3.44 *Transitional measure.* Financial provision on divorce could be seen as a transitional measure, designed to smooth the path from married status, with its concomitant right to aliment, to self-sufficient single status (a status which in fact will often terminate with remarriage). Some of those consulted supported this as an element in a system of financial provision but none suggested that it should be the sole objective. We were at one time strongly attracted by the idea of an objective framed in terms of enabling the parties to effect the economic transition from marriage to divorce. It seemed to us that such an objective, if suitably qualified, could cater for most situations and could express an important policy decision—namely, that the parties to a divorce should be encouraged to look towards an independent future, and to effect so far as possible a "clean break" with the past.[83] The underlying philosophy of this approach would be that divorce does indeed terminate the marriage, financially as well as legally, and that the law should concentrate on helping the parties to adjust to their new circumstances. We have concluded, however, that an objective which was genuinely transitional would be too narrow, and that an objective which was wide enough to be acceptable would not be genuinely transitional. Let us consider first an objective framed in some such terms as "to enable the parties to effect the economic transition from marriage to divorce" or rather (since that particular transition is instantaneous and automatic) "from dependence on, to independence of, the other party". Such an objective would provide no guidance at all. If the court made no order for financial provision whatsoever the parties would still be able to effect the economic transition referred to. They would have no choice. To have any content the objective would need to be qualified in some way. If it were, for example, "to enable the parties to effect more easily the economic transition" from dependence on, to independence of, the former spouse it would have some meaning, but it would not cover all cases. It would not cover, for example, the case of the older wife, who with her husband's approval had not been employed outside the home, who had been a housewife throughout her long marriage, who had no capital and no future prospects of remunerative employment, and who was divorced through no fault of her own by a man with little capital but a substantial income. In such a case we think that something more would be required than an easing of the transition to supplementary benefit level. Nor would such an objective cover all cases where a property adjustment might be required. Suppose, for example, that a husband and wife have both worked throughout their marriage. Both have contributed towards the purchase of property but the property is in the name of one alone—it does not matter which. They obtain a divorce on the basis, say, of five years' separation. Since parting they have both obtained accommodation and have continued in their respective employments. There is no need for any easing of the transition in such a case. It has already been effected. But there is, we think, a need for some property adjustment. This would not be catered for by an objective of the type discussed. It would be possible, of course, to frame an objective in some such

[83]The advantages of a "clean break" were pointed out by Professor Meston in his book on *The Succession (Scotland) Act 1964* (1st edn. 1964), p. 13. The phrase, which has been much used in recent years, seems more applicable to techniques than to objectives.

terms as "to enable the parties to effect, *as equitably as possible*, the transition from marriage to divorce" but that would be to change the emphasis from transition to equitable adjustment and would be a different objective altogether.[84] We therefore reject the view that the sole objective of financial provision on divorce should be to enable the parties to effect, or to effect more easily, the transition from marriage to divorce, or from dependence on to independence of the other spouse. We think, however, that some sort of transitional allowance would be a useful and appropriate ingredient of any system of financial provision on divorce.[85]

3.45 *Relief of public purse.* The purpose of financial provision on divorce could be seen as the relief of the public purse. On this view, if a person requires support after divorce his or her former spouse should pay rather than the taxpayers at large. The objection to this view is that the whole point of divorce is to sever the relationship of husband and wife. The parties become strangers to each other in the eyes of the law, and the desire to spare the public purse is not a sufficient reason for requiring a man or a woman to support an impoverished stranger. It is significant that for the purposes of supplementary benefit a person is not liable to maintain his or her divorced spouse.[86] This particular policy decision has therefore already been taken by Parliament. There was no support on consultation for the view that the objective of financial provision on divorce should be to save the public purse. Such an objective would be difficult to justify and we have no hesitation in rejecting it.

3.46 *Equitable adjustment of economic advantages and disadvantages arising from the marriage.* This was the objective which we provisionally favoured in the Memorandum.[87] We pointed out that, under this objective, financial provision could be used to provide support for the spouse who had to look after the children of the marriage and for the older spouse who had interrupted, or never taken up, a career because of marriage. In both cases the disadvantages would have arisen from the marriage. Financial provision could also be used to adjust the spouses' rights in property acquired during the marriage. We wish to stress that this objective is not a "relief of need" objective.[88] The aim would be an equitable adjustment of property or income or both whether or not there was need. In some cases a divorced spouse who was in need would get nothing because his or her need had no connection with the marriage: in others a divorced spouse who was not in need would get something because, for example, of the way in which property accumulated during the marriage happened to be held. There was some support for this objective on consultation. Several commentators, however, while sympathising with the approach in general terms, thought that it would be unacceptable to cut off rights to financial provision in all cases where the need for such provision did not arise from the marriage. Others thought that the objective was too vague and would not provide sufficiently clear guidance to the courts and the legal profession. It was also pointed out that it would be difficult in

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[84]See paras. 3.46 and 3.57 below.
[85]See paras. 3.107 to 3.109 below.
[86]Supplementary Benefits Act 1976, s.17.
[87]Proposition 64 and paras. 3.2(e) and 3.7.
[88]Cf. Law Com. No. 103, paras. 70 to 72.

practice to quantify the advantages and disadvantages arising out of the marriage. "How for instance would the court determine what would have been the career pattern of a woman who married immediately on graduating from a university ten or twelve years ago, and thereafter devoted herself exclusively to bringing up her children?"[89] We accept these criticisms and do not now recommend a statutory objective in the above terms, although we think that some of the ideas lying behind this approach have validity.

3.47 *Preservation of economic position of both parties.* The Law Commission in their Discussion Paper[90] considered several "models" which had been put forward. Most of these overlap with the objectives we have discussed above. Thus the first model was based on the retention of the policy of the present English law, which is that the court should have regard to various factors and should so exercise its various powers

> "as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."[91]

This apparently clear direction is made less clear by the assumptions underlying some of the factors to be considered (e.g. "the duration of the marriage" and "the contributions made by each of the parties to the welfare of the family") and has been ignored by the courts in many cases where it would have been absurd to give full effect to it.[92] We think that, as a direction standing by itself, it is inappropriate. It is open to the objections which have led us to reject the idea of a continuing obligation of support as the sole objective of financial provision on divorce.[93]

3.48 *Justice at court's discretion.* The second model considered by the Law Commission was essentially the unfettered discretion model of the present Scots law.[94] We have given our reasons for rejecting this.

3.49 *Relief of need.* The third model was a "relief of need" model under which

> "the economically weaker party would be eligible to receive financial assistance from the economically stronger party if, and so long as, he or she could show that, taking into account his or her particular social and economic conditions, there is actual need of such assistance".[95]

If "need" is not narrowly restricted, this seems to us to be simply a variant of the continuing support model and to be open to precisely the same objections. If "need" is fixed at a low level, the model would still be too wide

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[89] *Ibid.*, para. 85.

[90] Law Com. No. 103. The purpose of this document was not to put forward even tentative proposals for reform but was merely to contribute to the debate on the policy underlying financial provision on divorce by focusing attention on the fundamental problems.

[91] Matrimonial Causes Act 1973, s.25.

[92] See Law Com. No. 103, paras. 59 to 65.

[93] See para. 3.43 above.

[94] Paras. 66 to 69.

[95] *Ibid.*, para. 70.

in some respects (in that it would still impose a life-long obligation of support where there was no good reason to do so) and too narrow in others (in that it would make, for example, no provision for property adjustment). If "need" is limited to need arising from the marriage the model would still be too narrow, in that it would not cater for property adjustment. We can see that if the law begins with the idea of a continuing obligation of support after divorce, a process of restricting that obligation to cases of need has some attractions. It enables the courts to escape from the notion that a divorced wife is entitled to be supported for life even if she could support herself by taking employment. We think, however, that that is the wrong starting point. From any other starting point a "relief of need" approach is hard to justify and has few attractions. It does not explain why one divorced spouse should relieve another's needs and it does not explain why the process of financial adjustment on divorce should be confined to the relief of needs.

3.50 *Rehabilitation.* The fourth model considered by the Law Commission was a "rehabilitation" model.[96] The objective would be to award such sums as were necessary to assist a divorced spouse to regain an independent role in society and to relieve hardship during the rehabilitative process. This model is very similar to the "transitional" model which we have considered above and rejected as the sole objective of financial provision.[97]

3.51 *Division of property.* The fifth model was a "division of property" model.[98] We believe that an equitable division of property is an essential ingredient of any defensible system of financial provision on divorce, but we do not think it can be the sole objective. In many divorce cases there is little or no property to divide and yet some financial provision is called for, if only to provide for some sharing of the burden of child-care.

3.52 *Apportionment of means according to formula.* The sixth model was a so-called "mathematical approach" whereby the spouses' rights on divorce would be fixed by reference to a formula (such as a division in certain proportions of the spouses' combined property and income) which could then be departed from, if need be, to take account of certain specified factors.[99] There are obvious attractions in such an approach,[100] and we recommend later that it should be used to some extent in relation to the division of property on divorce.[101] We think, however, that as a single and general objective it would not do. A solution which involved income transfers between the parties for their joint lives on the basis of a formula would be open to even more objections than the continuing maintenance model. We can see no more reason for tying divorced parties together for life with a formula than for doing so without a formula. Predictability of results ceases to be a virtue if the results are predictably unsatisfactory and unjustifiable.

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[96] *Ibid.*, paras. 73 to 76.

[97] See para. 3.44 above.

[98] Paras. 77 to 79.

[99] *Ibid.*, paras. 80 to 83.

[100] Legal practitioners already make use of such rules of thumb in relation to financial provision on divorce: see *McRae* v. *McRae* 1979 S.L.T. (Notes) 45 and *Lambert* v. *Lambert* 1980 S.L.T. (Notes) 77.

[101] See paras. 3.65 to 3.90 below.

3.53 *Restitution.* The seventh model was based on the idea of restoring the parties to the position in which they would have been had their marriage never taken place.[102] This model bears a certain resemblance to the objective of adjusting equitably the advantages and disadvantages arising out of the marriage. It would be open to some of the same objections. It would not provide for continuing support in certain cases where that might be thought to be appropriate. It would be difficult to apply in practice. It would, moreover, involve a very artificial process. The marriage *has* taken place. Things have changed. It is unrealistic to seek to put the clock back. Again, we do not think that this could be the sole objective of financial provision.

3.54 *Combination of models.* The final model considered by the Law Commission was a combination of models.[103] We are very attracted by this approach and develop it further below.[104]

3.55 *Provision for children.* It would be possible to take the view that the sole purpose of financial provision on divorce was to cater for dependent children of the marriage. On this view a periodical allowance could be awarded to an ex-spouse if, and only if, he or she had the care of young children and was thereby prevented from realising his or her full earning potential or was put to the expense of paying a child-minder. Awards of capital sums or transfers of property could similarly be made if, and only if, there was a need to provide a home for the children or funds for their education and upbringing. That criteria of this nature have a most important part to play in a system of financial provision on divorce (in addition to aliment for the children themselves) we do not doubt.[105] We do not think, however, that it could be seriously argued that provision for children should be the sole objective of financial provision on divorce. There may, for example, be a need for an equitable redistribution of property on the termination of a childless marriage.

3.56 *Reward for past contributions.* The desirability of taking into account the contributions made by both parties to the marriage is stressed in several laws on financial provision on divorce.[106] We have considered whether a general objective based on the idea of a fair reward for past contributions would be possible. There are certain attractions in this approach and we suggest later that it could be used as an ingredient in a system of financial provision on divorce.[107] We think, however, that a general objective based

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[102]Paras. 84 to 85.

[103]*Ibid.*, para. 86.

[104]At paras. 3.60 *et seq.*

[105]They play a part under the present system: see e.g. *Cowie* v. *Cowie* 1977 S.L.T. (Notes) 47; *Whitehouse* v. *Whitehouse* 1980 S.L.T. (Notes) 48. We recommend later that they should play a part in the system we propose: see paras. 3.100 to 3.106.

[106]See e.g. Matrimonial Causes Act 1973, s.25(*f*) (court to have regard to "the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family"); Australian Family Law Act 1975, s.79(4).

[107]Paras. 3.91 to 3.99. The Court of Session already has regard to contributions in appropriate cases in awarding capital sums on divorce: see e.g. *Sharpe* v. *Sharpe* 1970 S.L.T. (Notes) 26; *McRae* v. *McRae* 1977 S.L.T. (Notes) 78; *Russell* v. *Russell* 1977 S.L.T. (Notes) 13 (all on financial contributions); *Nicol* v. *Nicol* 1969 S.L.T. (Notes) 67; *Cowie* v. *Cowie* 1977 S.L.T. (Notes) 47; *Gray* v. *Gray* 1979 S.L.T. (Notes) 94; *Macrae* v. *Macrae* 1977 S.L.T. (Notes) 72; *Hyslop* v. *Hyslop* 1980 S.L.T. (Notes) 21 (all on non-financial contributions such as service in the home).

exclusively on a fair reward for past contributions would be too narrow. For reasons which we develop later we think that the idea of equal sharing is a better starting point for a division of property accumulated during the marriage than the idea of a reward for contributions.[108] More fundamentally, we think that an objective conceived only in terms of past contributions would be too exclusively retrospective. In relation to financial provision on divorce the court has often to look forwards, for example to the continuing need for child-care.

3.57 *Equitable adjustment without qualification.* At a very general level a choice has to be made between two quite different approaches to the question of financial provision on divorce. The first seeks to preserve so far as possible the economic relationship of the parties notwithstanding the divorce. The second recognises that on divorce there is a transition from one status to another and seeks to adjust the parties' economic situation in a fair and equitable way. In the Memorandum we referred to the first approach as "the support view", because the main economic consequence of a subsisting marriage is the obligation of lifelong support, and to the second as "the adjustment view".[109] We expressed a clear preference for the adjustment view. In the Memorandum we favoured an objective framed in terms of an adjustment of the economic advantages and disadvantages arising from the marriage.[110] We have given our reasons for rejecting a statutory objective in such terms.[111] It would be possible, however, to say that the objective of financial provision should be an equitable adjustment of the spouses' economic position on divorce, without any limitation. This would, in our view, come as close to an acceptable single objective as it is possible to get. It is, however, far too vague and general to provide sufficient guidance to the courts, the legal profession and the public. It would indicate a preference for adjustment on divorce but would, in practice, be little better than leaving matters to the unfettered discretion of the courts.

An objective coupled with a list of factors

3.58 We have considered carefully whether it would be possible to provide sufficient guidance by stating an objective and listing various factors to be taken into account. The objective would have to be a very general one, such as an equitable adjustment of the parties' economic position on divorce, and the list of factors would have to be extensive. In England,[112] for example, the court is directed to have regard to:

> "(*a*) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (*b*) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

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[108]Paras. 3.65 *et seq.* The New Zealand experience is instructive on this question: see Gray, *Reallocation of Property on Divorce* (1977), pp. 42 to 45, 71 to 96.

[109]Para. 3.2.

[110]Proposition 64 and para. 3.7.

[111]Para. 3.46 above.

[112]Matrimonial Causes Act 1973, s.25.

(*c*) the standard of living enjoyed by the family before the breakdown of the marriage;

(*d*) the age of each party to the marriage and the duration of the marriage;

(*e*) any physical or mental disability of either of the parties to the marriage;

(*f*) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(*g*) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring; . . ."

It seems to us that such a system does not go far enough in the direction of principles and predictability. There is no acceptable way of specifying how much weight should be given to the various factors, some of which pull in opposite directions.[113] The factors are so numerous and so various that the discretion is likely in the end to be as wide as it would be without the list.[114]

Conclusion—no single objective sufficient

3.59 Our conclusion is that none of the above objectives, with or without a list of factors, is sufficient to serve as the sole objective of financial provision on divorce. Several of them could, however, usefully feature in a scheme based on a combination of principles or objectives and we make recommendations below to that effect.

A combination of principles

Advantages and disadvantages of a combined system

3.60 The main advantage of a system of financial provision on divorce based on a combination of principles is that it corresponds to reality. We have seen that no single objective which is precise enough to be useful is wide enough to cover all the situations in which an award of financial provision may be called for. The reason is that an award of financial provision on divorce may be justified by one or more principles. It leads to clarity in the law to recognise this. A subsidiary advantage is that a system based on a combination of several principles can be discriminating as well as realistic. It may be, for example, that matrimonial misconduct will be relevant in relation to some principles but not others; or that an order for periodical payments for an indefinite period will be justified by some principles but not by others.

3.61 The main disadvantage of a system based on a combination of principles is its appearance of complexity when put into statutory language. There is no doubt that the system which we recommend in this Report is more

[113]E.g. future needs and past contributions. How should these factors be reconciled if, e.g., a wife intends to remarry and her second husband is very wealthy? See Cretney, *Principles of Family Law* (3rd. edn., 1979), Ch. 10.

[114]See Barrington Baker, Eekelaar, Gibson and Raikes, *op. cit.*; Law Com. No. 103, paras. 59 to 60; Cretney, *op. cit.*, pp. 334 to 335.

complex legislatively than one which simply directs the court to make such order as it thinks fit. Any acceptable system would be. The new system would not necessarily, however, be more complex in practice than the existing system. In many cases only one or two principles would apply. And the provision of a framework of principles should make it easier, and not more difficult, for the parties to reach agreed settlements.

Need for balance between principle and discretion

3.62 One of the main criticisms made of the present law on financial provision is that it leaves too much to the unfettered discretion of the court. We think that this criticism is justified. On the other hand we have no doubt that the courts must be left with considerable discretion to take account of the great variety of circumstances in cases which come before them. One of our main concerns in this Report has been to try to strike the right balance between principle and discretion. We take as our starting point the proposition that an order for financial provision should be made if, and only if, it is justified by an applicable principle. Some such starting point is essential if there is to be any underlying principle in the law. Immediately, however, an obvious difficulty arises. An applicable principle might, if it were unqualified, compel a court to make an order which would be unreasonable in the light of the parties' resources at the time of the divorce. One principle might, for example, be equal sharing of property acquired during the marriage and owned at the time of final separation. Application of this principle might require a husband to pay, say, half the value of the matrimonial home to the wife. But by the time of the divorce, which could be years after the sale of the home, the husband might not, through no fault of his own, have the means to make such a payment. Similar difficulties could arise if payment was sought from a wife in analogous circumstances. A law on financial provision on divorce would be open to serious criticism if it appeared to compel courts to make orders which seemed unreasonable in the light of the parties' actual economic position. For this reason we think that the courts should be directed to make an order for financial provision if, and only if, (a) the order is justified by an applicable principle, and (b) the order is reasonable having regard to the resources of the parties. This introduces at the outset a certain balance between principle and discretion. The balance can be maintained, and, in our view, should be maintained by the way in which the applicable principles are framed.

Identifying the applicable principles

3.63 In identifying the principles which should govern an award of financial provision on divorce we have applied the following criteria. First, the system must be such as could be justified to reasonable husbands and reasonable wives: it must be non-discriminatory as between men and women. Second, it must be capable of applying to many different types of marriage—whether long or short, with children or without children, with property or without property, whether housewife marriages or two-career marriages, whether entered into one year ago or forty years ago. Third, it must be capable of applying to cases where the marriage was ended because of the fault of the person applying for financial provision, or the fault of the other party, or the fault of both, or the fault of neither.

3.64 Applying these criteria, and taking into account all the submissions and comments made to us, we **recommend**:

31. The court should make an order for financial provision on divorce if, and only if, (*a*) the order is justified by one or more of the following principles:
    (i) fair sharing of matrimonial property;
    (ii) fair recognition of contributions and disadvantages;
    (iii) fair sharing of the economic burden of child-care;
    (iv) fair provision for adjustment to independence; and
    (v) relief of grave financial hardship
    and (*b*) the order is reasonable having regard to the resources of the parties.
    (Paragraphs 3.35 to 3.64; Clause 8(2).)

In the following pages we explain and develop each of the above principles.

FAIR SHARING OF MATRIMONIAL PROPERTY

A principle of quantification

3.65 When we refer to the principle of fair sharing of matrimonial property we are not talking about the division of specific items of property. How the value of a spouse's share would be satisfied would depend on the resources available at the time of the divorce. The court's powers would not be limited to matrimonial property (as defined) but would extend to all of the spouses' resources at the time of the divorce. The concept of matrimonial property would be relevant only as a means of arriving at a figure. We define "matrimonial property" below.[115] The basic idea is that it covers property acquired by the spouses, otherwise than by gift or inheritance, in the period between the marriage and their final separation.

The norm of equal sharing

3.66 It would be too vague to empower the courts to award simply a "fair share" of matrimonial property. One of the major criticisms of the present law is that it provides no guidance on the amount of a capital sum which can be expected on divorce. It would, on the other hand, be too rigid to lay down a fixed rule of apportionment for all cases. We think that the best solution is to provide that matrimonial property should normally be divided equally between the parties but that the court should be able to depart from this norm of equal sharing in special circumstances.

3.67 We have opted for a norm of equal sharing for the following reasons. First, there is clear public support for this solution. In the survey of family property in Scotland carried out in 1979 informants were asked how they thought the types of property most commonly owned by married people[116] ought to be divided on the breakdown of the marriage. Several questions were asked. The first related to property acquired during the marriage by a childless couple where both spouses had contributed towards the purchase. Over 90% of informants thought that in this case the property should be

[115] See para. 3.69.
[116] I.e. houses, household goods and savings.

divided equally between the parties.[117] The next question related to the same facts, but upon the assumption that only one spouse had contributed financially to the purchase. About 65% of informants still thought that the assets should be shared equally[118] Among married informants the proportion was higher (over 69%).[119] Our second reason for favouring a norm of equal sharing is that this solution was supported in submissions and comments made directly to us.[120] Our third reason is that we felt unable to justify any system of sharing in fixed proportions which was not based fundamentally on the idea of equality. The way in which the title to property is held by spouses varies greatly from case to case and depends on a variety of factors which bear little or no relation to the way in which the spouses regard the property.[121] It would be arbitrary and unfair to begin with the way in which the title is held and award the poorer spouse, say, such a sum as to give him or her a third of the "joint" property. If the property was mainly in the husband's name the wife's share would be a third. If the property happened to be mainly in the wife's name the husband's share would be a third. We can see no justification for such a solution. It is sometimes suggested that the division of property on death provides an analogy. It is difficult to know, however, what division this analogy would suggest. In many cases the surviving spouse takes all the property[122]—a solution which would hardly be appropriate on divorce. The old common law division into thirds—a third to the widow, a third to the children, and a third to the "dead's part" (for heirs or legatees)—applied only to moveable property[123] and is inappropriate on divorce, because divorce does not, and in our view should not, affect children's property rights. Where there were no children the surviving spouse took half of the moveable property.[124] In our view the analogy with death is unhelpful. The situations on death and divorce are entirely different. On the dissolution of a marriage by death there is only one surviving spouse and there may or may not be other relatives or beneficiaries with competing claims. It has sometimes been argued that a wife should receive less than half of the capital on divorce because she also receives a share of her husband's income.[125] This argument is based on certain assumptions which will often be unjustified,[126] and it is inapplicable to the scheme we are proposing. We suggest later that the court should, where possible, adjust the parties' economic position by means of a capital sum or property transfer order, and should award a periodical allowance only where its other powers are insufficient. Moreover, under our proposals there would be no reason why a wife (or a husband) should not

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[117]Manners and Rauta, *op. cit.*, Table 3.2. The figures varied slightly according to the nature of the property (house, furniture or savings).

[118]*Ibid.*, Table 3.3. Again the figures varied slightly according to the nature of the property.

[119]Table 3.4.

[120]See also Gray, *op. cit.*; Eekelaar, "Some Principles of Financial and Property Adjustment on Divorce" (1979) 95 L.Q.R. 253; Eekelaar, *Family Law and Social Policy* (1978), pp. 184 to 188.

[121]See para. 3.27 above.

[122]See Meston, *The Succession (Scotland) Act 1964* (2nd edn., 1969), p. 27.

[123]*Ibid.*, p. 3.

[124]*Ibid.*, pp. 3 to 4.

[125]See *Wachtel* v. *Wachtel* [1973] Fam. 72.

[126]For example that if both spouses are in full-time employment after divorce, a husband will always require domestic assistance whereas a wife will not—see Denning M.R. in *Wachtel* at p. 94; see also Stone, *Family Law* (1977), p. 175; Eekelaar, *Family Law and Social Policy* (1978), p. 181.

receive half of the matrimonial property *and* in certain cases a share of the joint income after divorce. A fair share of the assets accumulated during the marriage should not, for example, preclude income payments designed to provide partial compensation for the continuing burden of child-care. In short, we can see no good reason for giving either spouse, whether legal owner or not, whether wife or husband, less than half of the matrimonial property. The underlying idea is that of partnership in marriage[127] and the only fair solution seems to us to be an equal division of the "partnership" assets as the norm. We are confirmed in this conclusion by the fact that no system of matrimonial property of which we are aware provides for a division of such property in any fixed proportions other than equal shares.[128]

3.68 Where there are special circumstances justifying a departure from equal sharing (and we give examples of such circumstances later) we think that the court should be directed to share the matrimonial property in such proportions as may be fair in those circumstances. It would be impossible to provide with precision for the infinite variety of special circumstances which may arise. We therefore **recommend**:

32. (*a*) The principle of fair sharing of matrimonial property is that the net value of the matrimonial property should be shared equally or, if there are special circumstances justifying a departure from equal sharing, in such other proportions as may be fair in those circumstances.
(Paragraphs 3.65 to 3.68; Clauses 9(1)(*a*); 10(1).)

Definition of matrimonial property

3.69 "Matrimonial property" could be defined in various ways for the purpose of property redistribution on divorce. It could be confined, say, to the matrimonial home. That, however, would mean in Scotland one law for the 37% of couples who own their home and another law for the 63% who do not.[129] It could be confined to assets ordinarily used for family purposes.[130] That, however, would mean treating people differently according to whether they put their savings into, say, their home or their business. The wife of a professional man might receive more or less depending on whether he was in government service or private practice. It seems to us that the key idea is that of sharing what is acquired by the spouses' efforts or income during the effective period of marriage. It should not matter how the spouses choose to invest those acquests. We considered but rejected the idea of providing for an equalisation of gains made during the marriage without reference to particular items of property.[131] There are undoubted attractions in such a system but it has the disadvantage of requiring a sharing of increases in the value of property which may be regarded as separate property. This is particularly unfair if increases in value due to inflation are included. Even if

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[127]See Gray, *op. cit.*

[128]*Ibid.*; Rheinstein and Glendon, *Interspousal Relations* in *International Encyclopaedia of Comparative Law* (1980) Vol. IV pp. 4–52 to 4–161. The recent legislation in New Zealand and many Canadian provinces on the division of matrimonial property or family assets on marriage breakdown (see para. 3.3) is all based on a norm of equal sharing.

[129]Manners and Rauta, *op. cit.*, Table 2.1.

[130]See e.g. the Canadian statutes referred to at para. 3.3 above.

[131]Cf. the West German B.G.B. Arts. 1363 to 1390.

some way is found to exclude mere inflationary gains[132] (which adds to the complexity) we think that the idea of sharing mere increases in the capital value of separate property would be contrary to the expectations of most couples, at least in relation to the types of property most commonly owned. If a wife inherits, say, some antique furniture from her mother she will tend to regard that as her furniture whatever its value for the time being. Our starting point, therefore, is the idea of property acquired by the spouses or either of them during the marriage. We refine this concept in the following paragraphs.

3.70 The spouses may, of course, have acquired and disposed of many items of property during their marriage. It is only property retained at a particular date which can be regarded as available for sharing. We think this date should be the date of the final separation of the parties. That is the effective end of their matrimonial partnership. Some years may elapse between separation and divorce and it would, we think, be unrealistic and potentially unfair to regard property acquired in that period as matrimonial property.[133] So far as the beginning of the relevant period for acquisition of matrimonial property is concerned, we think that it should as a general rule be the date of the marriage. The exclusion of premarital assets from the principle of equal sharing appears to be supported by public opinion. In the survey on family property in Scotland informants were asked what the law should say about the family property[134] of a childless married couple where one partner owned the property before the marriage. Over 64% said that it should go to the original owner; less than 31% thought it should be shared equally.[135] In one case, however, we think that property acquired before marriage ought to be included within the definition of matrimonial property. This is where a house or furniture or both are bought by the parties or either of them for use by them as their joint residence or as furniture and equipment for their joint residence.[136] The property is so closely connected with the couple's life in common that it would be unrealistic to exclude it from the definition of matrimonial property. It can be regarded as matrimonial property by destination.

3.71 Property acquired by gift or inheritance from a third party is not the fruit of the spouses' efforts or income and should be excluded from the definition of matrimonial property. Again, this solution seems to have public support. Informants in the family property survey were asked what the law should say about the family property[137] of a childless married couple when one partner inherited the property during the marriage. A clear majority[138] said that the property should go to the inheritor.[139]

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[132]See Gray, *op. cit.*, pp. 141 to 151.

[133]See *McLean* v. *McLean* 1979 S.L.T. (Notes) 82.

[134]I.e. house, furniture and household goods, savings of £3,000.

[135]Manners and Rauta, *op. cit.*, Table 3.5. There were no differences between men and women in their attitudes towards the house, but women were more likely than men to say that furniture and savings should go to the original owner and less likely to say they should be divided equally.

[136]See e.g. *Henderson* v. *Henderson* 1981 S.L.T. (Notes) 25.

[137]I.e. house, furniture and household goods, savings of £3,000.

[138]59% in the case of the house, 71% in the case of furniture and household goods, 61% in the case of savings.

[139]Again there were no differences between men and women in their attitudes towards the house, but women were more likely than men to say that furniture and savings should go to the inheritor: Manners and Rauta, *op. cit.*, Table 3.7.

3.72 There are various ways in which property may be acquired during marriage otherwise than from the spouses' efforts or income. The most obvious is where a spouse buys property during marriage with funds owned before marriage. Others are where a spouse acquires property as a result of a gambling win or an award of damages. We have considered different ways of dealing with this question. One solution would be to define matrimonial property as property acquired by the spouses' efforts or income during the marriage. This, however, would lead to great difficulty in determining what property fell within the definition. A particular asset might have been derived partly from income, partly from capital and partly from chance. It might be sold and the proceeds used as part of the purchase price of another asset and so on indefinitely. The complications which could be involved in tracing property back to its source are such that we were compelled to reject this solution, attractive though it may appear at first sight. A second solution would be to define matrimonial property as property acquired during the marriage but to exclude from the definition property which represented a replacement of premarital assets. This too might be an attractive solution at first sight and we have given it the most careful consideration. It is, however, open to the same objection as the first solution considered above. It would often be extremely difficult to decide to what extent property was simply a replacement of premarital assets. If the principle is recognised at all there would be no satisfactory reason to limit it to the first replacement of an asset. It would therefore become necessary to trace each item of property back to its source, perhaps through many intermediate transactions. Where there had been frequent changes of, and in, investments held, tracing would be a daunting and sometimes impossible task. We have therefore rejected this solution. A third solution, the one which we have adopted, is to define matrimonial property essentially in terms of property acquired during the marriage; to take as the norm equal sharing of the value of such property; but to allow the court to depart from that norm if the property was not derived from the spouses' efforts or income during the marriage. This would provide a comparatively simple rule but would allow the court to take into account the fact, for example, that property was largely derived from premarital assets. In complicated cases the court could take a fairly broad axe. No solution to this problem is without disadvantages but, in our view, this solution has fewer disadvantages than any other. We return to it later[140] when we deal with circumstances justifying a departure from equal sharing. In the meantime we **recommend**:

32. (*b*) Matrimonial property should be defined as any property belonging to either party or both parties at the date of final separation which was acquired (otherwise than from a third party by gift or succession) by him or them

    (i) before the marriage for use by the parties as their joint residence or as furniture or equipment for their joint residence; or

    (ii) after the marriage.

    (Paragraphs 3.69 to 3.72; Clause 10(3).)

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[140]Para. 3.79.

Rights under life policies or pension schemes

3.73 Life insurance policies and pension schemes are important ways of saving for the future. In most marriages at least one of the spouses has rights under one or other of them.[141] Where such rights have been acquired wholly during the period from marriage to final separation the value of these rights would constitute matrimonial property.[142] In many cases, however, rights under life policies or pension schemes or similar arrangements will have been built up partly before and partly after the marriage. In such cases we think that only the proportion which is attributable to the period between the marriage and the final separation should be treated as matrimonial property.

3.74 The person who has rights under a retirement pension scheme is very often unable to realise these rights until a future date. This is a factor which the court will have to take into account. It would often be a special circumstance justifying a departure from the principle of equal sharing.[143] Where the person concerned has substantial capital apart from the rights under the scheme the court could order payment out of that capital. Where there is no other capital at present but a lump sum is due in the foreseeable future the court could make an order for payment of a capital sum at a future date.[144] In other cases the court could order payment of a capital sum by instalments.[145]

3.75 We have considered whether it is necessary to exclude rights to term assurance benefits (payable if and only if death occurs within a certain period) from any definition of these rights. Term assurance benefits are similar to rights under a policy of fire or motor insurance. They are a form of protection rather than a form of investment, and should not come within the scope of matrimonial property. We think, however, that it is unnecessary to legislate for their exclusion. They have no surrender value and would therefore be left out of account. We have also considered whether widows' and dependants' death benefits should be expressly excluded. Again we think that this is unnecessary. Dependants' benefits would not enter into a calculation of the parties' resources and widows' benefits would have no value for a divorced wife.

3.76 Rights under life policies and pension schemes have to be valued for various purposes. We have considered whether any basis of valuation should be laid down by statute for the purpose of financial provision on divorce. We have concluded that this would be inappropriate. Questions of valuation can arise in relation to any type of property and there are obvious dangers in attempting to deal with them in advance by legislation. In relation to life policies, for example, it might be thought that the surrender value could be designated as the appropriate value for present purposes. No doubt it would be appropriate in many cases; but if a policy had only a short time to run the discounted maturity value might well be more realistic. We would prefer to

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[141]Manners and Rauta, *op. cit.*, Table 2.14.

[142]See the definition of such property at para. 3.72; see also Gray, *op. cit.*, pp. 155 to 169 and 179 to 184.

[143]See para. 3.81 below.

[144]See para. 3.118 below.

[145]See para. 3.117 below.

leave questions of valuation to be dealt with according to the circumstances of each case.

3.77 It will be noted that we are concerned with the value of rights on the break-up of the marriage rather than with what one spouse or the other might have received (by way of widow's pension for example) had the marriage continued. This is consistent with our whole approach to the question of financial provision on divorce, which is not to try to put the parties in the position in which they would have been had the marriage continued but rather to recognise that the marriage has not continued and make the necessary financial and property adjustments. One of these adjustments is, in our view, a sharing of savings made during the marriage, including savings made by means of life policies or retirement pension schemes. Our intention is that such savings should be taken into account if they have an economic value. To avoid argument about whether a spouse has a right or merely an interest under a pension scheme or similar arrangement the legislation should, we suggest, refer to rights or interests. We therefore **recommend**:

32. (*c*) Where either spouse has rights or interests under a life policy or occupational pension scheme or similar arrangement, the proportion of such rights or interests which relates to the period from the marriage until the date of final separation should be treated as matrimonial property.
(Paragraphs 3.73 to 3.77; Clause 10(4).)

Special circumstances justifying departure from equal sharing

3.78 *Parties' agreement.* The parties may have agreed that a particular item of property should be treated as separate property or that property acquired during marriage should be shared otherwise than in equal proportions. In such circumstances it may be supposed that they would often settle the question of financial provision on divorce in accordance with their previous agreement without involving the court. If, however, one of them does apply for an order for financial provision their prior agreement should be regarded as a special circumstance which might justify a departure from equal sharing. We do not think the agreement should be conclusive.[146] Circumstances may have changed radically since the agreement was entered into. It would be better, in our view, to preserve flexibility by enabling the court to take the agreement into account without requiring the court to be bound by it. The terms in which title to property was taken would not in themselves constitute an agreement.

3.79 *Source of funds or assets.* Property bought after the marriage may have been paid for out of funds owned by one party at the time of the marriage. It may represent merely a switching of investments. We think that this should justify a departure from equal sharing. Similarly we think that a departure from equal sharing could be justified if the source of the funds or assets used by a spouse to acquire property during the marriage was a gift from a third party (such as a spouse's parent).[147] The underlying principle is the sharing of property acquired by the spouses' efforts or income during the marriage.

[146]We are dealing here with agreements made before or during the marriage, but not for the purposes of an imminent or current divorce action. We discuss agreements of this latter type at paras. 3.190 *et seq.*

[147]See e.g. *Russell* v. *Russell* 1977 S.L.T. (Notes) 13.

Property acquired wholly or partially with funds or assets derived from other sources need not be shared equally. The possible combinations of circumstances which might arise are such that, as noted above,[148] we prefer to deal with this question by giving the court a discretion rather than by laying down any rule. In practice few couples own substantial assets at the time of marriage.[149]

3.80 *Destruction, etc, of property.* If one party has destroyed, dissipated or alienated matrimonial property that, we think, is a circumstance that the court should be able to take into account in deciding whether a departure from equal sharing is justified.[150] We deal later with the effect of conduct generally in relation to financial provision on divorce.[151] These particular types of conduct are, however, so closely related to the property that they can usefully be referred to separately in this context.

3.81 *The nature of the property and the use made of it.* Under the present law the court may take into account, in awarding a capital sum on divorce, the nature of the property and the use made of it. A spouse's capital may be tied up in a business, a farm, a pension scheme or a private company in such a way that it is not reasonable to expect it to be used as a source of money for payment of a capital sum on divorce.[152] In the reported cases the point has been made that to force a defender to sell his business would often diminish the income available for a periodical allowance. Under our proposals, which express a preference for dealing with financial provision by means of a capital sum or property transfer, the emphasis would be rather different. The point would be not so much the diminution of a periodical allowance as the disproportionate hardship to the defender caused by a requirement for sale. Nevertheless we consider that the nature of the property and the use made of it and, in particular, the extent to which it is reasonable to expect it to be realised or divided or used as security should be circumstances which the court could, if it thought fit, take into account in departing from the principle of equal sharing. In appropriate cases the court could keep close to the principle of equal sharing, without causing undue hardship to the defender, by awarding a capital sum payable by instalments. In some cases, however, it would probably be necessary to recognise that an approximation to equal sharing was impracticable or inequitable in the circumstances.

3.82 Use of the matrimonial property as a family home is also a relevant factor. Under the present law on financial provision the courts, both in Scotland[153] and in England,[154] take into account the desirability of retaining a

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[148]Para. 3.72.

[149]Manners and Rauta, *op. cit.* (para. 2.6), found that only 3% of married informants had owned a house or land at the time of the marriage.

[150]Cf. *McHardy* v. *McHardy* 1976 S.L.T. (Notes) 57.

[151]See paras. 3.172 *et. seq.*

[152]Cf. *Patterson* v. *Patterson* 1966 S.L.T. (Notes) 20 (business); *Robertson* v. *Robertson* 1967 S.L.T. (Notes) 78 (business); *Frankland* v. *Frankland* 1975 S.L.T. (Notes) 59 (private company); *Downie* v. *Downie* 1977 S.L.T. (Notes) 24 (farm); *Clark* v. *Clark* 1978 S.L.T. (Notes) 45 (farm); *Gray* v. *Gray* 1979 S.L.T. (Notes) 94 (business).

[153]See *Fraser* v. *Fraser* 1976 S.L.T. (Notes) 69; *Cowie* v. *Cowie* 1977 S.L.T. (Notes) 47; *Hyslop* v. *Hyslop* 1980 S.L.T. (Notes) 21.

[154]See e.g. *Mesher* v. *Mesher* (1973) [1980] 1 All E.R. 126; *Chamberlain* v. *Chamberlain* [1973] 1 W.L.R. 1557; *Harnett* v. *Harnett* [1974] 1 W.L.R. 219; *Allen* v. *Allen* [1974] 1 W.L.R. 1171; and see generally Cretney, *Principles of Family Law* (3rd edn.), pp. 320 to 326.

home for the children of the marriage. In certain cases we think that this consideration could justify a departure from the principle of equal sharing. This result seems to be supported by public opinion. In the survey of family property in Scotland informants were asked whether the law on family property should be affected if there were dependent children. Seventy-one per cent of men and 69% of women said that it should be affected.[155] These informants were then asked in what ways the law should be affected. Eighty-one per cent said that the law should allocate more of the family property to the parent with the children than to the other parent.[156]

3.83 There is a danger that the supposed needs of children (who, after all, often have to move house and suffer a drop in living standards even in unbroken families) could be used to justify results which would be unfair to one of the spouses.[157] We think that any departure from the principle of equal sharing of matrimonial property should be kept to the minimum and that the courts should use the wide powers which will be available under our recommendations[158] to achieve as fair a solution as is practicable. In some cases this may involve ordering an immediate counter-balancing payment of capital or transfer of property.[159] In others it may involve an order for such a payment or transfer at a later date—say, when the children cease to be dependent.[160] In others it may involve awarding less by way of a periodical allowance for child-care than would otherwise have been awarded.[161]

3.84 *Liability for valuation and legal expenses.* We think that the court should be able to take into account, as a factor justifying a departure from the principle of equal sharing of matrimonial property, the liability or prospective liability for the expenses of valuation or transfer of property in connection with the divorce. We think it better to leave this matter for the court to adjust in the light of the actual or prospective liability for the expenses, rather than to lay down any fixed rule. We are concerned here only with expenses relating to property disputes on divorce. In relation to the expenses of the divorce proceedings themselves we have already recommended[162] that a wife's expenses should no longer be regarded as necessaries for which the husband is liable. The courts would thus be free to develop such rules as are considered to be fair and practicable.

3.85 *Other special circumstances.* The above list is meant to draw attention to some of the special circumstances which might, if the court thought fit, justify a departure from equal sharing. It is not meant to be exhaustive.

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[155]Manners and Rauta, *op. cit.*, Table 3.12.

[156]*Ibid.*, Table 3.14. There was no statistically significant difference between men and women giving this response. More women than men did, however, refer specifically in their answers to the children's need for accommodation.

[157]We received submissions to the effect that this happened under the present English law.

[158]See paras. 3.113 to 3.146; Appendix A, clauses 12 to 14.

[159]See e.g. *Backhouse* v. *Backhouse* [1978] 1 W.L.R. 243.

[160]See e.g. *Hector* v. *Hector* [1973] 1 W.L.R. 1122. In such cases there is a risk of injustice if the deferred payment does not take account of inflation and interest.

[161]See e.g. *Hanlon* v. *Hanlon* [1978] 1 W.L.R. 592.

[162]Para. 2.150.

3.86 We therefore **recommend**:

32. (*d*) Special circumstances which may justify a departure from the principle of equal sharing, if the court thinks fit, should include

(i) the terms of any agreement between the parties on the ownership or division of any matrimonial property;

(ii) the source of the funds or assets used to acquire the matrimonial property where those funds or assets were not derived from the parties' efforts or income during the marriage;

(iii) any destruction, dissipation or alienation of matrimonial property by either party;

(iv) the nature of the property, the use made of it (including use for business purposes or as a family home) and the extent to which it is reasonable to expect it to be realised or divided or used as security; and

(v) the actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce.

(Paragraphs 3.78 to 3.85; Clause 10(5).)

3.87 **Net value of matrimonial property.** The first question which must be considered under this head is the date of valuation. This should, we think, be the date of the parties' final separation. The date of final separation is the date when the matrimonial partnership comes to an end and there are good reasons for choosing that date as the date when the matrimonial property should be valued. After that date the actings of one spouse in relation to property forming part of the matrimonial property should not benefit or prejudice the other spouse. If, for example, a wife has a small business in her own name any increase in its value due to her own efforts after the date of separation should not benefit her husband. Similarly, if one spouse manipulates or neglects matrimonial property after separation so as to reduce its value, that should not prejudice the other spouse. A period of some years may well elapse between separation and divorce and it would be unrealistic to regard the spouses as united in a community of gains and losses during that time. This is perhaps particularly clear in the case of interests in pension schemes.

3.88 It is only the net value of matrimonial property which should be subject to the principle of equal sharing. Any debts which have been incurred by either party during the marriage[163] and which are still outstanding at the date of final separation will, therefore, fall to be deducted from the gross value of the matrimonial property as at that date.

3.89 We therefore **recommend**:

32. (*e*) "The net value of the matrimonial property" should mean the value of such property at the date of final separation, after deduction of any debts outstanding at that date and incurred by

[163]Or before the marriage in relation to a house or furniture acquired for use as or in the parties' joint residence: see para. 3.70 above.

either party (a) during the marriage or (b) before the marriage in relation to such property as is mentioned in paragraph (*b*)(i) above.
(Paragraphs 3.87 to 3.88; Clause 10(2).)

3.90 **Date of final separation.** We have assumed so far that the date of final separation will be a clear cut matter. In some cases it will be. In others, however, the spouses may have parted and resumed cohabitation and parted again in such a way as to make it difficult to decide when they finally separated. We suggest that where they have separated for a substantial period, short resumptions of cohabitation thereafter should be ignored for the purposes of determining the date of final separation. If, for example, they have been separated for a year and then resume cohabitation for a week in an unsuccessful attempt at reconciliation, it would seem to be more realistic to regard the earlier separation as the final separation and to ignore the subsequent week's cohabitation. The choice of actual periods is to some extent an arbitrary one. On the analogy of the Divorce (Scotland) Act 1976[164] we suggest that where the parties have ceased to cohabit for a period of 90 days and have then resumed cohabitation for a period or periods of less than 90 days in all,[165] no account should be taken of such resumed cohabitation. If the parties are still cohabiting at the date of raising the divorce action (as sometimes happens) that date should be taken as the date of final separation. We therefore **recommend**:

32. (*f*) "The date of final separation" should be defined as the date, not later than the date of raising the action of divorce, when the parties last cohabited as husband and wife, but where the parties ceased to cohabit for 90 days or more and thereafter resumed cohabitation for a period or periods of less than 90 days in all, such period or periods should be ignored for the purposes of this recommendation.
(Paragraph 3.90; Clause 10(2) and (6).)

FAIR RECOGNITION OF CONTRIBUTIONS AND DISADVANTAGES

Purpose and scope

3.91 In many cases a spouse's contributions during the marriage will be recognised by his or her share of the matrimonial property.[166] If both spouses have contributed to the welfare of the family, if both have enjoyed the same standard of living during the marriage and if both have earning potential on divorce which has not been affected by the marriage, then a fair sharing of any property built up during the marriage by their joint efforts or income will often produce a satisfactory result. In some cases, however, a share of the

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[164]S. 2.

[165]As a period of "three months" may vary in length we would prefer to express the provision in terms of days rather than months. This is of particular importance where, as here, the total period may be made up of an accumulation of non-consecutive short periods. How many such periods amount in total to three months?

[166]In the survey on family property in Scotland, over 60% of informants thought that work in the home should be taken into account in deciding who owned the spouses' house and furniture. Manners and Rauta, *op. cit.*, Table 3.1.

matrimonial property will not be a sufficient recognition of contributions made during the marriage. There may, for example, be no matrimonial property or it may be of small value. We think that it is essential, if justice is to be done, that there should be some further provision for the due recognition of contributions.[167] Various situations have to be considered before it can be decided how this principle should be expressed.

3.92 The first is where the contributions of one spouse have contributed to an improvement in the other's economic position. A husband, for example, may have paid off a loan over a house owned by his wife before the marriage, or he may have worked for years extending and improving her house. Similarly a wife may have worked for years, unpaid, in a small business owned by her husband before the marriage and may have helped to build up its value. In all these cases one spouse has contributed to an increase in the capital of the other and we think it reasonable that the court should be able to award some financial provision on divorce in recognition of the contributions.[168] The position is essentially the same where one of the spouses has contributed to an increase in the other's earning potential. A wife, for example, may have bought the husband into a partnership or franchise arrangement on such terms that there are minimal rights to capital but a valuable earning potential. A husband may have worked overtime to pay his wife's fees for some special course of further education or training. A wife may have helped her husband with his work on an unpaid basis (e.g. as a personal secretary or business manager) but because of the nature of his work (e.g. author, doctor, advocate, professional sportsman, entertainer) the result of her contributions may be an increase in his earning potential rather than in the capital value of a business. Again, there may be cases where one spouse's unpaid services as a housekeeper, hostess, domestic manager and child-minder could be shown to have contributed directly or indirectly to an improvement in the other spouse's economic position. It may be possible to prove, for example, that a wife's contributions of this nature have enabled her husband to work long hours furthering his career. In all these cases, where there is a demonstrable link between one spouse's contributions and an improvement in the other spouse's economic position, it seems to us that there is a strong case for enabling the contribution to be recognised where this is not already done by means of a share in matrimonial property.

3.93 The position becomes more difficult, however, if there is no link between the contributions and any improvement in the other spouse's economic position. Suppose, for example, that three men all started work in the same employment at the age of 20. The first married a wife who assumed the traditional housewife's role and did all the domestic work. The second married an idle woman and did most of the domestic work himself. The third remained unmarried and did all his own domestic work. All three lived in

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[167]This is not, of course, a new idea. The courts already have regard to a spouse's contributions, financial or otherwise, in appropriate cases: see note 107 at para. 3.56 above.

[168]The spouse making the contributions might sometimes be able to make a claim based on unjustified enrichment, but the law is not clear and success could not be guaranteed. There is doubt, for example, about the need to prove error and about the circumstances in which contributions might be regarded as donated or work regarded as done for the spouse's own benefit: see *Rankin* v. *Wither* (1886) 13 R.903; *Newton* v. *Newton* 1925 S.C. 715.

rented accommodation. None accumulated any savings. All advanced remorselessly up their salary scale. If the first man was divorced at the age of 40 it would certainly not be obvious that his wife's contributions over the years had contributed to any improvement in his economic position, although they may well have contributed to an increase in the time available to him for leisure activities. Should an industrious wife receive more than an idle wife in this case? Should the principle of fair recognition of contributions extend to contributions to the welfare of the family[169] even if they have not improved the other spouse's economic position? One submission made to us was that such contributions were made voluntarily and should therefore be ignored. The same point could, however, be made about many contributions which have directly improved the other spouse's economic position. Another view put to us was that the law should take a hard line on the question of a housewife's contributions in order to encourage women to preserve their economic independence during marriage. In our view, however, it is not the function of financial provision on divorce to encourage people to adopt any particular life style during marriage. The law in our view ought to be neutral in this respect. We therefore reject these two arguments. We think, however, that there are other grounds for not recognising a claim based on contributions which have not resulted in any improvement in the other spouse's economic position. First, such contributions will often be evenly balanced. If, in the traditional type of marriage, a housewife could make a claim on the basis of contributions in work towards the welfare of the family, her husband could often do the same. One of the findings of the survey on family property in Scotland in 1979 was that 50 per cent of married informants said that the contributions of the husband and the wife in unpaid work in the home were about the same.[170] Moreover, if a wife could make a claim on the basis of her contributions in work, her husband could often make a claim on the basis of his contributions in money to the welfare of the family. In some cases (for example the lazy wife, the wife with domestic help) the husband would be able to make a claim on this basis for a payment out of the wife's separate property. We doubt whether this would be acceptable. Secondly, an attempt to work out which spouse had contributed more to the welfare of the family during the marriage would often involve an unproductive examination and investigation of conduct over many years. Thirdly, and more fundamentally, the purpose of financial provision on divorce is not, in our view, the punishment of bad conduct or the reward of good conduct. In our view its concern should be with the economic effects of marriage and divorce. We return to this question later in relation to conduct generally.[171] In the meantime we conclude that contributions which have not resulted in any improvement in the other spouse's economic position should not justify a claim for financial provision.

3.94 There is a further problem. One spouse may have sustained an economic disadvantage in the interests of the other party or of the family. The standard illustration is the well-qualified woman who married, say, 20 or 30 years ago and who gave up her own career prospects, perhaps with the

[169]See Matrimonial Causes Act 1973, s.25(1)(*f*).
[170]Manners and Rauta, *op. cit.*, Table 2.18.
[171]See paras. 3.172 *et seq.*

encouragement or passive approval of her husband, in order to look after and bring up the family. There are other illustrations. A husband may have given up career prospects (for example the chance of a lucrative post abroad) in his wife's interests. An older woman may have given up a good position on marriage in order to look after her husband and may be unable to obtain employment again after divorce.[172] One of the parties may have given up a tenancy in order to live with the other party on marriage.[173] In all such cases there should in our view be the possibility of financial provision on divorce in recognition of the economic disadvantages sustained.

3.95 We suggest, therefore, that the principle of fair recognition of contributions and disadvantages should be that where one party has made contributions which have been to the economic benefit of the other party, or has sustained economic disadvantages in the interests of the other party or of the family, he should receive such an award of financial provision as is fair and reasonable in the circumstances in recognition of those contributions or disadvantages.

Factors to be taken into account

3.96 The principle of fair recognition of contributions and disadvantages applies no less to husbands than to wives. It follows that there will be many cases where contributions made and disadvantages sustained by one party will be balanced, to a greater or lesser extent, by contributions made and disadvantages sustained by the other. This should, we think, be referred to in the legislation as a factor to be taken into account, as should the extent to which the contributions or disadvantages have been or will be recognised by a share of the net value of the matrimonial property or otherwise.

3.97 We have considered whether various other factors ought to be specified as factors to be taken into account. One such factor might be the duration of the marriage. In some cases, however, this will be irrelevant. If, for example, a husband spends six months improving his wife's premarital property or an older wife gives up a good post in order to look after her husband, a claim would be justified however short the marriage. Where the duration of the marriage is relevant it will be because it affects the extent of the contributions made: it will, therefore, be taken into account by the court automatically. We also considered whether the expectations of the parties at the time the contributions were made or the disadvantages sustained ought to be specified as a factor to be taken into account. There is something to be said for such an approach. One of the main justifications for this principle is that it provides for the spouse who acts unselfishly in the expectation that the marriage will continue for life. There would not be the same equitable basis for the claim if a spouse acted in a cold and calculating way in the expectation that the marriage would end in divorce in a few years. Referring to expectations might also underline the possibility of distinguishing between marriages where both spouses expected to fill traditional roles and marriages where both expected

[172]Cf. *Abdureman* v. *Abdureman* (1978) 122 S.J. 663 (widow aged 45 gave up job on marriage to look after husband, who worked irregular hours; he deserted her 12 weeks later).

[173]Cf. *Warder* v. *Warder* (1978) 122 S.J. 713 (wife gave up tenancy of council house on marriage; marriage lasted less than 4 months; wife awarded lump sum of £1,000 for her "disturbance").

to retain their economic independence. We have concluded, however, that to encourage evidence to be led about the spouses' expectations would be undesirable. Such evidence would be highly subjective and would add little to the objective facts which would have to supplement it. We considered other factors, such as the nature and extent of the contributions, but concluded that the court would certainly take them into account in applying this principle and that it was therefore unnecessary to mention them. We deliberately rejected factors such as "the needs of the parties and all the circumstances of the case" on the ground that they could and in some cases would invite consideration of extraneous and irrelevant matters. The focus of attention in the application of this principle is *past* contributions and disadvantages: the present needs and circumstances of the parties are irrelevant.[174] We deal with conduct later.[175]

3.98 There is one further question which has to be considered, and that is whether the court should be able to take into account contributions made or disadvantages sustained before the marriage. In a recent English case[176] the parties had cohabited for 24 years before marrying. They did not marry until after the husband was divorced in Poland by his first wife, and lived together for only a few months after the marriage. Over the whole period of cohabitation the wife had made substantial contributions, financial and non-financial, to the husband's economic well-being. Wood J. held that he was entitled to have regard to what had happened during the cohabitation[177] and indeed could not otherwise do justice between the parties. It is not at all clear that the same approach would be taken in Scotland. In one case,[178] where admittedly the period of premarital cohabitation was much shorter, Lord Grieve said that in his opinion "a wife who divorces her husband is not entitled to any financial award for a period when she was her husband's mistress". It must be admitted that it is anomalous to recognise contributions during a period of non-marital cohabitation if parties marry for a short time and are then divorced, but not if they split up without ever being married. The remedy for this anomaly may be to deal with the legal effects of cohabitation—something with which we are not concerned in this Report. In the context of financial provision on divorce we believe that injustice could arise if the courts were unable to have regard to contributions made or disadvantages sustained[179] during a period of cohabitation before marriage.

3.99 We therefore **recommend** as follows:

33. (*a*) The principle of fair recognition of contributions and disadvantages is that where one party has made contributions which have been to the economic benefit of the other party or has sustained economic disadvantages in the interests of the other party or of the family, he should receive due recognition of those contributions or disadvantages.

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[174]The resources of the parties will, however, be relevant to the overall assessment of financial provision under Recommendation 31—see para. 3.64 above.

[175]At paras. 3.172 *et seq.*

[176]*Kokosinski* v. *Kokosinski* [1980] 1 All E.R. 1106.

[177]In taking account of "conduct" and "all the circumstances of the case".

[178]*Fraser* v. *Fraser* 1976 S.L.T. (Notes) 69 at p. 70.

[179]A wife, for example, may have given up a post or a tenancy before the marriage but in anticipation of it: see *Abdureman* v. *Abdureman* and *Warder* v. *Warder* (cited in para. 3.94 above).

(*b*) In applying this principle the court should have regard to the extent to which such contributions or disadvantages made or sustained by one party have been balanced by contributions or disadvantages made or sustained by the other party, and to the extent to which the contributions or disadvantages have been, or will be, recognised by a share in the net value of the matrimonial property or otherwise.

(*c*) The court should take into account relevant contributions or disadvantages made or sustained before the marriage.

(*d*) "Contributions" should include contributions, whether financial or non-financial, direct or indirect and in particular should include contributions made by looking after the home or caring for the family.

(Paragraphs 3.91 to 3.98; Clauses 9(1)(*b*) and (2); 11(2).)

FAIR SHARING OF ECONOMIC BURDEN OF CHILD-CARE

Purpose and scope

3.100 In a large number of divorce cases one of the parties, usually the wife, has the care of young children of the marriage. So long as the marriage subsists the wife[180] can claim not only aliment for the children but also aliment for herself. On divorce she can still claim aliment for the children but loses the right to aliment for herself. She may nevertheless be unable to work, or to work full-time, because of the need to look after the children. If she is able to work she may have the expense of employing a child-minder or paying for child-care facilities. It seems to us that in this situation there can be no question of a "clean break" and that some equitable adjustment of the financial burden of caring for children of the marriage is required. This would be in addition to aliment for the children themselves. We have considered but rejected the idea that the adjustment should take the form of a "wage" for child-minding. The idea that a former wife should be paid a "wage" for looking after the children of the marriage has the objectionable connotation that she is in some way employed by her former husband to look after his children. We prefer to view the financial burden of child-care as a burden arising from the marriage which should be shared fairly.

3.101 We have also considered, but rejected, a suggestion that any provision for a parent based on the need to look after a child after divorce should be made in the form of increased aliment for the child. Aliment for a child and financial provision for a parent, based on child-care, serve quite different purposes and should, we think, be kept distinct. The former is designed to provide reasonable support for the child himself. It may continue, under our recommendations, until the child is 18 or, where the child is undergoing further education or training, until he is 25. The latter is designed to compensate the parent, in so far as is fair and reasonable, for the fact that he or she is suffering economic loss or disadvantage as a result of the need to care for the child. An allowance for the parent would generally be limited to the period when the child was young. We do not therefore favour the idea that the two should be lumped together and treated as aliment for the child. It

[180] Exactly the same considerations apply if the husband has care of the children.

is true nonetheless that the two forms of provision are interrelated. If, for example, aliment for the child is paid on such a generous scale that a nanny or child-minder can be employed, there will be little if any justification for financial provision based on child-care. It appears to be the case, too, that men often find it more acceptable to pay aliment for their children than a periodical allowance to their former wives. No doubt parties would continue, under our proposals, to adjust the relative levels of aliment and periodical allowance to suit their own needs.

Factors to be taken into account

3.102 The considerations just mentioned suggest that the court, in applying this principle, should take into account any arrangements made, or to be made, for aliment for the child.[181] Another important factor is the amount of any expense (such as the cost of employing a child-minder) or loss of earning capacity caused by the need to care for the child. We do not think it would be desirable to attempt to specify when a loss of earning capacity is the result of a need to care for a dependent child rather than of a voluntary decision not to work. This will depend on the circumstances of the case. There may be cases where a divorced person could reasonably be expected to realise his or her full earning capacity when the children were, say, of primary school age. On the other hand there may be cases where some loss of earning capacity or extra expense for child-care would continue even after the children were at secondary school. It should be left to the courts to apply the principle in the light of the circumstances. We intend this principle, like the other principles of financial provision, to be non-discriminatory as between men and women: a man should be able to obtain financial provision under this head if, but only if, a woman could have obtained it and *vice versa.*

3.103 The ages and health of the dependent children will clearly be important factors, as will their education, financial and other circumstances, and the availability and cost of suitable child-care facilities or services. It would be unreasonable, for example, to compensate a spouse for a substantial loss of earning capacity under this heading if a suitable child-minder could reasonably be employed for a fraction of the amount of that loss. Child-care services would include services provided gratuitously by a relative or other person. The factors to be taken into account should also, we think, include the needs and resources of the parties, including, in particular, any need for suitable accommodation for the children of the marriage, and the other circumstances of the case. The resources should include not only the actual but also the foreseeable resources of the parties. They should therefore include any award of financial provision made under any other head. We deal later with the relevance of conduct.[182]

Meaning of "dependent child"

3.104 As financial provision under this head is linked to the need to care for a dependent child or children, we think there should be a cut-off point when

[181]Cf. the Divorce (Scotland) Act 1976, s.5(2).
[182]At paras. 3.172 *et seq.*

the youngest relevant child reaches a certain age. There is an element of arbitrariness in fixing an age for this purpose and there will, inevitably, be certain hard cases falling on the wrong side of the line. There is, however, a point at which the need to care for a dependent child of the marriage merges into the voluntary assumption of the burden of caring for another adult. We do not think that the latter is something for which a former spouse should be liable. We have concluded that that point comes, for this purpose, when the child attains the age of 16. A person above that age does not normally need to have someone staying at home to look after him. Many people leave school at 16, and 16 is the age at which a decree awarding custody in a divorce action ceases to have effect. A man would meet with scant sympathy if he claimed that he could not work because he had to stay at home to look after his 17-year-old son, and we think that the same principle must apply to both sexes. The child's own right to aliment may, of course, continue beyond the age of 16 in certain cases.[183]

3.105 We envisage that financial provision could be claimed not only where the applicant has the care of children of the marriage but also where he or she has the care of any child, other than a child boarded out by a public or local authority or a voluntary organisation, who has been accepted by both parties as a child of the family.

3.106 We therefore **recommend** as follows:

34. (*a*) The principle of fair sharing of the economic burden of child-care is that the economic burden of caring for a dependent child of the marriage after the divorce should be shared fairly between the parties to the marriage.

(*b*) In applying this principle the court should have regard

(i) to any arrangements made or to be made for aliment for the child;

(ii) to any expense or loss of earning capacity caused by the need to care for the child;

(iii) to the age and health of the child, to the educational, financial and other circumstances of the child, to the availability and cost of suitable child-care facilities or services, to the needs and resources, actual and foreseeable, of the parties, including the need for suitable accommodation for any dependent child of the marriage, and to the other circumstances of the case.

(*c*) In this recommendation:
"dependent child of the marriage" means a child under the age of 16 who is (i) a child of the marriage or (ii) a child, other than a child boarded out by a public or local authority or a voluntary organisation, who has been accepted by both parties as a child of the family.
(Paragraphs 3.100 to 3.105; Clauses 9(1)(*c*) and (2); 11(3).)

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[183]See paras. 2.31 to 2.33.

FAIR PROVISION FOR ADJUSTMENT TO INDEPENDENCE

The principle

3.107 In many cases divorcing spouses will already be economically independent by the time of the divorce. In many cases an award of financial provision under one of the principles discussed above would be sufficient to provide for any necessary adjustment to post-divorce independence. In other cases, however, we think that a reasonable objective of an award of financial provision on divorce is to enable a spouse to adjust, over a relatively short period, to the cessation on divorce of any financial dependence on the other spouse. Depending on the circumstances, the purpose of the award might be to enable the payee to undertake a course of training or retraining, or to give the payee time to find suitable employment, or to enable the payee to adjust gradually to a lower standard of living. It would be essential to specify a maximum time over which the adjustment would have to be made because otherwise there would, in many cases, be no way of ensuring that a transitional provision did not become permanent life-long support. We think that a period of three years from the date of divorce would be an adequate maximum period, given that in most cases the final separation between the parties would be some considerable time before that. We considered whether an adjustment provision ought to be available for, say, three years after the termination of a period of child-care after divorce. We have concluded, however, that this would not be justified. The main purpose of a provision under this principle is to provide time to adjust. That time would be available where the spouse had a periodical allowance during a period of child-care. To allow a periodical allowance for up to a maximum of sixteen years on the basis of child-care and then to follow this with a transitional provision for another three years would, we think, prolong dependence too long and would run counter to our general approach, which is to seek to terminate continuing financial links between the divorced parties except where a continuing link is clearly justified.

Factors to be taken into account

3.108 In addition to the usual factors such as the needs and resources of the parties, we think that it would be desirable to refer specifically, in relation to this principle, to the earning capacity of the payee, to the duration and extent of the payee's past dependency on the payer and to any intentions of the payee to undertake a course of education or training. We deal later with the relevance of conduct.[184]

3.109 We therefore **recommend** as follows:

35. (*a*) The principle of fair provision for adjustment to independence is that where one party to the marriage has been financially dependent on the other and that dependence has come to an end on divorce, the dependent party should receive such financial provision as is fair and reasonable to enable him to adjust, over a period of not more than three years from the date of divorce, to the cessation of that dependence.

[184] At paras. 3.172 *et seq.*

(*b*) In deciding what financial provision is fair and reasonable under this recommendation the court should have regard to the age, health and earning capacity of the applicant, to the duration and extent of the applicant's past dependency on the payer, to any intention of the applicant to undertake a course of education or training, to the needs and resources, actual or foreseeable, of the parties, and to the other circumstances of the case.
(Paragraphs 3.107 to 3.109; Clauses 9(1)(*d*); 11(4).)

RELIEF OF GRAVE FINANCIAL HARDSHIP

Purpose and scope

3.110 It could be argued that the four principles which we have discussed so far are adequate to cover all cases where financial provision on divorce is justified. This would mean that if there was no matrimonial property, if there was no claim based on contributions or disadvantages, and if there were no dependent children, then a divorced spouse could be awarded at most a provision designed to ease his or her adjustment to independence over a period of not more than three years. Thereafter he or she would have no claim against the former spouse. While there is much to be said for this approach, we have rejected it. The four principles discussed already would not always ensure that a spouse who suffered severe financial hardship as a result of the marriage and the divorce could recover some financial provision in appropriate cases. A wife might, for example, have gone with her husband to some tropical country and might have contracted a disabling disease. Or she might have been permanently disabled as a result of injury in childbirth. We think that in such cases financial provision on divorce would be justified if it were reasonable having regard to the parties' resources. We have more doubt about whether a former spouse should ever be expected to relieve the hardship of the other if the hardship does not arise in any way from the marriage. If we were approaching the matter as one of pure principle we would be inclined to reject such a proposition as contrary to the idea that divorce ends the marriage. Financial provision on divorce is not, however, simply a matter of abstract principle. It is essential that any system should be acceptable to public opinion and it is clear from the comments we have received that many people would find it hard to accept a system which cut off, say, an elderly or disabled spouse with no more than a three-year allowance after divorce, no matter how wealthy the other party might be. We have concluded therefore that the law ought to provide, as a "long-stop", for the case where one spouse would suffer grave financial hardship[185] as a result of the divorce. In such a case the court should be able to award such financial provision as is fair and reasonable in the circumstances to relieve the hardship over such period as the court may determine. We do not intend this principle to be a gateway to support after divorce in all cases just as if the marriage had not been dissolved. We do not think, for example, that a man who suffers

[185]The expression "grave financial hardship" is used in s.1(5) of the Divorce (Scotland) Act 1976, which gives the court power to refuse a divorce on the ground of five years' non-cohabitation if the grant of decree would result in "grave financial hardship to the defender". Our recommendations, if carried into effect, might make it less necessary to resort to this provision.

hardship on being made redundant at the age of 52 should have a claim for financial provision against a former wife whom he divorced thirty years before. We think that the general principle should be that after the divorce each party bears the risk of *supervening* hardship without recourse against the other. It should therefore be made clear in the legislation that it is only where the likelihood of grave financial hardship is established at the time of the divorce that a claim will arise under this principle. We recognise that if the principle is framed in this way there will be cases falling narrowly on the "wrong" side of the line. The man or woman paralysed as a result of a road accident six months before the divorce would have a claim for financial provision. The man or woman who suffered a similar injury six months after the divorce would not. Similarly the spouse whose progressive disease was diagnosed before the divorce would have a claim but the spouse whose disease was first diagnosed after the divorce would not. We consider, however, that a line has to be drawn somewhere and that the right place to draw the line is the date when the legal relationship between the parties comes to an end. After that each should be free to make a new life without liability for future misfortunes which may befall the other.

Factors to be taken into account

3.111 The nature of this principle is such that the court should be able to take account of all the circumstances of the case, including the age, health and earning capacity of the applicant, the needs and resources, actual or foreseeable, of the parties, the duration of the marriage and the standard of living enjoyed during the marriage. We deal with conduct later.[186]

3.112 We therefore **recommend** as follows:

36. (*a*) The principle of relief of grave financial hardship is that where it is established at the time of the divorce that one party to the marriage is likely to suffer grave financial hardship in consequence of the divorce, that party should receive such financial provision as is fair and reasonable in the circumstances to relieve that hardship, over such period as the court may determine.

    (*b*) In deciding what financial provision would be fair and reasonable to give effect to this principle the court should have regard to the age, health and earning capacity of the claimant, to the needs and resources, actual or foreseeable, of the parties, to the duration of the marriage, to the standard of living enjoyed by the parties during the marriage, and to all the circumstances of the case.

    (Paragraphs 3.110 to 3.111; Clauses 9(1)(*e*); 11(5).)

ORDERS WHICH MAY BE MADE

Introduction

3.113 Under the present law, the court can make an order that one spouse should make cash payments to the other in the form of a capital sum or a

[186] At paras. 3.172 *et seq.*

periodical allowance or both.[187] It also has certain ancillary powers.[188] In the Memorandum we suggested that the court should also have power to order the transfer of property on divorce and should have wider powers to make incidental or ancillary orders.[189] There was strong support on consultation for the conferring of a power to transfer property and for most of the incidental powers we suggested. We therefore **recommend**:

37. An order for financial provision should mean any one or more of the following orders:—
    (*a*) an order that one party should pay a capital sum to the other;
    (*b*) an order that one party should transfer property to the other;
    (*c*) an order that one party should pay a periodical allowance to the other;
    (*d*) an incidental order.
    (Clause 8.)

3.114 In the following paragraphs we discuss these different types of order in more detail. As similar considerations apply to orders for payment of capital sums and orders for transfer of property we deal with them together. We wish to stress that a claim under a particular principle referred to in Recommendation 31 need not be satisfied by a particular type of order.[190] An order for payment of a capital sum or transfer of property might be particularly appropriate when based on the principle of fair sharing of matrimonial property or fair recognition of contributions or disadvantages but would not be limited to such cases. There may be cases, for example, where the payer is extremely wealthy and where both parties prefer that a provision based on child-care, or the easing of the adjustment to independence, or the relief of grave financial hardship, should take the form of a capital sum or property transfer. We see no reason why it should not do so. Indeed we can see great advantages in a final settlement of financial provision at the time of the divorce whenever this is possible. Some of our later recommendations are designed to promote this policy.[191]

Orders for payment of a capital sum or transfer of property

3.115 ***Scope.*** We think that the powers of the court should be wide and flexible. We do not therefore recommend any restrictive definition of capital sums or property for this purpose. In particular we do not think it necessary to specify the funds out of which a payment of a capital sum is to be made. There may be cases where a court would wish to make an order for payment of a capital sum against a spouse who had disposed of funds in such a way that he still effectively controlled them. Nor do we think it necessary to specify that the property must belong to the transferor spouse. A court would not order a party to do what was legally impossible and would not therefore order him to transfer property which he did not own and was not in a position to acquire by the date of the transfer. In the Memorandum we suggested that the power to order the transfer of property should include power to order the transfer of a tenancy from one spouse to the other, subject to various restrictions designed

[187]Divorce (Scotland) Act 1976, s.5(1)(*a*) and (*b*).
[188]*Ibid.*, s.5(1)(*c*) (to vary marriage settlements); s.6 (to counteract avoidance transactions).
[189]Paras. 3.8 to 3.67.
[190]See para. 3.64.
[191]See e.g. paras. 3.117 to 3.118; 3.121 to 3.123.

to protect the position of third parties.[192] This suggestion was generally welcomed. We took the opportunity in our Report on Occupancy Rights in the Matrimonial Home and Domestic Violence[193] to recommend its implementation in relation to tenancies of the matrimonial home and provision is made for this in the Matrimonial Homes (Family Protection) (Scotland) Bill which is currently before Parliament.[194] The Bill does not apply to tenancies other than of the matrimonial home, and even in relation to such tenancies it excludes certain types of property (such as a house which is part of an agricultural holding, or pertains to a croft, or is let on a long lease or is part of the tenancy land of a tenant-at-will). In the Memorandum we invited views on the transfer of other tenancies, such as agricultural tenancies of various kinds. There was little objection on consultation to the conferring of a power to order the transfer of such tenancies provided the consent of the landlord and any other necessary consents (e.g. of the Crofters Commission) were obtained. We doubt whether such a power would require to be much used but can see no reason why the court should not be able to order the transfer of such tenancies (e.g. of property let on a long lease or to a tenant-at-will) in an appropriate case. If this power were not conferred there would be an anomalous gap in the court's powers. We therefore **recommend**:

38. (*a*) For the purposes of Recommendation 37(*b*) "property" should include a tenancy (other than a tenancy which is transferable under the Matrimonial Homes (Family Protection) (Scotland) Bill).
(Clause 12(5).)

We deal later with the protection of the interests of third parties.[195]

3.116 ***Timing.*** Under the present law an order for payment of a capital sum on divorce can be made only on granting decree of divorce.[196] It was suggested to us that it would be useful if the court had power to grant decree of divorce and continue the action, for such period as the court may specify, to enable the question of financial provision to be dealt with later. We think that this would add a useful measure of flexibility. There may, for example, be cases where one party has good reasons for wishing an immediate decree of divorce but where some essential piece of information relevant to financial provision is not available. In the Memorandum we invited views on the question whether it should be possible, with the leave of the court, to apply for a capital sum or property transfer at *any* time after the decree of divorce.[197] Although there was some support for this idea on consultation there was also a strong negative reaction on the ground that it was desirable to have early finality in relation to the disposal of capital and property on divorce. The parties should, it was argued, be able to know where they stand at, or shortly after, the time of the divorce and to plan their lives accordingly. They should not be exposed to claims for capital or property at a later date.

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[192]Paras. 3.23 to 3.35.

[193]Scot. Law Com. No. 60 (July 1980), Part V.

[194]Clause 13. Under clause 13(4) the landlord is to receive a copy of the application for a transfer and is to have an opportunity of being heard on it.

[195]Paras. 3.156 to 3.171.

[196]Divorce (Scotland) Act 1976, s.5(1), (2) and (3).

[197]Proposition 87 and para. 3.98.

We think there is force in these objections and do not recommend that there should be a right to apply for a capital sum or transfer of property after the decree of divorce.[198] We therefore **recommend**:

38. (*b*) The court should have power to make an order for payment of a capital sum or transfer of property (i) on granting decree of divorce, or (ii) within such time thereafter as it may allow (by continuing the action) on granting decree of divorce. (Clause 12(1).)

3.117 ***Instalments and future payments or transfers.*** We regard it as particularly important that the court should have power to order a capital sum to be paid by instalments. An award may be justified on the basis of past events, such as the accumulation of property during the marriage or contributions made during the marriage, but there may not be any property or capital immediately available to satisfy it. In such a case an award of a capital sum payable by instalments would often be an appropriate solution.

3.118 Similarly it would be very useful if the court had power to order payment of a capital sum or a transfer of property at a future date. A husband, for example, might be due to receive a lump sum under an occupational pension scheme some six months after the divorce. The court might wish to order him to make a capital payment to his wife at that time. Or the court might wish to order a half share in the matrimonial home to be transferred to the husband, or its value paid to him, at a future date (for example, when the home ceased to be needed as a family home for the children). We therefore **recommend**:

38. (*c*) The court should have power:—
    (i) to order a capital sum to be paid by instalments (Clause 12(3));
    (ii) to make an order for payment of a capital sum or transfer of property at a future date. (Clause 12(2).)
    (Paragraphs 3.117 and 3.118.)

3.119 ***Variation and recall.*** An order for payment of a capital sum is not, under the present law, subject to variation or recall. In the Memorandum we suggested that this rule should continue to apply to such orders and to orders for the transfer of property unless the orders were made on an erroneous basis, because of the withholding of material facts from the court, or for other sufficient reason.[199] Most commentators agreed with this suggestion. Some, however, thought that it went too far and that the advantages of finality outweighed those of flexibility. Our recommendations that the court should have power to order payments by instalments and payments or transfers at a future date require some provision for variation. The fact that a payment is to be made by instalments or at a future date does not mean that the total amount should be variable. It does mean, however, that provision should be

[198]We recommend in the following paragraphs that the court should have power to order payments at a future date and payments by instalments. This will help to deal with the case where the payer has no funds at the time of the divorce but is likely to acquire funds later.

[199]Proposition 76 and para. 3.66.

made for varying the date or method of payment. The payer may, for example, acquire funds which would enable him to pay off the whole sum outstanding. In such circumstances we think that the payee should be able to apply for an order for accelerated payment. Similarly we think that it should be possible to vary the date of transfer specified in a property transfer order. For the rest we think that orders for the payment of a capital sum or transfer of property should not be variable. It seems to us, on reconsidering this matter in the light of the comments received, that a power to vary the amount of a capital sum or the nature or amount of property transferred on the ground that material facts had been withheld would result in too much uncertainty. It would expose both parties to the risk of subsequent litigation on the mere averment that there had been non-disclosure of material facts. It would, moreover, complicate divorce procedures and negotiations for financial settlements on divorce by making it risky for the parties to reach a rough and ready agreement. We can see no reason why one party should not be able to offer and the other accept a lump sum in full settlement of financial claims on divorce without a full mutual disclosure of all potentially relevant financial information. In short we agree with those commentators who think that in this area the advantages of finality and simplicity should not be thrown away. We therefore **recommend**:

38. (*d*) The court should have power to vary, on a change of circumstances, the date or method of payment or the date of transfer specified in an order for payment of a capital sum or transfer of property, but should have no other power to vary such an order.
(Clause 12(4).)

3.120 ***Effect of death or remarriage.*** An order for payment of a capital sum or transfer of property is, once made, like any other decree. It confers a right to a fixed sum or to the transfer of a specified item of property. It should not be affected by subsequent events. We therefore consider that rights under an order for payment of a capital sum or transfer of property which has not been fully implemented should not be extinguished by the death or remarriage of either party. As this result would follow in any event, in the absence of any provision to the contrary, legislation to this effect is not required.

Orders for periodical payments

3.121 ***Restrictions on use.*** One of the most forceful complaints made about the law on financial provision on divorce in recent years is that it allows, and does nothing to discourage, the award of a periodical allowance to a former spouse until death or remarriage. This complaint is made not only by men and second wives, who often resent what they see as an unjustified burden on their family finances, but also by some women who object to the idea of continuing financial dependence implicit in the present system. We have been left in no doubt about the strength of feeling which exists on this question and we have no doubt, after making due allowance for the fact that we generally received only one side of a story, that the present law does give rise to avoidable human suffering. We heard of cases, sometimes from the individuals concerned and sometimes from third parties, where periodical allowances were awarded to young women who were able to work and who did in fact later take up employment. In theory the former husband in such a

case could apply for a variation but in practice this does not always happen. First, he may not know of the change in the situation. The former wife may, for example, keep her whereabouts and activities hidden from him and insist on payment being made through her solicitor. Second, he may not wish to risk going back to court. His own income may have increased and he may fear, however unjustifiably, that the court may increase the payments. Third, he may be so sickened of legal disputes, and their expense, that he may prefer to pay what he sees as an unreasonable allowance rather than go back to court. The other side of the coin is that former wives who do need a periodical allowance often find that it becomes so eroded by inflation as to be of little value. Again, it is clear that the right to apply for a variation is not the complete answer in practice. A woman may fear her former husband and be reluctant to anger him. She may fear that any new claim might cause him to make difficulties over custody or access. She may simply not wish to get involved in the anguish of new court proceedings. We think that the technique of a continuing periodical allowance after divorce is an unsatisfactory one for both parties and that, whenever this would be sufficient and appropriate, financial provision on divorce should take the form of a capital sum or transfer of property. We therefore **recommend**:

39. (*a*) The court should not make an order for a periodical allowance unless it is satisfied that an order for payment of a capital sum (whether by instalments or otherwise) or transfer of property would not by itself be appropriate or sufficient to give effect to the principles laid down in Recommendation 31.
(Clause 13(1).)

3.122 We do not think that legislation following upon this Report should attempt to specify cases where a capital sum or property transfer would be inappropriate or insufficient. This should in our opinion be left to the discretion of the court in each case. In many cases governed by the principle of fair sharing of the continuing burden of child-care a capital sum or property transfer might be inappropriate, because it would not allow the award to be varied on a change in circumstances. The same would apply to many cases governed by the principle of relief of grave financial hardship. Even in these cases, however, a capital sum or transfer of property would not always be inappropriate. Both parties might, for example, prefer to take the risk of changes in circumstances in order to have a final settlement. The court should not be precluded from making an award on this basis.

3.123 ***Duration.*** We think, however, that the legislation should restrict further the use which may be made of long-term periodical allowances as opposed to capital sums payable by instalments. The difference between these forms of award is that a capital sum payable by instalments is fixed, once and for all, at the time of the divorce. Both parties know that the payments will come to an end when the total sum is paid. Both can plan accordingly. The emphasis is on payment of a sum which is due rather than on indefinitely continuing support. A capital sum payable by instalments is, therefore, appropriate, and a periodical allowance inappropriate, where the amount payable is fixed by reference to past events. In the context of our recommendations this means that cash awards based on the principle of fair sharing of the value of matrimonial property, or on the principle of fair

recognition of contributions and disadvantages, should be in the form of a capital sum (payable by instalments if necessary) rather than in the form of a long-term periodical allowance. Cash awards based on the principle of easing the adjustment to independence are based partly on past dependency and partly on future needs and may appropriately take the form of either a capital sum or a periodical allowance. In any event a periodical allowance under this principle could not last for more than three years. Awards based on child-care or the relief of grave financial hardship are based mainly on future needs and may appropriately take the form of a periodical allowance which could vary with changes in the circumstances. In the case of the child-care provision there would in any event be an end to the allowance when the youngest relevant child reached the age of sixteen. In other words the only case where, in our view, a life-long periodical allowance (rather than a capital sum payable by instalments) would be justified is where it is necessary to relieve grave financial hardship caused by the divorce. We therefore **recommend**:

39. (*b*) Without prejudice to the court's power to order a capital sum to be paid by instalments, a periodical allowance should not be awarded for a longer period than three years from the date of the divorce, unless the payments are required in accordance with the principles laid down in Recommendations 34 and 36, in which case the award should be for such period as the court may determine in the application of those principles.
(Clause 13(3).)

3.124 ***Timing.*** Under the present law an application for a periodical allowance in an action of divorce may be made at any time prior to decree being granted: if such an application has been withdrawn or refused, or if no such application has been made, either party can apply for a periodical allowance after the date of the divorce decree if since that date there has been a change in the circumstances of either party.[200] Provided that there are, as we have recommended, restrictions on the use of, and duration of, orders for periodical allowances we think that the existing rules on the time of application should, in general, continue to apply. The custody of children may change, for example, after the decree of divorce, thus justifying a late application for a periodical allowance under the child-care principle. Or, again, a spouse may not have applied for an allowance under the transitional adjustment principle because the other spouse had no means. If the other spouse inherits a fortune and if the period of three years from the date of divorce has still some time to run there is no reason why an application for a periodical allowance should not still be made. There is more difficulty about a claim based on any of the other principles, particularly the principle of relief of grave financial hardship. We would not wish to perpetuate the situation whereby a man divorced at 22 and made redundant at 52 can claim a periodical allowance from his former wife. The important point is, however, that any claim would be governed by the applicable principles, and they have been framed so as to exclude a claim based on events arising after the divorce. There is also a practical reason for allowing claims for periodical allowance to be made after divorce. It is, we think, desirable that a periodical allowance should be variable. If, however, a periodical allowance is variable and if it is

[200]Divorce (Scotland) Act 1976, s.5(1) and (3).

not possible to apply for a periodical allowance after divorce, people will simply conclude for awards of a nominal amount so as to keep open the possibility of a subsequent variation. We would not regard this as a desirable development. It would encourage unnecessary claims and false disputes. We therefore **recommend**:

39. (*c*) The court should have power to make an order for a periodical allowance (i) on granting decree of divorce or (ii) within such time thereafter as it may allow (by continuing the action) on granting decree of divorce[201] or (iii) at any time after the decree on an application by either party on a change of circumstances.[202]
(Clause 13(2).)

3.125 ***Variation and recall.*** Under the present law an order for payment of a periodical allowance may be varied or recalled on a change of circumstances.[203] This has been interpreted by the Inner House as including cases where the order was made on the basis of incorrect information or where, through inadvertence, the defender had not opposed the pursuer's conclusions.[204] We think that this should continue to be the law. We also think, for the reasons given earlier in relation to aliment,[205] that the court should have power to backdate a variation or recall to the date of the application for variation or recall, or on cause shown to an earlier date, and to order repayment of any amounts overpaid. This would help to deal with the case where the payee takes up employment and conceals this change in circumstances from the payer. The power to vary could also be used to commute a periodical allowance into what would, in effect, be a lump sum. If, for example, the payer came into a large sum of money the court could, on the payee's application, award a periodical allowance of a very large amount for a short period. The facility of converting a periodical allowance into a lump sum (or even a transfer of property) would often be useful (particularly on the payer's death) and we think the court should be given power to do so directly and in so many words and should not be left to strain its power to vary to achieve the same result. We therefore **recommend**:

39. (*d*) The court should have power, if satisfied that there has been a change of circumstances since the date of the order
(i) to vary or recall an order for a periodical allowance;
(ii) to backdate such variation or recall to the date of the application for variation or recall or, on cause shown, to an earlier date and to order repayment of any amounts overpaid;
(iii) to convert an order for a periodical allowance into an order for payment of a capital sum or transfer of property.
(Clause 13(4) and (5).)

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[201]Cf. para. 3.116.

[202]By this we mean a change of circumstances since the date of the decree: cf. *Jenkinson* v. *Jenkinson* 1981 S.L.T. 65.

[203]Divorce (Scotland) Act 1976, s.5(4).

[204]*Galloway* v. *Galloway* 1973 S.L.T. (Notes) 84.

[205]Paras. 2.113 to 2.117.

3.126 ***Effect of death or remarriage.*** Under the present law an order for a periodical allowance ceases to have effect on the death or remarriage of the payee, except in relation to accrued arrears: on the death of the payer, however, the order continues to operate against the payer's estate, without prejudice to the court's power to vary or recall it.[206] In the Memorandum we suggested that in certain circumstances an order might continue after the remarriage of the payee.[207] We had in mind that an order might have been made in order to give the payee a share in property accumulated during marriage and that in such circumstances there was no reason why it should terminate on remarriage. There was a mixed reaction to this proposal. Under our present recommendations an order for this purpose and for the purpose of recognising contributions or disadvantages would normally take the form of a capital sum payable by instalments so that the problem does not arise in such cases. It would give rise to justified resentment if a periodical allowance for any other purpose were to continue after the payee's remarriage. We therefore **recommend**:

39. (*e*) An order for a periodical allowance should cease to have effect on the death or remarriage of the payee.
(Clause 13(6)(*b*).)

(*f*) An order for a periodical allowance should not, if it still subsists, cease to have effect on the death of the payer, although the death may justify an application for variation, recall or conversion.
(Clause 13(6)(*a*).)

3.127 ***Effect of cohabitation.*** In the Memorandum we expressed the preliminary view that the payee's cohabitation with another person as husband and wife should not automatically terminate an order for a periodical allowance (although it might justify an application for variation).[208] This was strongly endorsed on consultation and we therefore make no recommendation that an order for a periodical allowance should terminate automatically on cohabitation.

Incidental orders

3.128 ***Introduction.*** In the Memorandum we suggested that the range of orders available to the court should be extended. Our proposals were generally welcomed on consultation and we consider that, if the principles underlying financial provision are clear, there is everything to be said for giving the court the widest range of incidental powers to give effect to those principles. Firmness of principle and flexibility of technique should, in our view, characterise the law on financial provision.

3.129 ***Order for the sale of property.*** Under the present law the court can often bring pressure to bear on a person to sell property by making an order for payment of a capital sum. The court has, however, no powers in a divorce action[209] to order property to be sold. The Law Commission have recently

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[206]Divorce (Scotland) Act 1976, s.5(5).

[207]Proposition 83 and para. 3.90.

[208]Proposition 84 and para. 3.91.

[209]As opposed to an action for division and sale of property owned by two or more proprietors in common.

recommended that such a power should be given to the English courts,[210] and this recommendation has been implemented by the Matrimonial Homes and Property Act 1981. We think that such a power should also be given to the Scottish courts. We do not envisage that it would have to be used very often. There is much to be said for the view that a capital sum, which leaves the payer a choice about how to raise the necessary money, is generally preferable to an order for the sale of particular property. Nevertheless there will be circumstances where a power to order a sale would be useful. The court may wish, for example, to ensure that the matrimonial home can be used as a family home for the children for some years but that it will then be sold and the proceeds divided equally. We deal later with incidental orders which may be attached to an order for sale and with the protection of third parties. Subject to this latter point we think that the power to order sale should be expressed in wide and unqualified terms and should be available whenever it is necessary to give effect to the principles governing financial provision on divorce.

3.130 ***Order for the valuation of property.*** In most cases it can be left to the parties to produce their own valuations of property for the purposes of financial provision on divorce. There may be cases, however, where it would be useful for the court to order property to be valued independently. As the Faculty of Advocates pointed out in their comments on the Memorandum, a remit to, say, an accountant to produce an independent valuation could obviate the leading of evidence as to the value of assets and thus save court time and reduce the area of controversy. We think, therefore, that the courts should be given an express power to order the valuation of property.

3.131 ***Order for resolving property disputes.*** In an action of divorce the parties may be in dispute about who owns an item of property or about their respective rights in or over a particular item of property. It will often be convenient that such disputes should be dealt with in the context of the divorce action rather than in separate proceedings, and we therefore suggested in the Memorandum that the court should have power in an action of divorce to grant a declarator concerning the property rights of the spouses and any other relevant patrimonial matters.[211] This suggestion was generally supported on consultation, although a few commentators thought that it was unnecessary. We think that the proposal might usefully be widened slightly. There may be cases where the appropriate method of resolving a dispute between the parties as to their rights in property is not necessarily a declarator. It may, for example, be an interdict or a decree ordaining the other party to produce accounts (if the parties had been partners in a small family business). Such cases would probably not be frequent, but we think that it would be useful to give the courts power in an action of divorce[212] to

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[210]Law Com. No. 99, *Family Law: Orders for Sale of Property under the Matrimonial Causes Act* 1973 (1980).

[211]Proposition 70 and para. 3.56. There is no clear authority on the competency of conclusions for resolving property disputes in an action of divorce: see *Ellison* v. *Ellison* (1901) 4 F. 257.

[212]This power should be exercisable whether or not decree of divorce is granted: see Appendix A, clause 21.

resolve property disputes between the parties by granting decree of declarator or otherwise.

3.132 ***Order in relation to pension rights.*** We considered in the Memorandum[213] whether the court in a divorce action should be given power to make orders directly affecting pension rights—for example, an order directing the trustees of an occupational pension scheme to pay a proportion of a widow's pension to a divorced wife. We made no suggestions for reform as the matter was then under consideration by the Occupational Pensions Board. The Board has since made a number of recommendations on this question[214] including a recommendation that the courts should have power to allocate a widow's or widower's pension.[215] We make no recommendations in this Report on the conferring of powers on the courts to make orders against the trustees of pension schemes, for two reasons. First, we think that this question is more appropriately discussed in the context of the law on pension schemes generally and on the basis of the Occupational Pension Board's recommendations. It would not be appropriate for us, particularly in view of our limited consultation on this question, to deal with one aspect of a much wider topic. Secondly, our whole approach to financial provision on divorce makes the problem of far less importance. We do not recommend that an attempt should be made to place the parties in the position in which they would have been had the marriage continued. Accordingly we are not concerned that a divorced wife should receive the widow's pension which she would have received had she remained married. Our recommendations are based on the equitable adjustment of the economic position at the time of the divorce. Under our earlier recommendations this might involve an order that one spouse should pay to the other a share of the value of accrued pension rights. It would not involve any orders against pension fund trustees or any orders interfering with pension schemes in any way. It would simply be a question of adjustment between the spouses.

3.133 ***Order regulating the occupation of the matrimonial home and the use of furniture and plenishings in it.*** The Matrimonial Homes (Family Protection) (Scotland) Bill, currently before Parliament, enables either spouse to apply to the court for an order regulating the rights to occupy the matrimonial home conferred by the Bill and also for an order granting to the applicant the possession or use of furniture and plenishings in the home.[216] Any order made under these provisions, however, ceases to have effect on the termination of the marriage.[217] We think that it is important that the court in a divorce action should have power to regulate the occupation of the matrimonial home and the use of the furniture and plenishings in it after

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[213]Paras. 3.43 to 3.50.

[214]*Equal Status for Men and Women in Occupational Pension Schemes* Cmnd. 6599 (Aug. 1976).

[215]Para. 13.56.

[216]Clause 3.

[217]Clause 5. The occupancy rights conferred by the Bill itself also cease on the termination of the marriage: they are conferred only on someone who is a "spouse".

the divorce. A proposal to that effect in the Memorandum [218] was generally supported on consultation. A power of this nature is essential if the Scottish courts are to be able to make the type of orders preserving the use of the matrimonial home for the dependent children of the marriage which the English courts have found so useful.[219] It may be desirable, for example, to ensure that the parent with care of the children is permitted to occupy the home until the youngest child reaches majority. It may also be desirable to grant one party the use of furniture and plenishings belonging to the other and situated in the matrimonial home. We envisage, however, that this latter type of order would generally be appropriate only as a short-term solution (for example, if the wife is given the use of the home and the husband has no intention of setting up a home of his own until, say, six months later). As a long-term solution it would generally be more appropriate to divide the ownership of the furniture between the parties. To give, say, the wife the use of the husband's furniture for twelve years might mean that at the end of that time the husband would receive depreciated furniture which he did not need while the wife would need to buy a complete new set of furniture and equipment. The provisions on occupancy rights in the Matrimonial Homes (Family Protection) (Scotland) Bill contain a list of factors to which the court is to have regard in making orders declaring, enforcing, restricting, regulating or protecting occupancy rights.[220] We do not think it necessary or desirable that such a list should be reproduced in the legislation on financial provision. The situation on divorce is different in that the court is adjusting the spouses' position in accordance with certain statutory principles, each of which contains its own reference to relevant factors. We deal later with the important question of the rights of third parties.[221] "Matrimonial home" should be defined as in the Matrimonial Homes (Family Protection) (Scotland) Bill.

3.134 ***Order regulating liability for outgoings on or in relation to the matrimonial home and its furniture and plenishings.*** As a corollary of the above power it is necessary that the court should have power to regulate *as between the parties* liability for outgoings on or in relation to the matrimonial home or the furniture and plenishings in it. If, for example, the wife is to be given the right to occupy the matrimonial home while the children are dependent it may be reasonable, depending on the circumstances, for the court to order that she should be responsible for repairs and rates. We do not suggest that the court should have any power to prejudice the rights of third parties. It should, however, have power to order an adjustment of liability for the payments *as*

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[218]Proposition 68 and para. 3.52. The proposal in the Memorandum was not limited to the matrimonial home and its plenishings. It was suggested to us on consultation, however, that the proposed power should be so limited. We agree with this suggestion. In our *Report on Occupancy Rights in the Matrimonial Home and Domestic Violence* (Scot. Law Com. No. 60 (1980), paras. 2.42 to 2.44) we recommended that the court should not have power to regulate the use and possession of the family car. We thought that this would give rise to severe practical difficulties. We remain of this view. More generally we think that there is no need to give the court power to regulate the use and occupation of property other than the home and contents and that such a power might merely give rise to unnecessary disputes.

[219]See Cretney, *op. cit.*, pp. 320 to 324.

[220]Clause 3(3).

[221]Paras. 3.156 *et seq.*

between the husband and wife. We suggest later[222] that certain provisions of the Matrimonial Homes (Family Protection) (Scotland) Bill should apply to rights of occupation conferred by the court as they apply to occupancy rights conferred by that Bill. This would mean, among other things, that the occupying spouse would have certain essential subsidiary rights (in relation to outgoings and repairs, for example) even in the absence of a court order.

3.135 ***Order for provision of security.*** In relation to aliment during marriage it can be argued that a person's dependants should follow his fortunes and should not be protected against his ordinary creditors. For this and other reasons we have recommended earlier in this Report that there should be no power to order security to be provided for the payment of aliment. The position is different on divorce. The alimentary relationship is terminated and the parties are at arm's length. In the Memorandum we suggested that the court should have power on divorce to order security to be provided for the payment of a periodical allowance or capital sum or both.[223] This was generally supported on consultation. The English courts have had such a power for many years.[224] It has been found useful for the court to indicate the amount to be secured and to give the payer an opportunity to make proposals as to how the security is to be provided.[225] This could be done in various ways. The payer could grant a standard security or he could offer to convey property to trustees on such terms that the property can be resorted to if the payments of financial provision are not duly made.[226]

3.136 ***Order for payment to trustee or curator bonis.*** Under the present law the court has power to order payment of a periodical allowance or capital sum to be made not only to the applicant spouse but also "for his benefit".[227] There may be cases where the person to whom financial provision is payable is incapable of managing his or her own affairs. There may be cases where the parties are agreed that payments should be made or property transferred to trustees for the payee instead of to the payee directly. We have already noted that it may be desirable to order money or assets to be transferred to trustees as security for the payment of financial provision.[228] We think therefore that the court should be given express power to order payments to be made, or property transferred, to any curator bonis or trustee or other person for the benefit of the other party to the marriage.[229]

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[222]Para. 3.145.

[223]Proposition 69 and paras. 3.53 to 3.55.

[224]Matrimonial Causes Act 1973, s.23(1) and (3); Cretney, *op. cit.*, pp. 276 to 279. In relation to lump sums the power exists only where they are to be paid by instalments.

[225]See *O'D* v. *O'D* [1976] Fam. 83 at p. 92.

[226]See para. 3.136 and Recommendation 40(*a*) below. For the English practice see Jackson, *Matrimonial Finance and Taxation* (2nd edn., 1975) pp. 115 to 124.

[227]Divorce (Scotland) Act 1976, s.5.

[228]See para. 3.135.

[229]The English courts have power to order a settlement of property for the benefit of the other party to the marriage and of the children of the family or either or any of them: Matrimonial Causes Act 1973, s.24(1)(*b*). We do not think that the court should have power on divorce to order settlements on children (see para. 3.1 above). There is nothing, however, to stop parties from setting up trusts for their children voluntarily if they so wish. The English courts also have power to order payments to be made, or property transferred, to third parties for the benefit of a mentally incapable spouse: Matrimonial Causes Act 1973, s.40.

3.137 ***Order varying a marriage settlement.*** Under the present law the court has power, on granting decree of divorce, to make an order varying the terms of any settlement made in contemplation of or during the marriage so far as taking effect on or after the termination of the marriage.[230] The origin of this provision was a recommendation of the Morton Commission. There was concern that marriage contract trusts entered into under the pre-1964 law, in accordance with which the guilty party in a divorce forfeited his rights under a marriage settlement for the benefit of the innocent spouse, might not have provided for the contingency of divorce.[231] In the Memorandum we made no proposals for a change in the law and none was suggested to us. The power should, in our view, be available only where justified by the principles governing financial provision on divorce. If, for example, in the application of those principles the court wished to order property of a certain value to be transferred from one spouse to the other, it might be possible to achieve this result by winding up a marriage settlement which had made no provision for divorce, valuing the spouses' respective interests in it, and ordering an appropriate transfer out of the funds thus freed. We recommend later that an incidental order should not prejudice the rights of third parties without their consent. It follows that this power to vary could not be used to deprive children of their rights under marriage contracts.[232] Marriage settlements are now rare and the power to vary them will, we envisage, be rarely used. We intend the power to vary to extend to an order extinguishing the rights or interests of either or both of the parties under the settlement.[233]

3.138 We recommend later that the courts should, subject to certain limited exceptions, have no power to vary agreements between the parties as to financial provision on divorce.[234] It will therefore be necessary for the courts to distinguish between the traditional antenuptial or postnuptial marriage contract trust and an agreement on financial provision on divorce. We do not think that this should give rise to difficulty in practice.

3.139 ***Order for payment of interest.*** Under our proposals the court may award a capital sum in instalments or a capital sum payable at a future date.[235] Depending on the circumstances it may be appropriate to award interest from the date of citation or decree or from some future date. It may even be appropriate to award interest as from a date prior to citation. The matrimonial property may, for example, have been valued at the date of final separation, some years before the divorce. *Prima facie* the value should be divided equally between the spouses. If, however, one party had had the sole use of the property in the intervening period the other party would have been deprived of "his" capital. In such circumstances one way of achieving a fair

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[230]Divorce (Scotland) Act 1976, s.5(1)(*c*). The right to apply for such a variation can be renounced by a suitable provision in the settlement—read, if need be, with s.33(2) of the Succession (Scotland) Act 1964: see *Thomson* v. *Thomson* 1981 S.L.T. (Notes) 81.

[231]Cmd. 9678 (1956), para. 554.

[232]Lord Keith of Avonholm dissented from the Morton Commission's recommendation because the power recommended by that Commission could have had this result: para. 554, note 48.

[233]This is expressly covered by the Matrimonial Causes Act 1973, s.24(1)(*d*).

[234]See paras. 3.190 to 3.200 below.

[235]See Recommendation 38(*c*) and paras. 3.117 to 3.118.

result would be to award interest on the half-share.[236] This could not be done under the present common law, under which the general rule in relation to illiquid claims is that interest can be awarded only from the date of the final decree.[237] We conclude therefore that the court should be given power to award interest from any date on any sum awarded as financial provision on divorce.

3.140 ***Order to furnish financial information.*** In Part II of the Report we recommended that the court in an action for aliment should have power to order either party to furnish information about his or her financial affairs.[238] We think this power would be equally useful in relation to financial provision on divorce.

3.141 ***Other incidental orders.*** In the Memorandum we suggested that the court should be given power to impose terms and conditions in exercising any of its powers to award financial provision[239] and should have adequate incidental powers to make the exercise of its principal powers effective.[240] We mentioned, as possible examples, a condition that a matrimonial home should not be sold before a certain date and an order remitting a matter to a conveyancer to prepare a suitable instrument. Other examples would be orders supplementing an order for the sale of property[241] or orders authorising a messenger-at-arms to enter the matrimonial home and take possession of any article ordered to be delivered.[242] Our suggestions were generally supported on consultation. We think that the court's powers should be widely expressed, provided it is made clear that they are available only where this is necessary or expedient to give effect to the principles governing an award of financial provision or to any order for financial provision. One advantage of an open-ended range of incidental powers is that the court can give effect in its decree to an agreement between the parties, even if the agreement contains incidental provisions beyond the scope of the court's main powers.

3.142 ***Timing.*** We think that the court should be able to make an incidental order on granting decree of divorce or at any time thereafter. There may be cases, for example, where one spouse has been allowed to occupy the matrimonial home for some years and where a new problem concerning the regulation of the occupation or the sale or valuation of the property emerges at a later stage. In some cases these questions could no doubt be dealt with by a variation of the original order. In others the problem might require an application for a new order of a different kind. Again, there may be cases

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[236]Another technique available under our recommendations would be to conclude that the sole use of the property over a period of years was a special circumstance warranting an award of a smaller share to the spouse who had enjoyed that advantage.

[237]See *Flensburg S.S. Co.* v. *Seligmann* (1871) 9 M.1011 at p. 1014; *Martin & Sons* v. *Robertson, Ferguson, & Co.* (1872) 10 M.949; *Macrae* v. *Reed and Mallik, Ltd.* 1961 S.C. 68. The law has been changed in relation to interest on damages by the Interest on Damages (Scotland) Acts 1958 and 1971.

[238]Paras. 2.93 and 2.94.

[239]Proposition 74 and para. 3.62.

[240]Proposition 75 and para. 3.63.

[241]Cf. s.7 of the Matrimonial Homes and Property Act 1981.

[242]See clause 3(5) of the Matrimonial Homes (Family Protection) (Scotland) Bill.

where no funds were available for the provision of security for a periodical allowance at the time of divorce but where such funds became available at a later date. In such circumstances we do not see why an application for security to be provided should not be competent after the divorce.

3.143 The question of orders before decree of divorce is more difficult. Several of the incidental orders referred to above are suitable for use at the interim stage, before decree of divorce has been pronounced. This applies to orders for the valuation of property, orders requiring parties to furnish information about their financial affairs, orders remitting a matter to a conveyancer and orders regulating the use and occupation of property. Some of the other incidental orders set out above—such as orders for the sale of property, or orders that security should be provided, or orders varying marriage settlements—are not, perhaps, so pre-eminently suitable for interim use, although no doubt cases could arise where an interim order might be useful. There are two conflicting policy considerations here. On the one hand it is desirable that the court should have the widest range of powers to give effect to the equitable principles governing financial provision on divorce. On the other hand it is undesirable to encourage delay and expense in divorce actions by multiplying the opportunities for interim disputes. The balance between these two principles may have to be adjusted from time to time in the light of experience. This is a matter for regulation by rules of court rather than by statute. Accordingly we think that the legislation should retain the maximum potential for flexibility by providing that incidental orders may be made at any time, before, on or after decree in the divorce action. Rules of court may restrict the categories of incidental orders which may be made before decree.

3.144 ***Variation and recall.*** The court should have power to vary or recall an incidental order. As incidental orders may take various forms, and as all the circumstances justifying a variation cannot be predicted, we suggest that the power to vary should be exercisable on cause shown and not merely on a change of circumstances.

3.145 ***Subsidiary rights in relation to use and occupation of matrimonial home and furniture.*** Various practical problems are likely to arise if one party is granted the right to occupy a matrimonial home or to use furniture belonging to the other. The occupying spouse may require to effect essential repairs to the property and to take various steps to protect his or her occupancy rights. It would be undesirable to require all such matters to be regulated in advance by the court or to be the subject of separate applications to the court for authorisation. We discussed this question in Part II of our Report on Occupancy Rights in the Matrimonial Home and Domestic Violence, and recommended that the spouse with occupancy rights in a matrimonial home should have certain subsidiary and consequential rights, most of them automatic but some requiring the authorisation of the court. This recommendation is being implemented by clause 2 of the Matrimonial Homes (Family Protection) (Scotland) Bill currently before Parliament. The position where one party is granted a right to occupy the matrimonial home after divorce is essentially the same as that where a spouse has occupancy rights during marriage, and the same solutions should apply to the various practical

problems which arise. We therefore propose that where the court has made an order giving one party the right to occupy a matrimonial home or to use furniture and plenishings in a matrimonial home that party should have, so long as the order is in force and unless it provides otherwise, the subsidiary and consequential rights conferred by clause 2 of the Matrimonial Homes (Family Protection) (Scotland) Bill. Clause 2 should govern the situation, with any necessary modifications, as if the parties were still spouses.

3.146 We therefore **recommend** as follows:

40. (*a*) An incidental order means any one or more of the following orders:

(i) an order for the sale of property
(Paragraph 3.129);

(ii) an order for the valuation of property
(Paragraph 3.130);

(iii) an order resolving any dispute between the parties, by granting decree of declarator or otherwise, as to their respective rights in any property
(Paragraph 3.131);

(iv) an order regulating the occupation of the matrimonial home and the use of furniture and plenishings in it
(Paragraph 3.133);

(v) an order regulating liability, as between the parties, for outgoings on or in relation to the matrimonial home or the furniture and plenishings in it
(Paragraph 3.134);

(vi) an order that security should be provided for any financial provision
(Paragraph 3.135);

(vii) an order that payments should be made or property transferred to any curator bonis or trustee or other person for the benefit of the other party to the marriage
(Paragraph 3.136);

(viii) an order varying any term in an antenuptial or postnuptial marriage contract or settlement
(Paragraphs 3.137 and 3.138);

(ix) an order that interest should run from any date on any sum awarded as financial provision on divorce
(Paragraph 3.139);

(x) an order that either party should furnish information about his or her financial affairs
(Paragraph 3.140);

(xi) any other incidental order which is necessary or expedient in order to give effect to the principles governing an award of financial provision or to any order for financial provision.
(Paragraph 3.141);

(Clauses 14(2) and (5); 20.)

(*b*) The court should have power to make an incidental order in a divorce action at any time, whether before, on or after decree

of divorce, but rules of court may restrict the categories of order which may be made as interim orders.
(Paragraphs 3.142 and 3.143; Clause 14(1).)

(*c*) The court should have power to vary or recall an incidental order on cause shown.
(Paragraph 3.144; Clause 14(3).)

(*d*) Where the court has made an order giving one party the right to occupy a matrimonial home or to use furniture and plenishings therein that party should have, so long as the order is in force and except to the extent that it provides otherwise, the subsidiary and consequential rights conferred by clause 2 of the Matrimonial Homes (Family Protection) (Scotland) Bill: clause 2 should govern the situation, with any necessary modifications, as if the parties were still married.
(Paragraph 3.145; Clause 14(4).)

3.147 **Orders counteracting avoidance transactions.** Under the present law,[243] where a spouse has claimed aliment or financial provision, he or she may within a year of the disposal of the claim apply to the court for an order (1) reducing or varying any settlement or disposition of property belonging to the other spouse made in favour of any third party at any time within a period of three years before the making of the claim; or (2) interdicting the other spouse from making any such settlement or disposition, or transferring out of the jurisdiction of the court, or otherwise dealing with, any property belonging to him. The court may make such an order if it is satisfied that the settlement or disposition was made or is about to be made, or that the property is about to be transferred or otherwise dealt with, wholly or partly for the purpose of defeating the claim in whole or in part. The property rights of any third party who has acquired the property in good faith and for value are not affected.

3.148 In the Memorandum we suggested that the court should continue to have powers, on these lines, to counteract avoidance transactions.[244] This was supported on consultation. It was suggested to us that transactions effected within the period of five years before the claim (instead of three years, as in the present law) should be open to challenge. This suggestion is a reasonable one in the light of the changes in the divorce law made by the Divorce (Scotland) Act 1976. Under that Act[245] a divorce may be granted if the parties have not cohabited for a period of five years. If the time within which avoidance transactions could be challenged were not extended it would be possible in certain situations for a man to use the first two years of that period to divest himself of his property in some suitable way. It seems to us, therefore, that the present provision should at least be altered by substituting a period of five years for the period of three years.

3.149 In the Memorandum we noted that it was doubtful whether the powers of the court to reduce or vary "any settlement or disposition of

[243]Divorce (Scotland) Act 1976, s.6.
[244]Proposition 72 and paras. 3.57 to 3.60.
[245]S.1(2)(*e*).

property" extended to dispositions or transactions not effected in writing, and suggested that the court's powers to cut down or counteract avoidance transactions should be set out in the widest terms.[246] The need for some extension of the court's powers was shown by the case of *Maclean* v. *Maclean*,[247] where it was held that the court had no power to set aside a gift of money and that it could reduce or vary only a written instrument which could be described as a "settlement or disposition". Our suggestion was generally accepted on consultation, subject to provisos about the protection of third parties[248] and the need to set out the court's powers in terms which were not too open-ended. We think therefore that the court's powers should include powers to set aside *any* avoidance transaction or transfer of property and should not be limited to reducing or varying a settlement or disposition effected by a written instrument.

3.150 We received some critical comment on the present law relating to the test of intention to defeat a financial claim. One judge told us that the present formula does not work in relation to interdicts because there is no way of telling what the purpose of a proposed disposition is. All that the courts can do is to consider whether the proposed disposition may in fact prejudice the applicant's claim. We think that this point applies also in relation to past transactions. It is very difficult to prove an intention to defeat a claim for financial provision. In the Memorandum we suggested that if a transaction was entered into within the prescribed period and in fact had the effect of defeating the relevant claim, there might be a presumption that it was intended to defeat the claim.[249] There was a mixed reaction to this proposal. Some consultees objected to the introduction of a statutory presumption of fraudulent intent. Others supported the suggestion as a means of surmounting the difficulty of complying with the present law. On reconsideration we think that the answer to this problem is to bring the test itself into line with reality and to give the court power to set aside or interdict a transaction or transfer of property if it is shown to its satisfaction that the transaction or transfer has the effect of, or is likely to have the effect of, defeating in whole or in part any claim for financial provision. This would only be a power. The court would not be obliged to exercise it and presumably would not exercise it if the transaction or transfer appeared to be a genuine one with no avoiding intention. The rights of third parties would be protected.[250]

3.151 We therefore **recommend**:

41. The court should continue to have power to counteract transactions intended to defeat claims for financial provision on divorce but
    (i) the power to counteract past transactions should extend to transactions entered into within 5 years before the claim for financial provision is made (instead of 3 years as under the present law) and should include power to set aside transactions and transfers of property (even if not effected by a written disposition or settlement); and

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[246]Proposition 73 and para. 3.60.
[247]1976 S.L.T. 86.
[248]See paras. 3.156 *et seq.*
[249]Proposition 72 and para. 3.60.
[250]We return to this question at paras. 3.156 *et seq.*

(ii) the power to interdict or set aside transactions should extend to any transaction which has the effect of, or is likely to have the effect of, defeating the applicant's claim (even if it cannot be proved that it was or is intended to do so).
(Paragraphs 3.147 to 3.150; Clause 18.)

Inhibition and arrestment on the dependence

3.152 Inhibition is a procedure whereby the defender in an action can be prevented, pending the disposal of the action, from disposing of his heritable property. Arrestment on the dependence is a procedure whereby a third party holding moveable property for the defender or owing money to the defender can be prevented from parting with the property or money pending the disposal of the action. Under the present law the pursuer in a divorce action cannot inhibit or arrest on the dependence of the action unless he avers some special ground such as that the defender is verging on insolvency, or is outside Scotland, or is about to decamp, or is depleting his assets to defeat the pursuer's claim.[251] In the Memorandum we suggested that it should be competent to inhibit or arrest on the dependence of a divorce action even in the absence of special circumstances.[252] This was generally supported on consultation. It was pointed out by one judge that interdict was a difficult remedy to enforce in this situation and that if inhibition and arrestment on the dependence were available interdict could be used only as a remedy of last resort.

3.153 We therefore consider that inhibition and arrestment on the dependence should be made available as normal remedies in divorce actions. This in turn raises the question of the procedure for obtaining them. In the normal case a warrant for inhibition or arrestment on the dependence of an action can be obtained as a matter of course on the signeting of the summons by simply inserting the appropriate application in the printed form of summons.[253] In the Memorandum we suggested that this might not be suitable in relation to financial provision on divorce where there was no existing debt, any liability being contingent on the court's decree. We suggested that an appropriate procedure might be by motion intimated to the other party, although we recognised that intimation might enable the other party to take rapid steps to frustrate the arrestment or inhibition. There was a mixed reaction on consultation. The Faculty of Advocates favoured use of the normal procedure, on the ground that speed was essential. The Law Society of Scotland and several other consultees, including two judges, thought that in divorce actions warrant for inhibition or arrestment on the dependence should not be granted until the defender had had a chance to be heard. Resort to inhibitions and arrestments on the dependence as a mere matter of course in divorce actions would, in our view, be undesirable and we therefore suggest that the court should have power, on cause shown, to grant the appropriate warrant to inhibit or arrest. The procedure would be a matter for rules of court but might be by intimated motion. It could be reviewed and, if necessary, changed in the light of experience.

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[251] *Ellison* v. *Ellison* (1901) 4 F. 257; *Stuart* v. *Stuart* 1926 S.L.T. 31; *Gillanders* v. *Gillanders* 1966 S.C. 54; *Brash* v. *Brash* 1966 S.C. 56; *Wilson* v. *Wilson* 1981 S.L.T. 101.

[252] Proposition 71 and paras. 3.57 to 3.60.

[253] Rule of Court 74.

3.154 A further question which arises if arrestment and inhibition on the dependence are made available as normal remedies in divorce actions is whether it should be possible to restrict them to specific items of property or to funds specified in the warrant. At present a warrant to inhibit enables the grantee to register an inhibition in the Register of Inhibitions. This affects all the heritable property owned by the defender: it is not competent to restrict the warrant in the first instance to particular items of property, although the defender may subsequently apply for it to be restricted. Similarly, a warrant to arrest is in general terms and enables the grantee to arrest any funds of the other party in the hands of third parties even if the amount greatly exceeds the value of the claim. In the Memorandum we invited views on the question whether it should be competent to obtain a warrant for inhibition restricted to specific heritable property (such as the matrimonial home) or a warrant for arrestment restricted to funds or assets specified in the warrant.[254] There was very strong support on consultation for the view that such restricted arrestments or inhibitions should be competent in divorce actions. We shall be examining this question more generally in relation to all kinds of actions when we undertake consultation on these particular aspects of diligence. As we are proposing a new procedure in divorce actions, however, we can see no disadvantages and considerable advantages in dealing with this question in the present context, without prejudice to further reform in other contexts.

3.155 We therefore **recommend**:

42. (*a*) the court should have power, on cause shown, to grant warrant for inhibition or arrestment on the dependence of a divorce action;
    (*b*) rules of court should lay down the procedure for obtaining such warrants (the suggested procedure being by motion intimated to the other party); and
    (*c*) it should be competent to restrict such warrants to specific items of property or to funds not exceeding a certain value.
    (Paragraphs 3.152 to 3.154; Clause 19.)

RIGHTS OF THIRD PARTIES

Present law

3.156 Under the present law on financial provision on divorce there is provision for the protection of third parties from the effects of anti-avoidance orders. Section 6(2) of the Divorce (Scotland) Act 1976 provides that such orders

> "shall not prejudice the rights (if any) in that property[255] of any third party who has in good faith acquired it or any of it for value, or who derives title to the property or any of it from any person who has done so".

The only suggestion we received in relation to this provision was that it should be made clear that it protected the interests of a *bona fide* third party who had missives in his favour—that is, someone who had in good faith agreed by

[254]Proposition 71 and para. 3.60.

[255]I.e. the property disposed of, or about to be disposed of, to defeat a claim for financial provision.

written contract to purchase the property but who did not yet have any rights in the property as a proprietor, having only a personal right to a conveyance. We think this is a useful suggestion. The purchaser may have altered his position (as by selling his own house) on the faith of the contract, and it seems right that he should be protected. There is also provision in the Matrimonial Homes (Family Protection) (Scotland) Bill for the protection of landlords in relation to the transfer of a tenancy on divorce. Clause 13(4) provides for the landlord to receive a copy of an application for a tenancy transfer order and gives him a right to be heard before an order is made. This protection is not affected by the recommendations in this Report and should clearly continue to apply.

Property transfer orders

3.157 *Heritable creditors.* Under our proposals the question of the protection of the rights of third parties will arise in relation to orders for the transfer of property over which there is a heritable security. In many cases the property in question will be the matrimonial home and it will be burdened with a building society loan. A transfer of the house from, say, the husband to the wife would not diminish the building society's security rights over the house itself and would not affect the husband's contractual obligation to repay the loan. A transfer might, however, affect the husband's willingness to make the repayments and might therefore increase the creditor's difficulties even if his legal position remained unaltered. It might also, if made without the society's consent, be in breach of the husband's agreement with the building society and might activate the society's rights to call up the loan or realise its security. The English courts have had to face this situation since 1970. A Practice Direction of the High Court dated 27 January 1971[256] dealt with it in the following terms:

> "Where application is made for an order under s.4 of the Matrimonial Proceedings and Property Act 1970 for a party to a marriage to transfer to the other party or to a child or other person property such as the matrimonial home, difficulties may arise if the property is subject to a mortgage. Consideration should be given to the rights of the mortgagee. It is usually the case that a term of the mortgage, or the building society's rules binding the mortgagor, contains provision that the mortgagor shall not transfer the property except with the consent of the mortgagee. Compliance by the mortgagor with an order for transfer where such consent has not been obtained may result in the mortgagee having a right to foreclose.
>
> Although transfer of the mortgaged property will neither affect the mortgagor's liability to discharge the mortgage debt nor reduce the mortgagee's security, it may well prejudice the latter's interests since, should the mortgagor (as is likely) go out of possession, there will be a greater chance of payments not being made and of covenants in the mortgage being broken.
>
> These difficulties may be avoided if the mortgagee is given an opportunity to decide, before any order is made, whether to consent to the transfer and if the court is made aware on what (if any) terms his consent will be forthcoming.

[256][1971] 1 All E.R. 896.

In all cases where an application is made for a transfer of property order in relation to property which is subject to a mortgage, it is desirable that the mortgagee should have notice of the application and an opportunity to be heard. Although no express provision is made in the Matrimonial Causes Rules 1968, the registrar's powers under r 77(6) enable him to give directions for the conduct of the proceedings, and registrars should exercise those powers to ensure that no person or corporate body is prejudiced by an order without having notice of the application and an opportunity to be heard before the order is made."

3.158 In their comments on the Memorandum the Building Societies Association said they were not aware of any English cases where the interests of member societies had been unduly prejudiced by property transfer orders. They thought there should be no objection in principle to the Scottish courts having power to make property transfer orders. They pointed out that in the context of voluntary arrangements between separated spouses building societies were accustomed to being asked to consent to arrangements whereby, for example, a house was transferred to the wife's sole name, she also taking over the loan repayments using money provided by her husband. In such cases building societies might ask the husband to guarantee the repayments by the wife. The Association considered, however, that building societies needed more formal protection than was afforded under English law. They recommended, in particular, that a secured creditor should have a statutory right to be heard in respect of any order or warrant affecting the security subjects. We think that this is a reasonable suggestion and propose that effect should be given to it.

3.159 *Moveable property: creditors' rights.* In relation to certain types of moveable property (such as ships and aircraft) there may be secured creditors who are in a similar position to heritable creditors. In their case the same rule should apply. In relation to moveable property such as furniture and household equipment the problems are rather different. If a husband, say, were acquiring goods under a hire-purchase or conditional sale agreement the goods would not be his to transfer. There could therefore be no question of the court ordering him to transfer the ownership of such goods to his wife unless the order required him first to pay off the balance of the outstanding payments so that the goods became his. If, however, he were acquiring goods under a credit sale agreement or any other type of agreement by virtue of which the ownership in the goods had passed to him, he could be ordered to transfer the goods to his wife. Such a transfer would not affect his legal liability to repay any loans obtained in connection with the purchase of the goods. A supplier who gives credit to enable goods to be purchased outright and who has no security interest in the goods takes the risk that the goods will be sold or otherwise disposed of by the purchaser. He retains his rights to recover his debt no matter what happens to the goods, and we can see no reason why any different or special rule should apply in relation to transfers made in compliance with a court decree. In most cases where an effective security was created over moveable property (as by pawning goods, or by assigning an insurance policy in security) the owner spouse would not be in a position to transfer the goods without the concurrence and co-operation of the creditor. In such circumstances we think that the owner spouse should not

be ordered to transfer the goods unless the court is satisfied that the third party is prepared to renounce his rights.

3.160 *Landlord and tenant.* As noted above, the Matrimonial Homes (Family Protection) (Scotland) Bill would give the landlord a right to be heard before the court makes an order transferring the tenancy of a matrimonial home. In cases not coming under the Bill the tenant may or may not, depending on the terms of the lease[257] and any applicable common law[258] or statutory restrictions,[259] be able to assign the tenancy without the consent of the landlord. In either event there seems to be no good reason for a special rule for assignations in compliance with a court decree. If the landlord's consent is necessary in the case of a voluntary transfer it should be necessary in the case of a forced transfer. If it is not necessary (as in the case of a long let) there is no reason for any special protection on a forced transfer. The converse situation, where the court orders a spouse who is a landlord to transfer the tenanted property to the other spouse, gives rise to no difficulty. The landlord spouse (unless the terms of the lease were unusual) could transfer the property voluntarily without the tenant's consent, and there would seem to be no reason why the same rule should not apply to a transfer under a court decree.

3.161 *Co-proprietors.* Where two or more people own property they may do so in one of two ways. Normally each owns an undivided share in the property which he or she is free to dispose of without the consent of any other proprietor. In this case the property is said to be common property. If, for example, a wife and her sister had bought a house before the wife's marriage and had taken the title in their joint names, the property would normally be common property and either could dispose of her one-half undivided share.[260] The other sister would not be bound to share the house with the disponee but could insist on a division and sale.[261] As one co-proprietor could transfer his or her share voluntarily without the consent of the other, there seems to be no reason why the same rule should not apply to a transfer under a court decree on divorce.

3.162 The second, and less usual, type of co-proprietorship is known as joint property. In this situation, of which the only common examples are cases of ownership by trustees or partners or the members of an unincorporated association, no proprietor can dispose of his interest. The ownership of the property is not severable. On the death of one proprietor the whole property belongs to the surviving proprietors. It is inconceivable that a court would order one spouse to transfer his or her interest in joint property to the other spouse. The courts will not order people to do what is legally impossible.

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[257]Many leases prohibit assignation by the tenant without the landlord's consent.

[258]Agricultural leases of ordinary duration are regarded as involving personal choice by the landlord and are thus not assignable by the tenant at common law: Paton and Cameron, *Landlord and Tenant* (1967), pp. 150 to 151.

[259]E.g. tenancies of crofts can be assigned to a member of the crofter's family without the consent of the Crofters Commission but only if the landlord consents: Crofting Reform (Scotland) Act 1976, s.15.

[260]*Johnston* v. *Craufurd* (1855) 17 D. 1023.

[261]*Mags of Banff* v. *Ruthin Castle, Ltd.* 1944 S.C. 36 at p. 68.

3.163 *Trust property.* There is no reason why one spouse should not be ordered to transfer his or her vested rights under a trust to the other spouse in any case where that can legally be done. On the other hand it should not be possible for the court to order a spouse to transfer property which he holds only as trustee for a third party or parties. We do not think that either of these points needs to be provided for specifically by legislation. We have given careful consideration to the question whether the court should have power to "get at" any interest of a spouse under a discretionary trust. This would require special legislation and we have concluded that such legislation would not be desirable. There would be no point (quite apart from the theoretical difficulties involved) in enabling the court to order a spouse's interest as a potential beneficiary under a discretionary trust to be transferred, because such an interest would be valueless if the trustees chose not to exercise their discretion in favour of the transferee. There would also be grave objections to giving the court power to direct trustees under a private trust to exercise their discretion in a particular way. The mere fact that one of the potential beneficiaries had been involved in a divorce could not, we think, justify such an interference in private settlements. In certain cases the court might be able to reduce or vary a discretionary trust under its anti-avoidance powers or its powers to vary marriage settlements. In other cases the court would be able to take into account the extent to which a spouse was likely to benefit under a discretionary trust in deciding what award it was reasonable to make in the light of the parties' resources. We do not think any further provision for discretionary trusts is necessary or desirable.

3.164 In the Memorandum[262] we raised the question whether the court should have power to order the transfer of an alimentary liferent (which, by its nature, is not transferable voluntarily). The general response on consultation was that such a power would be unnecessary and undesirable (because it would frustrate the truster's intentions and create uncertainty). We agree, and make no recommendations for any special rule for alimentary liferents.

3.165 *Private companies.* The transfer of shares in a private company is often dependent on the concurrence and co-operation of third parties. The directors normally have the right under the articles of association to refuse to register a transfer, and other shareholders often have a right of pre-emption over shares which it is proposed to transfer. In the Memorandum we took the view that it would not be appropriate to order a transfer over the objection of the directors and shareholders.[263] We invited views, however, on the question whether the court should have power in an appropriate case to make an order that a spouse owning shares in a private company should seek the consents required by the articles of association to the transfer of those shares to the other spouse.[264] Opinion was fairly evenly divided on this issue between those who thought such a power would be useful and those who thought that the court should not interfere in what was often a delicate situation. We have

[262]Proposition 67(i) and para. 3.42.
[263]Para. 3.40.
[264]Proposition 67(h) and paras. 3.40 to 3.41.

concluded that, on balance, it would be better not to provide specifically for the compulsory activation of the procedures for transfer of the shares in a private company. Before it could decide whether the case was an appropriate one for the exercise of this power the court would require information about the effects of any transfer on the company and its management, and we agree with those who think that this is not an area in which courts should interfere.

3.166 *Statutory bodies.* In certain cases the transfer of an interest in property may be possible only with the consent of a statutory body. For example a crofter cannot assign his croft to someone outside his family without the consent in writing of the Crofters Commission.[265] In the Memorandum we suggested that the court should be able to order a transfer in such cases only if the appropriate consents had been obtained.[266] This was accepted on consultation.

3.167 *Conclusion.* The above list of situations in which a third party may have rights in property which could be the subject of a property transfer order or tenancy transfer order is not exhaustive. We think, however, that it covers the main problems which are likely to arise and that it is sufficient to enable two governing principles to be formulated. First, the court should not order property or a tenancy to be transferred if the consent or concurrence of any third party is required under any voluntary obligation or rule of law and if that consent or concurrence is not given. The court, in other words, should be able to order a transfer if, but only if, a voluntary transfer would be possible. Secondly, the court should not, in any event, order property to be transferred without giving any creditor having a right of security in that property an opportunity of being heard. The first principle could give rise to a risk of devices designed to defeat a claim for a property transfer order. A husband, for example, might enter into an agreement with a friend whereby the friend's consent was necessary to any transfer of the husband's house. The remedy for this lies, however, in the court's powers to set aside transactions designed to defeat claims for financial provision.

Incidental orders

3.168 *Existing rights of third parties.* We have no doubt that the policy of the law in relation to incidental orders should be that such orders should not affect adversely the rights, existing at the time of the order, of any third parties. Thus an order giving a wife the right to occupy for a few years a house belonging to the husband should not affect the rights of any building society or other heritable creditor having a right in security over the house. Similarly an order giving the wife the use of furniture being purchased by the husband under a hire-purchase or conditional sale agreement should not affect any rights of the creditor to repossess the goods or to take proceedings against the husband for the outstanding debt. Again, an order varying a marriage

[265]Crofters (Scotland) Act 1955, s.8 as amended by the Crofters (Scotland) Act 1961, Sch. 1. Under s.15 of the Crofting Reform (Scotland) Act 1976 the consent of the Crofters Commission is not necessary where the crofter proposes to assign his croft to a member of his family and where the landlord consents to the assignation. "A member of his family" includes the crofter's wife or husband but not, it seems, a former wife or husband.

[266]Proposition 67(d) and paras. 3.29 to 3.31.

settlement should not, we think, affect the rights of any third parties (such as children) under the settlement: the mere fact that one beneficiary under a settlement is divorced hardly seems a sufficient justification for depriving other beneficiaries of their rights.[267] In most cases an order would not, in any event, affect the interests of third parties but this would not necessarily be the case in relation, for example, to an order varying a marriage settlement. We think therefore that it should be made clear that neither an incidental order nor any rights conferred by such an order should prejudice the existing rights of any third parties.

3.169 *Protection against adverse dealings and other arrangements.* The next situation which requires to be considered is where a third party acquires rights in the property after the order has been made. Let us suppose that the court makes an order allowing a wife to occupy for five years a house belonging to the husband. No third party has any rights in or over the house at the time of the order. What should be the position if the husband sells the house or burdens it with a debt within the five years? Should her right of occupation be protected against the purchaser or creditor? If the right is not given some protection it would be too easy for the husband to defeat it by simply selling or disposing of the house to a third party. This problem is similar to that which we considered, in relation to occupancy rights during marriage, in our Report on Occupancy Rights in the Matrimonial Home and Domestic Violence. There is, however, an important difference in that the matter is under the control of the court from the outset. The court could therefore be asked by a wife to use its powers to protect her rights in advance against adverse dealings. It could, for example, where this was otherwise appropriate, order the house to be transferred into the joint names of the spouses.[268] Or it could, in the exercise of its incidental powers, interdict the husband from disposing of or burdening the house. Or it could order the house to be conveyed by the husband to trustees to hold it for the husband subject to the wife's rights of occupancy for the specified period. There may be cases, however, where such precautionary measures would be inappropriate or inadequate. It may not be justifiable in a particular case to order the house to be conveyed into joint names or to trustees, and measures directed personally against the husband may be ineffective if he is likely to be resident out of Scotland. We have therefore considered whether any other protection should be provided for a spouse who is allowed by the court to occupy the matrimonial home after divorce. One possibility would be to provide that the spouse's rights should prevail over subsequent adverse dealings without his or her consent if he or she had recorded the decree conferring the right in the Sasine Register or registered it in the Land Register. We recommended a system of this nature, based on registrable matrimonial home notices, in Part III of our Report on Occupancy Rights in the Matrimonial Home and Domestic Violence. This solution was, however, rejected by the Government partly, we understand, because it was thought that registration of a notice by a cohabiting spouse might have been seen as a hostile act and partly because of the extra manpower needed to operate such a system. Neither objection

[267]See para. 3.137 above.

[268]This would not, in theory, be a complete protection as the other spouse could sell his one-half share. In practice, however, it would be a considerable protection as an undivided one-half share of a house is not readily disposable on the open market.

would apply with much force to occupancy rights granted by the court on divorce. The parties are already estranged. The number of cases would be small. Nevertheless we do not feel justified in recommending the creation of a special scheme to deal with this very limited problem. In the interests of consistency and simplicity it is desirable that any occupancy rights in the matrimonial home conferred by the court on a divorced spouse should enjoy the same protection against adverse dealings and other arrangements (such as contrived sequestrations or other contrived diligences) as the occupancy rights conferred by statute on a married spouse. We think therefore that the provisions contained in the Matrimonial Homes (Family Protection) (Scotland) Bill which protect a spouse's occupancy rights against adverse dealings and other arrangements[269] should apply, with any necessary modifications,[270] to occupancy rights in the matrimonial home granted by the court in a divorce action.

3.170 In so far as the above provisions of the Matrimonial Homes (Family Protection) (Scotland) Bill provide protection against arrangements designed to defeat a spouse's right to use furniture and plenishings in the matrimonial home, [271] we think they should apply also where a spouse has been given similar rights by a court in a divorce action. Further protection could be provided, if need be, by an interdict against the owner spouse prohibiting him from disposing of the furniture or plenishings or removing them from the matrimonial home.[272]

3.171 Our **recommendations** on third party rights in relation to financial provision on divorce are therefore as follows:

43. (*a*) Third parties who have in good faith acquired property for value should continue to be protected against the effect of an order designed to counteract avoidance transactions, and it should be made clear that the protection extends to third parties who have in good faith entered into a binding agreement to purchase the property.
(Paragraph 3.156; Clause 18(2).)

(*b*) Landlords should continue to have a right to be heard before any order is made transferring the tenancy of a matrimonial home under the Matrimonial Homes (Family Protection) (Scotland) Bill.
(Paragraph 3.156.)

(*c*) The court should not order one spouse to transfer property or a tenancy (other than one transferable under the Matrimonial Homes (Family Protection) (Scotland) Bill) to the other spouse if the consent or concurrence of any third party is required under any voluntary obligation, enactment or rule of law and if

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[269] I.e. clauses 6, 8, 10 (which inserts new provisions in the Bankruptcy (Scotland) Act 1913), 11 and 12.

[270] There will, for example, be no need for the provision on dispensing with the occupying party's consent to a sale or other dealing. The court has adequate powers under our proposals to recall or vary orders granting occupancy rights or to make other incidental orders regulating the position.

[271] Clause 11 provides protection against continued poindings.

[272] A similar interdict would normally accompany an exclusion order under clause 4 of the Bill.

that consent or concurrence is not given.
(Paragraphs 3.160; 3.167; Clause 15(1).)

(*d*) Where property is subject to a security then, even in a case where the creditor's consent is not required under the foregoing paragraph, the court should not order the property to be transferred without the creditor's consent unless he has been given an opportunity of being heard.
(Paragraphs 3.157 to 3.158; 3.167; Clause 15(2).)

(*e*) Neither an incidental order, nor any rights conferred by such an order, should prejudice any third party rights existing at the date of the order.
(Paragraph 3.168; Clause 15(3).)

(*f*) The provisions of the Matrimonial Homes (Family Protection) (Scotland) Bill which protect a spouse's occupancy rights or rights to use furniture and plenishings against subsequent adverse dealings or arrangements by the other spouse should apply, with any necessary modifications, to occupancy rights in the matrimonial home, and rights to use the furniture and plenishings therein, granted by the court in a divorce action.
(Paragraphs 3.169 to 3.170; Clause 14(4).)

CONDUCT AND OTHER SPECIAL FACTORS

Development of the law on the relevance of conduct

3.172 Before 1964 the general rule was that the innocent spouse in a divorce action was entitled to his or her legal rights in the other's estate, and to any marriage contract provision, just as if the other spouse had died on the date of the divorce.[273] The guilty spouse forfeited all legal rights and all claims under a marriage contract. If both spouses were found guilty of a matrimonial offence in cross actions of divorce neither had any claim. The system was based squarely on guilt and innocence. As we have seen, the Succession (Scotland) Act 1964 replaced this system with a discretionary system. The pursuer in a divorce action could apply for a periodical allowance or a capital sum or both and the court could make such order as it thought fit having regard to the means of the parties and all the circumstances of the case.[274] The Act did not refer expressly to conduct, but conduct was regarded as a relevant circumstance to be taken into account. The position after the 1964 Act was, therefore, that only the pursuer could apply for financial provision on divorce, but a pursuer who was found guilty of a matrimonial offence (e.g. in a cross action) was not automatically denied financial provision. His or her conduct was merely a factor which the court would take into account.[275] The Divorce (Scotland) Act 1976 made the irretrievable breakdown of the marriage the sole ground of divorce and, as a corollary, allowed either the pursuer or the defender to apply for financial provision.[276] It is clear, however, that judges still regard conduct as an important factor to be taken

[273]See Fraser, *Husband and Wife* (2nd edn. 1878), pp. 1216 to 1226; Clive and Wilson, *Husband and Wife* (1974), p. 540. There was special provision for divorce on the ground of incurable insanity.

[274]S.26; see paras 3.4 to 3.10 above.

[275]*Thomson* v. *Thomson* 1966 S.L.T. (Notes) 49; *Gray* v. *Gray* 1968 S.C. 185.

[276]S.5; see para 3.11 above.

into account, although there is room for wide differences of opinion about the weight to be attached to it in any particular case.[277] In some cases the conduct of the person claiming financial provision has been used to justify a reduction (of up to a half) in the amount awarded;[278] in others the conduct of the person from whom an award is claimed has been used to help to justify an award or an increased award.[279] There has been no attempt in Scotland, as there has been in England,[280] to limit reference to conduct to cases where it is gross and obvious.

Arguments for having regard to conduct

3.173 If the court were simply directed to make such award as it thought fit, it could be argued that disregard of the parties' conduct would lead to results which members of the public would find unacceptable. People often apportion blame for the breakdown of a marriage, it may be said, and expect to find their moral evaluations reflected in awards of financial provision on divorce. If people find it hard to accept that a man should be obliged to support his former wife after divorce they find it even harder to accept that he should have to support her if she has been responsible for the breakdown of the marriage. Similarly, people may find it hard to accept that a "guilty" wife should receive the same share of her husband's capital as an innocent wife. Upon this approach it is argued that financial provision is concerned with justice between the parties and that justice requires their conduct to be taken into account.

Arguments against having regard to conduct

3.174 It can be argued on the contrary that it is inconsistent with the non-fault philosophy of the present divorce law to make matrimonial misconduct a significant factor in the assessment of financial provision. This argument would be reinforced if future legislation were to provide that the sole ground of divorce should be, say, one year's non-cohabitation, and if a major reason for so enacting was to prevent investigations of past conduct. It would tend to frustrate the policy of such an enactment if conduct could be considered in connection with financial provision. However, the argument has some force even in relation to the present law, because one of the objectives of that law was to allow dead marriages to be buried with a minimum of embarrassment, humiliation and bitterness,[281] and because cases based on two or five years' non-cohabitation are based on non-fault grounds in fact as well as in theory. The argument is weakened, however, by the preservation of adultery, unreasonable behaviour and desertion as ways of establishing the irretrievable breakdown of the marriage.

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[277]Compare *Craig* v. *Craig* 1978 S.L.T. (Notes) 61 with *McLean* v. *McLean* 1979 S.L.T. (Notes) 82; and see *Lambert* v. *Lambert,* 17 June 1981 (unreported), allowing a reclaiming motion against the decision of the Lord Ordinary reported at 1980 S.L.T. (Notes) 77.

[278]See *Wormsley* v. *Wormsley* 1977 S.L.T. (Notes) 79; *McKay* v. *McKay* 1978 S.L.T. (Notes) 36; *Craig* v. *Craig* 1978 S.L.T. (Notes) 61.

[279]See *McRae* v. *McRae* 1977 S.L.T. (Notes) 78; *Boyd* v. *Boyd* 1978 S.L.T. (Notes) 55; *Forbes* v. *Forbes* 1978 S.L.T. (Notes) 80.

[280]*Wachtel* v. *Wachtel* [1973] Fam. 72.

[281]See our Report, *Divorce: The Grounds Considered* (Scot. Law Com. No. 6, 1967, Cmnd. 3256), para. 29.

3.175 It can be argued that, even if financial provision is viewed on its own and apart from the ground of divorce, it is undesirable to give the parties to a divorce action a financial incentive to rake up petty incidents from the past and minor character defects in order to establish who was responsible for the failure of the marriage.[282] This can only increase expense and delay and lead to unnecessary bitterness. It does nothing to encourage an amicable settlement.

3.176 Another argument against taking conduct into account is that it is notoriously difficult to decide in many cases who is responsible for the breakdown of a marriage. This leads to great conflicts of evidence and opinion. Courts of law are not necessarily well equipped to decide such questions.

3.177 It can be argued that the weighing up of conduct is such a subjective matter that to make this a significant factor in decisions on financial provision is to increase the risk of unpredictability and inconsistency in the law. People will sometimes be at the mercy of the moral views of the judge who happens to decide their case. It would be surprising if all judges had the same views on questions of marital conduct.

The effect of our proposals in relation to conduct

3.178 So far we have been treating conduct as if there has to be only one rule applicable across the board. This, however, is not the case. Under our proposals it is advisable, and indeed necessary, to examine the role of conduct separately in relation to each governing principle. When this is done it is seen that different principles may require different approaches.

3.179 The principle of fair sharing of matrimonial property is based on the idea of partnership in marriage. The underlying idea is that on the dissolution of the partnership each partner should be entitled to an equal share of the assets built up over the period of the partnership unless there are special circumstances justifying some other apportionment. Such special circumstances might include conduct which has adversely affected the extent or value of the assets.[283] We have already recommended that the court should have a discretion to take into account, as a special circumstance, any destruction, dissipation or alienation of matrimonial property by either party.[284] These are particularly extreme forms of economically related conduct, which seemed to us to be worth singling out for special mention. Other forms of conduct affecting the matrimonial property would also, however, seem to be relevant. Thus if one spouse had failed to contribute in any way to the economic success of the marriage, that would be a factor to be taken into account. Matrimonial misconduct which had not affected the extent or value of the matrimonial property would, on the other hand, seem to be irrelevant. If both spouses have played their respective economic roles (whatever they might be in any

[282]In *Henderson* v. *Henderson* 1981 S.L.T. (Notes) 25, evidence of this nature was led. Lord Stewart declined "to approach a marriage breakdown as if it were an industrial or road accident and allocate to the parties exact percentages of responsibility for the failure" (p. 25). Nevertheless, the evidence was led and considered and conduct was taken into account.

[283]See Gray, *op. cit.*, pp. 203 to 266.

[284]Para. 3.80.

particular case) throughout, say, fifteen years of marriage it is not easy to see why conduct such as adultery, desertion or violence should deprive either of a proportion of his or her accrued rights. That is simply to award damages under another name.[285] A partner in an ordinary partnership does not lose his share of the partnership assets merely because he has assaulted another partner or bullied him over many years or had an affair with a secretary.

3.180 It might be argued that, while it might be justifiable to disregard economically irrelevant misconduct in cases where the norm of equal division of matrimonial property would otherwise apply, it would be unacceptable to do so in cases where for some other reason the court was departing from the equality norm. Suppose, for example, that the matrimonial property consists of a farm owned and worked by the husband. It would be unreasonable to expect him to sell it and impracticable in the circumstances to expect him to raise money on it. The court is therefore inclined to award the wife less than half of its value, and that largely in the form of a capital sum payable by instalments. Should the amount awarded in this situation be greater if the husband had been responsible for the breakdown of the marriage? It is tempting at first sight to say that it should. The corollary of this, however, would be that the wife should get less if she had been solely to blame for the breakdown of the marriage. This would be to penalise her twice—once because of the nature of the property, and a second time because of her misconduct. The reason for departing from the norm of equal sharing in this type of case is that the paper value of the asset is not a realistic representation of the amount actually available at the time unless the husband is to be forced to sell his farm. We do not think, on the one hand, that a "guilty" wife should be doubly penalised or, on the other hand, that a "guilty" husband should be penalised by being forced to sell his farm or to raise more money than he can reasonably be expected to raise. We do not, in short, think that matrimonial misconduct as such is any more relevant in a special case of this kind than in a normal case.

3.181 It is interesting to note that several jurisdictions have recently adopted an approach to the division of property on divorce which disregards economically irrelevant matrimonial misconduct. Thus the Californian Civil Code provides that in this context "evidence of specific acts of misconduct shall be improper and inadmissible".[286] Again in the United States of America, the Uniform Marriage and Divorce Act provides that the division of marital property is to be carried out "without regard to marital misconduct".[287] The New Zealand Matrimonial Property Act 1976 provides for equal sharing of the matrimonial home and family chattels and then lays down a norm of equal sharing of other matrimonial property unless one party's contributions to the "marriage partnership" have clearly been greater than the other's.[288] The Act then defines "contributions" and provides that:

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[285]If a spouse wishes to claim damages from his or her spouse for assault there is no reason why this should not be done under the existing law. The Law Reform (Husband and Wife) Act 1962, s.2(1), gives spouses the right to bring proceedings against each other for wrongful acts.

[286]S.4800.

[287]S.307(a).

[288]Ss.11 to 15.

> "In determining the contribution of a spouse to the marriage partnership any misconduct of that spouse shall not be taken into account to diminish or detract from the positive contribution of that spouse unless the misconduct has been gross and palpable and has significantly affected the extent or value of the matrimonial property."[289]

We cite these examples not as models to be slavishly copied—each must be read in its own context—but merely to show that the idea of disregarding economically irrelevant matrimonial misconduct in dividing up matrimonial property is not unprecedented.

3.182 The principle of fair recognition of contributions and disadvantages, it can be argued, is also one which should apply regardless of misconduct which is not economically relevant. The rationale behind the principle is that the spouse's claim has been earned in the past. The claim based on contributions to an improvement in the other spouse's economic position is analogous to a claim based on unjustified enrichment. One spouse has lost and the other has gained unjustifiably. This should not be affected by economically unrelated matrimonial misconduct. Similarly if one spouse has sustained economic disadvantages in the interests of the family unit over, say, twenty years he or she should not, in our view, be penalised because of adultery or desertion or unreasonable behaviour at the end of that period. It is, of course, an essential element of the principle of fair recognition of contributions and disadvantages that economically relevant conduct will be taken into account. What is in issue is other conduct and we do not think that in the context of this principle it should be taken into account, whether it is good or bad. The spouse who has been an amusing companion over many years should not receive any credit for this quality on divorce: the spouse who has been an insufferable bore or nag should not be penalised. The principle of fair recognition of contributions is not intended as an opportunity for the handing out of rewards for good conduct or penalties for bad conduct. It is intended to be limited to the economic effects of marriage. Accordingly only conduct or misconduct which has had an effect on the parties' economic position in relation to each other should be taken into account.

3.183 Again, the principle of fair sharing of the economic burden of child-care should, we think, apply regardless of responsibility for the breakdown of the marriage. The justification for an award under this head is the assumption of the future care of a child or children of the marriage.[290] If one party assumes that burden and suffers economically as a result it is fair that the other should share the economic burden. This has nothing to do with the way the parties have behaved to each other in the past. The only type of conduct which should affect this claim is conduct which affects the extent of the economic burden of child-care. If, for example, the party with the custody of children unreasonably refused to take employment, that might be taken into account. Conduct which does not affect the economic basis of the claim should, in our view, be disregarded.

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[289] S.18(3).

[290] For the sake of simplicity we leave out of account here the case of "accepted" children.

3.184 The position is different in relation to the principle of easing the adjustment to independence. The claim here has not been "earned" in the past and is not based on a burden to be assumed in the future. It is designed merely to make things easier for a dependent spouse during the process of adjustment to independence. Normally, in present conditions, it will be the wife who is the dependent partner. If she is responsible for the breakdown of the marriage the husband may well ask "why should I smooth her path to independence when she has walked out on me? If she wants to abandon her marriage that is her decision, but I do not see why I should pay for this course she wants to take, or support her while she looks around for a suitable job." We think that there is force in this point of view and that it would be unacceptable to disregard responsibility for the breakdown of the marriage in applying this principle.

3.185 The position is similar in relation to the relief of grave financial hardship. The application of this principle may in some cases involve support for life. It is not based on what has been or will be earned. It is based on the view that it is unacceptable to allow one spouse on divorce to abandon responsibility for the other if the result would be grave financial hardship for the latter and if, having regard to his resources, that hardship could be relieved by the former. Under this principle it is in our view not only permissible but also essential to provide for conduct to be taken into account. The principle runs contrary to our general aim of restricting long-term financial links between divorced spouses. It is based on an assessment, in the light of our consultations, of what is acceptable. While we have reason to believe that it would be widely regarded as unacceptable to allow an innocent spouse to be abandoned to a state of grave financial hardship, where this could be avoided by an award of financial provision on divorce, we have no reason to suppose that the same compassion would be, or need be, shown to a spouse who has been responsible for the breakdown of the marriage. Indeed, in our view, it would be adding insult to injury to require an innocent party to support, possibly for life, a former spouse who had manifestly and deliberately brought the marriage to an end.

3.186 In short, we suggest that a distinction has to be drawn between those principles based, broadly, on the idea of what is earned and those based, broadly, on the relief of short-term or long-term hardship. In relation to the former, responsibility for the breakdown of the marriage is, as such, irrelevant: only conduct which affects the economic basis of the claim in question should be taken into account. In relation to the latter, economically relevant conduct, such as conduct affecting the claimant's resources or earning capacity, will be relevant, but so too will be the responsibility for the breakdown of the marriage. Even in this latter case, however, there is everything to be said for discouraging the raking up of trivial incidents from the past. Those who, on consultation, thought that conduct was relevant to financial provision on divorce generally thought that some attempt should be made to distinguish between cases where the conduct was "both obvious and gross"[291] and other cases. There is probably no way in which legislation could altogether prevent reference being made to trivial incidents if conduct is

[291] *Wachtel* v. *Wachtel* [1973] Fam. 72 per Lord Denning at p. 90.

relevant at all. It would often be necessary for evidence to be led before the court could decide whether the conduct was or was not so trivial as to be disregarded. We think nevertheless that the legislation could, and should, provide the courts with an effective instrument which they could use to prevent or moderate any over-exuberant references to conduct. What we have in mind is a provision to the effect that, even where relevant, conduct should be taken into account only where it would be manifestly inequitable to leave it out of account. This is the formula which we have suggested, for the same reasons, should apply to claims for aliment.[292] It should serve to discourage, and to enable the courts to discourage, the dragging up of trivial incidents which have no significant bearing on the fairness of the award sought. Some commentators suggested that only the payee's conduct should be relevant. There would, however, be dangers in this approach. An assessment of responsibility for the breakdown of the marriage would usually require regard to be had to the conduct of both parties. It would be an artificially and dangerously one-sided approach to have regard to the conduct of one party alone. Other commentators suggested that conduct should be taken into account only to reduce, and not to increase, the payee's award. Our proposals meet this point. Under our recommendations an award would have to be justified by one of the governing principles. These do not include any principle that the guilty should be punished. In applying the principle of relief of grave financial hardship, for example, the court would be limited to making an award to relieve that hardship. It would not be justified by that principle in making an award to punish misconduct. The effect of our proposals is, therefore, that conduct could not be used to increase an award above the ceiling which would be justified on the application of the governing principles.

3.187 We therefore **recommend**:

44. In applying the principles laid down in Recommendation 31, the conduct of the parties, except where it has affected the economic basis of the claim for financial provision, should be taken into account only in relation to the principles of fair provision for adjustment to independence and relief of grave financial hardship, and then only if it would be manifestly inequitable to leave that conduct out of account.
(Paragraphs 3.172 to 3.186; Clause 11(7).)

Needs and resources of third parties

3.188 We have recommended that the court should make an award of financial provision only if that would be reasonable having regard to the resources of the parties.[293] We have also recommended that in applying some of the principles governing financial provision on divorce[294] the court should have regard to the needs and resources of the parties and all the circumstances of the case.[295] In relation to aliment we concluded that these terms

[292]See paras. 2.104 to 2.110.
[293]Recommendation 31 and para. 3.64.
[294]I.e. fair sharing of the economic burden of child-care, fair provision for adjustment to independence, relief of grave financial hardship.
[295]Recommendations 34, 35 and 36: see especially paras. 3.103, 3.108 and 3.111.

required no further definition or elaboration and that it was implicit in them that the needs or resources of third parties would not, as such, be part of the needs or resources of the parties to the action or of the circumstances *of the case*.[296] The resources of an employer or brother or cohabitee would, as such, be extraneous and irrelevant factors. Our conclusion is the same in relation to financial provision on divorce, with the qualification that the financial circumstances of dependent children are expressly made relevant in relation to the fair sharing of the economic burden of child-care.[297] In this context our conclusion applies also to the needs and resources of a second spouse.

Unenforceable advantages and responsibilities

3.189 While the resources of third parties (other than children in the circumstances noted above) are irrelevant as such, any economic advantages derived by either party to the divorce action from third parties should, in our view, be regarded as part of the circumstances of the case or, where appropriate, as affecting that party's resources, even if they are unenforceable. Any other solution would be liable to lead to unrealistic results. This does not require legislation: a reference to the resources of the parties and the circumstances of the case would be sufficient by itself to enable the court to have regard to actual resources and circumstances even if particular advantages were not legally enforceable. In relation to unenforceable responsibilities there is, however, a need for legislation because the courts are at present precluded from taking into account a payer's obligations to other members of his household unless these obligations are legally enforceable.[298] We refer to our discussion of this problem in relation to aliment[299] and, for the reasons there given, **recommend**:

45. In having regard to the needs and resources of the parties and the circumstances of the case the court should be able, if it thinks fit, to take account of the responsibilities of the party from whom the financial provision is claimed towards any dependent member of his household (whether or not the dependant is a person to whom that party owes an obligation of aliment).
(Paragraph 3.189; Clause 11(6).)

AGREEMENTS ON FINANCIAL PROVISION

3.190 Under the present law the parties have complete freedom to enter into agreements governing financial provision on divorce. It has never been regarded as collusion in Scots law to regulate such matters by agreement, provided that the parties do not agree to put forward a false case or hold back a good defence.[300] There is no duty to refer such agreements to the court and there is no requirement that the courts should be satisfied that their terms are reasonable before granting decree of divorce.[301] A party can, it seems, effectively renounce or discharge his or her rights to financial provision on

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[296]Para. 2.98.
[297]Para. 3.106.
[298]*Henry* v. *Henry* 1972 S.L.T. (Notes) 26.
[299]Paras. 2.99 to 2.102 above.
[300]See *Walker* v. *Walker* 1911 S.C. 163 at 168; *McKenzie* v. *McKenzie* 1935 S.L.T. 198.
[301]The court does, however, have to be satisfied as to the arrangements for children: Matrimonial Proceedings (Children) Act 1958, s.8.

divorce.[302] In short, if the parties choose to regulate by agreement their financial affairs after divorce they can do so. The court has no power to vary an agreement between the parties.[303] If the parties have not renounced or discharged their rights and if an application for financial provision is competently before the court, the court is not, however, itself bound by the terms of any agreement between the parties. Although it would normally regard a fair agreement as a factor of great importance it retains its power to make what award it thinks fit. It is not, for example, bound to accede to a request by the parties to give effect to a joint minute regulating financial provision.[304]

3.191 In principle it seems desirable to encourage the parties to reach agreement wherever possible and not to refer disputes over financial matters to the court. This not only saves expense but helps to reduce the acrimony in divorce proceedings. Against this, however, has to be set the desirability of protecting the economically weaker party, which suggests that the court should have some degree of control over agreements on financial provision. The difficulty is to achieve a balance between these two objectives.

3.192 There are various ways of trying to achieve this balance. It could, for example, be provided that an agreement on financial provision on divorce was not enforceable unless approved by the court.[305] This, in our view, would err too much on the side of protection. It would require a large number of acceptable agreements to be referred to the court in order to control a few unacceptable ones. It would involve the court in a great deal of unnecessary work. The same objection could be made to a solution which required the court to be satisfied as to the fairness of any financial agreement before granting decree of divorce. Another approach would be to give the court a very wide power to alter agreements on financial provision at any time.[306] This, however, takes away much of the attraction of a settlement. There may seem to be little point in trying to achieve an agreement if it can be altered by the court at any time. It would also introduce an undesirable element of uncertainty, particularly if it applied to capital sums or property transfers. There is much to be said for finality in these matters. Another approach, which was suggested by some of those consulted, would be to leave the matter to be governed by the ordinary law on reduction of agreements for error, fraud, force and fear. This, in our view, would not give enough protection or flexibility. There may be cases where an agreement could not readily be challenged at common law but where it had been obtained by undue pressure or deliberate non-disclosure of material facts. The parties to a pending divorce action are not always on the same footing as two strangers negotiating freely from positions of strength. There are often opportunities for emotional blackmail, particularly if there are children, and it seems to us that on this ground, as well as on the ground of procedural convenience, it is desirable

[302]*Dunbar* v. *Dunbar* 1977 S.L.T. (Notes) 55; *Thomson* v. *Thomson* 1981 S.L.T. (Notes) 81.

[303]Unless it is an antenuptial or postnuptial marriage settlement coming under s.5(1)(*c*) of the Divorce (Scotland) Act 1976.

[304]Cf. *Lothian* v. *Lothian* 1965 S.L.T. 368; *Robson* v. *Robson* 1973 S.L.T. (Notes) 4.

[305]This is the solution adopted by the Australian Family Law Act 1975, s.87(2).

[306]This is the solution adopted in England: Matrimonial Causes Act 1973, s.35.

that the courts should have some power to control agreements on financial provision even if they are not challengeable at common law.

3.193 Consultation has confirmed us in the view that in many respects the present law of Scotland on this question is satisfactory. There was strong support for the propositions that it should continue to be possible for the parties to a marriage to enter into agreements on financial provision on divorce;[307] that it should continue to be possible for a party to renounce his or her rights to financial provision on divorce;[308] and that there should continue to be no requirement that agreements on financial provision should be referred to the court for approval.[309] We make no recommendations for any change in the law on these points.

3.194 The question which has caused us most difficulty in this area is the extent to which the court should have power to vary or set aside an agreement on financial provision. In the Memorandum we suggested that if the parties had expressly provided that their agreement might be varied by the court then the court should have power to vary.[310] This would merely extend a facility to the parties of which they could take advantage if they wished. It would do nothing to discourage agreements but, by offering a choice between finality and variability, might make them more attractive in some circumstances. There was general support on consultation for a power of variation at least as extensive as this, although the useful suggestion was made that the power should be expressly limited to a periodical allowance. We accept this suggestion and **recommend**:

46. (*a*) The court should have power, on the application of either party, to vary an agreement for the payment of a periodical allowance after divorce if the agreement expressly so provides. (Paragraph 3.194; Clause 16(1)(*a*).)

3.195 We also suggested for consideration in the Memorandum that the court might have a power to set aside agreements on financial provision which were altogether unfair and unconscionable.[311] This was intended to be a severe test which would not encourage parties to seek to overturn concluded agreements, but which would leave some scope for judicial review even in cases not covered by the ordinary law on error, fraud, force and fear. It was an attempt to strike the right balance between freedom of contract and protection for the weaker party. There was a mixed reaction on consultation. One view was that the test proposed was too severe. Another was that it gave too much scope for judicial intervention. We received suggestions that the matter should be left to the common law on error, fraud, force and fear; that the power to set aside should be limited to cases where a party was not legally represented; and that the test should be not whether the agreement *was* unfair but whether it had been *obtained* by unfair means. Concern was also

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[307]Proposition 89 and para. 3.111 of the Memorandum.

[308]Proposition 90 and para. 3.112. Any renunciation would not, of course, affect the court's statutory duty to be satisfied as to the arrangements for the children. See also the discussion in the following paragraphs.

[309]Proposition 91 and para. 3.113.

[310]Proposition 92 and para. 3.114.

[311]Proposition 93 and para. 3.115.

expressed about the absence of any express time limit in the proposed power to set aside agreements.

3.196 There are a number of preliminary points which must be made. First, the considerations applying to financial provision on divorce are not the same as those applying to aliment. There is no continuing relationship between the parties. There is no reason why the parties should not reach a final settlement of their affairs. Secondly, we are not concerned with arrangements for the custody or aliment of children. Nothing in this Part of the Report affects the question of aliment for children[312] or the court's statutory duty to be satisfied as to the arrangements for children before granting decree of divorce.[313] Thirdly, we are not concerned with the general law on reduction of contracts on such grounds as error, fraud, force and fear. Any recommendations we make on special powers to set aside agreements on financial provision on divorce will be without prejudice to the rights of the parties to challenge an agreement on any ground available under the general law. Fourthly, our general policy on orders for capital sums and transfers of property on divorce has been to favour finality. We have already recommended that such orders should not be competent after the time of the divorce and that the amounts payable or property transferable should not be subject to variation.[314] We have also tried to restrict long-term periodical allowances to cases where they were clearly justifiable.[315] We can see no good reason for adopting a different standpoint merely because the parties have entered into an agreement. Indeed the argument for finality is probably stronger in this case because *ex hypothesi* both parties will have been involved in the process. This will not always be so when an order for financial provision is made in an undefended action.

3.197 We have concluded that there should be no *continuing* power to vary or set aside an agreement for financial provision after the divorce except where such a power has been expressly provided for in the agreement itself in relation to a periodical allowance. Such a power would, in our view, be inconsistent with the aim of encouraging final settlements and discouraging the opening up of old wounds. We have also concluded, however, that the court should have power, on granting decree of divorce or within such time thereafter as it may have allowed, by continuation of the proceedings, on granting decree of divorce, to vary or set aside an agreement on financial provision or any term in it. If the power is clearly limited to the time of the divorce we think that it could with advantage be expressed slightly more widely than in the Memorandum. Since the Memorandum was published the Unfair Contract Terms Act 1977 has been enacted and we think that its provisions might appropriately be adapted for use in the present context. We therefore **recommend**:

46. (*b*) On the application of either party the court should have power, (i) on granting decree of divorce, or (ii) within such time thereafter as it may allow (by continuing the action) on granting

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[312]See para. 3.1 above.
[313]Matrimonial Proceedings (Children) Act 1958, s.8.
[314]See paras. 3.116 to 3.119.
[315]See paras. 3.121 to 3.123..

decree of divorce, to vary or set aside any agreement on financial provision on divorce if the agreement was not fair and reasonable at the time it was made.
(Paragraphs 3.195 to 3.197; Clause 16(1)(*b*).)

3.198 We do not think that the parties should be able to contract out of the right to bring an unfair or unreasonable agreement before the court for review. We therefore **recommend**:

46. (*c*) Any term of an agreement purporting to exclude the right to apply for an order under paragraph (*b*) should be void.
(Clause 16(3).)

3.199 We have considered whether there should be any legislative guidelines on factors which would be particularly important in determining whether an agreement was fair and reasonable when entered into. We have no doubt that in practice facts such as the following would be regarded as important:[316] the strength of the bargaining position of the parties relative to each other; whether a party was induced to accept the agreement by threats or other unfair means; whether material facts were withheld by one party from the other; and whether the parties were legally represented. We do not consider, however, that it is necessary to set out any list of factors in legislation.

3.200 We raised in the Memorandum the question whether there should be any regulation of the relationship between a joint minute between the parties and a decree granted in terms of it. There is, at least in theory, a risk that a joint minute might continue to have contractual effect notwithstanding the decree. We asked whether, for the avoidance of doubt, it should be made clear that in so far as an order for financial provision was made, at the request of the parties, in terms of a joint minute, the minute should thereafter be regarded as merged in or superseded by the court's decree and should cease to have contractual effect.[317] We have concluded, in the light of comments received on consultation, that legislation on this point would be unnecessary.

NULLITY

3.201 Under the present law, the court when granting a declarator of nullity of marriage has no power to order financial provision of any kind to either party. In theory, the marriage has never existed, and the parties should therefore be restored as far as possible to their previous position. In the Memorandum, while noting that the law on nullity would be reviewed in a separate memorandum, we suggested that the court should have the same powers on granting decree of declarator of nullity of marriage as a court granting decree of divorce.[318] This is the current position in England[319] and in some states of the United States of America. Not all commentators agreed with this suggestion. It was said that a distinction falls to be drawn between a void and a voidable marriage, and that difficulties might arise if a valid marriage followed upon a decree of declarator of nullity.

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[316]Cf. the Unfair Contract Terms Act 1977, ss.16 to 18, 20, 21 and 24.
[317]Proposition 94 and para. 3.116.
[318]Proposition 98 and paras. 3.121 to 3.122.
[319]Matrimonial Causes Act 1973, Part II.

3.202 It seems to us that the same questions of financial provision will arise regardless of whether the marriage was valid and ended in divorce, was voidable or was void altogether. In each case the parties may have lived together as man and wife for many years. In many cases where the marriage is void or voidable the parties may have been unaware at the time of entering into the alleged marriage that there was a legal impediment to their marriage, and may have remained in ignorance for many years. We believe that injustice would result if the law continued to deprive the court of power to make an award of financial provision on granting declarator of nullity, or if a distinction was drawn between void and voidable marriages.

3.203 We therefore **recommend**:

47. A court granting a decree of declarator of nullity of marriage should have the same powers in relation to financial provision as a court granting a decree of divorce.
(Paragraphs 3.201 to 3.202; Clause 17.)

TRANSITIONAL PROVISIONS

3.204 The rules on financial provision on divorce and nullity which we recommend in this Report will, as a general rule, apply only to actions brought after the commencement of implementing legislation. Any other solution would be impracticable and contrary to the principle that legislation should not have retrospective effect. It follows that an order for the payment of a periodical allowance granted under the present law will continue to be regulated by the provisions of the Divorce (Scotland) Act 1976. Some of those who, in their submissions to us, recommended that periodical allowances should have a maximum duration of three years also suggested that existing periodical allowances should terminate three years after the new legislation came into force or, alternatively, that it should be competent to apply to the court for an order terminating a periodical allowance on the ground that it was contrary to the principles underlying the new law. We have some sympathy with these suggestions but have concluded that we cannot endorse them. The court may have awarded a periodical allowance, or a larger periodical allowance, instead of a capital sum. To provide for the termination of existing periodical allowances without also providing for a re-opening of the capital position would be one-sided and potentially unfair, and we would certainly not recommend that decided cases should be open to reconsideration in relation to capital sums and property transfer orders. In short, our proposals on periodical allowances are part of a balanced scheme and it would, in our view, be wrong to apply only parts of that scheme to awards made under the present law.

3.205 Our recommendations on variation of agreements on financial provision will apply to agreements whenever made.[320] The power to vary a periodical allowance payable under an agreement is available only where the agreement expressly so provides and the more general power to vary or set aside agreements on financial provision is available only at the time of the divorce and only where the agreement was not fair and reasonable when it

[320]See Appendix A, clause 16.

was entered into.[321] We can see no reason for protecting existing agreements from scrutiny on these limited grounds. The other transitional provisions in the Bill are of a technical nature.

[321] *Ibid.*

PART IV SUMMARY OF RECOMMENDATIONS

4.1 The following is a summary of recommendations in this Report, with cross-references to the paragraphs where they are discussed and to the clauses of the draft Bill contained in Appendix A which implement them.

4.2 PART II ALIMENT

The Obligation of Aliment

Parties to obligation

1. A man should be liable to aliment his wife and a woman should be liable to aliment her husband.
(Paragraphs 2.5 to 2.7; 2.38; Clause 1.)

2. For the purposes of Recommendation 1 the terms "wife" and "husband" should include the parties to a valid polygamous marriage.
(Paragraphs 2.7; 2.38; Clause 1(4).)

3. A person should be liable to aliment
   (*a*) his legitimate child
   (Paragraph 2.8);
   (*b*) his adopted child, but not any child of his adopted by someone else
   (Paragraph 2.12);
   (*c*) his illegitimate child
   (Paragraph 2.13);
   (*d*) a child (other than a child who has been boarded out with him by a public or local authority or a voluntary organisation) who has been accepted by him as a child of his family
   (Paragraphs 2.18 to 2.28 and 2.30).

(Paragraph 2.38; Clause 1.)

4. For the purposes of Recommendation 3 "child" should be limited to a person under the age of 18 or a person over that age but under the age of 25 who is reasonably and appropriately undergoing instruction at an educational establishment or training for employment or for a trade, profession or vocation.
(Paragraphs 2.31 to 2.33; 2.38; Clause 1(4).)

5. There should be no other obligation of aliment by virtue of relationship.
(Paragraphs 2.8 to 2.12; 2.14 to 2.17; 2.29; 2.34 to 2.38; Clause 1.)

6. It should continue to be the law that a spouse who is unwilling without just cause to adhere cannot recover an award of aliment from a spouse who is willing to adhere, but the present common law and statutory provisions to this effect should be replaced by a general rule expressed in the form of a defence to an action for aliment.
(Paragraphs 2.40 to 2.44; Clause 2(5) and (6).)

Measure of obligation

7. The obligation of aliment should be defined as an obligation to provide such support as is reasonable in the circumstances.
(Paragraph 2.46; Clause 24.)

Order of liability

8. Where two or more persons are liable to aliment another person there should be no legal order of liability but the court, in deciding how much aliment, if any, to award against any of those persons should have regard, among the other circumstances of the case, to the liability of any other person to provide aliment.
(Paragraphs 2.47 to 2.50; Clause 4(2).)

The Action for Aliment

Competence

9. (*a*) It should be competent to bring an action for aliment in the Court of Session or the sheriff court;
(*b*) the distinction between an action for interim aliment and an action for permanent aliment should be abolished; and
(*c*) section 5 of the Sheriff Courts (Scotland) Act 1907 should be amended to make it clear that the sheriff court has jurisdiction (i) in any action for aliment and (ii) in any action of separation or adherence, whether or not it contains a crave for aliment.
(Paragraphs 2.57 to 2.59; Clause 2(1) and Schedule 1.)

Title to sue

10. A person to whom an alimentary obligation is owed should be able to bring an action for aliment against any person by whom that obligation is owed.
(Paragraphs 2.60; 2.72; Clauses 2(1) and (2); 4(2).)

11. A person ("the applicant") should be able to bring an action for aliment on behalf of a child under the age of majority (whether legitimate or illegitimate) against any person by whom an obligation of aliment is owed to the child, if the applicant is the child's parent; or the child's tutor; or a person entitled to, or seeking, custody of the child; or a person who in fact has, or is seeking to have, care of the child.
(Paragraphs 2.61 to 2.65; 2.67; 2.68; 2.72; Clause 2(2) and (8).)

12. A person who successfully brings an action for aliment on behalf of a child should be empowered, whether or not he is the child's tutor, to give a good receipt on behalf of the child for aliment paid under the decree.
(Paragraphs 2.66; 2.72; Clause 2(7).)

13. A pregnant woman should be able to bring an action for aliment in respect of her unborn child as if the child were already born (whether the child would be legitimate or illegitimate) but no such action should be heard or disposed of prior to the birth of the child.
(Paragraphs 2.69; 2.72; Clause 2(3).)

14. The curator bonis of an incapacitated person and the curator of an incapacitated minor should be able to bring an action for aliment on behalf of the incapax.
(Paragraphs 2.70; 2.72; Clause 2(2).)

Defences

15. It should be a defence to an action for aliment that the defender is living in the same household as the person for whom aliment is claimed and that he is fulfilling, and will continue to fulfil, his alimentary obligation to that person.
(Paragraphs 2.75 to 2.78; Clause 2(4).)

16. It should be a defence to an action for aliment that the defender is holding out a genuine and reasonable offer to receive the person for whom aliment is claimed (not being a child under the age of 16) into his home and to fulfil his alimentary obligation there. An offer should not be regarded as reasonable if, by virtue of any conduct, condition or other circumstances (including any relevant court decree), it would be unreasonable to expect the person for whom aliment is claimed to live in the same household as the defender. A voluntary agreement to live apart should not by itself be regarded as a sufficient reason for rejecting an offer.
(Paragraphs 2.79 to 2.82; Clause 2(5) and (6).)

Powers of court

17. The court should have power in an action for aliment
   (*a*) to award periodical payments of aliment, whether for an indefinite or definite period or until the happening of a specified event;
   (Paragraph 2.84; Clause 3(1)(*a*).)
   (*b*) to order the payment of sums to meet alimentary needs of an occasional or special nature;
   (Paragraphs 2.85; 2.86; Clause 3(1)(*b*) and (2).)
   (*c*) to backdate awards to the date of bringing the action or, on special cause shown, to an earlier date;
   (Paragraph 2.87; Clause 3(1)(*c*).)
   (*d*) to award less than the amount claimed, even if the claim is undisputed;
   (Paragraph 2.92; Clause 3(1)(*d*).)
   (*e*) to order either party to furnish information about his or her financial affairs or those of a child on whose behalf he is acting.
   (Paragraph 2.93; Clause 20.)

(Paragraph 2.94.)

18. In an action for aliment the court should have the same powers to counteract avoidance transactions and to grant warrants for inhibition and arrestment on the dependence as it has in an action for divorce.
(Paragraphs 2.89 to 2.91; 2.95; Clause 18.)

Quantification

19. The court should be directed, in deciding how much aliment, if any, to award, to have regard to the needs, resources and earning capacities of the parties and to all the circumstances of the case.

In having regard to all the circumstances of the case the court should be empowered, if it thinks fit, to take into account the responsibilities of the alimentary obligant towards any member of his household who is in fact dependent on him, whether or not legally entitled to aliment from him, and should be directed to have regard to the conduct of any party only if it is satisfied that it would be manifestly inequitable not to do so.
(Paragraphs 2.96 to 2.110; Clause 4.)

Variation and recall of decrees

20. A decree for periodical payments of aliment should always be capable of variation or recall on a change of circumstances.
(Paragraph 2.111; Clause 5(1).)

21. The statutory powers of the court in relation to an application for variation or recall of a decree for aliment should include power to make interim orders.
(Paragraph 2.112; Clause 5(3).)

22. In an application for variation or recall of a decree for aliment (other than interim aliment *pendente lite*) the court should have the same powers, and should have regard to the same factors, in deciding how much aliment, if any, to award, as in an action for aliment.
(Paragraphs 2.113 to 2.117; Clause 5(2) and (4).)

Summary cause procedure

23. It should be competent to raise any action for aliment alone as a summary cause if the aliment claimed in the action does not exceed an appropriate figure which should be variable by order of the Lord Advocate.
(Paragraphs 2.124 to 2.126; Clause 23.)

Interim aliment *pendente lite*

24. It should be competent for a party to an action for aliment or a consistorial action to apply for an award of interim aliment *pendente lite* against the other party to that action if, but only if, on his own averments there is an alimentary obligation between himself (or any person on whose behalf he seeks aliment) and the other party to the action. In relation to such an application the court should have power to order periodical payments of aliment until such date, not later than the date of disposal of the action, as it may specify, and to vary or recall any such order. It should have power, as under the present law, to award less than the amount claimed, or to make no award, even if the claim is undisputed. It should also have power to order either party to provide information about his financial position.
(Paragraphs 2.130 to 2.135; Clauses 6; 20.)

Agreements on aliment

25. Any provision in an agreement which purports to discharge an alimentary debtor of future liability for aliment or to restrict any right of an alimentary creditor to bring an action for aliment should have no effect unless it was fair and reasonable at the time when the agreement was entered into.
(Paragraphs 2.136 to 2.143; Clause 7(1).)

26. The courts should be given power to vary or terminate, on an application made by or on behalf of either party on a change of circumstances, the amounts payable under an agreement, or unilateral voluntary obligation, whereby one party to an alimentary relationship has bound himself to pay aliment to or for the benefit of the other party to the relationship.
(Paragraphs 2.136 to 2.143; Clause 7(2).)

Miscellaneous and supplemental

27. Where the court refuses a decree of divorce, nullity of marriage or separation it should not, by virtue of such refusal, be prevented from making an order for aliment or an order regulating custody, education or access.
(Paragraphs 2.144; 2.145; Clause 21.)

28. The expenses of a spouse in conducting or contesting consistorial litigation should no longer be regarded as necessaries for which the other spouse is liable.
(Paragraphs 2.146 to 2.150; Clause 22.)

29. The provision in section 6 of the Conjugal Rights (Scotland) Amendment Act 1861 dealing with the husband's liability for his separated wife's obligations and necessaries (i.e. from the words "and her husband" to the end of the section) should be repealed.
(Paragraphs 2.151; 2.152; Schedule 2.)

4.3 PART III FINANCIAL PROVISION ON DIVORCE

General power of court

30. In an action for divorce the court should have power, on the application of either party, to make an order for financial provision.
(Paragraph 3.34; Clause 8.)

Principles to be applied

31. The court should make an order for financial provision on divorce if, and only if, (*a*) the order is justified by one or more of the following principles:

(i) fair sharing of matrimonial property;
(ii) fair recognition of contributions and disadvantages;
(iii) fair sharing of the economic burden of child-care;
(iv) fair provision for adjustment to independence; and
(v) relief of grave financial hardship

and (*b*) the order is reasonable having regard to the resources of the parties.
(Paragraphs 3.35 to 3.64; Clause 8(2).)

Fair sharing of matrimonial property

32. (*a*) The principle of fair sharing of matrimonial property is that the net value of the matrimonial property should be shared equally or, if there are special circumstances justifying a departure from equal sharing, in such other proportions as may be fair in those circumstances.
(Paragraphs 3.65 to 3.68; Clauses 9(1)(*a*); 10(1).)

(*b*) Matrimonial property should be defined as any property belonging to either party or both parties at the date of final separation which was acquired (otherwise than from a third party by gift or succession) by him or them

(i) before the marriage for use by the parties as their joint residence or as furniture or equipment for their joint residence; or

(ii) after the marriage.

(Paragraphs 3.69 to 3.72; Clause 10(3).)

(*c*) Where either spouse has rights or interests under a life policy or occupational pension scheme or similar arrangement, the proportion of such rights or interests which relates to the period from the marriage until the date of final separation should be treated as matrimonial property.
(Paragraphs 3.73 to 3.77; Clause 10(4).)

(*d*) Special circumstances which may justify a departure from the principle of equal sharing, if the court thinks fit, should include

(i) the terms of any agreement between the parties on the ownership or division of any matrimonial property;

(ii) the source of the funds or assets used to acquire the matrimonial property where those funds or assets were not derived from the parties' efforts or income during the marriage;

(iii) any destruction, dissipation or alienation of matrimonial property by either party;

(iv) the nature of the property, the use made of it (including use for business purposes or as a family home) and the extent to which it is reasonable to expect it to be realised or divided or used as security; and

(v) the actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce.

(Paragraphs 3.78 to 3.86; Clause 10(5).)

(*e*) "The net value of the matrimonial property" should mean the value of such property at the date of final separation, after deduction of any debts outstanding at that date and incurred by either party (a) during the marriage or (b) before the marriage in relation to such property as is mentioned in paragraph (*b*)(i) above.
(Paragraphs 3.87 to 3.89; Clause 10(2).)

(*f*) "The date of final separation" should be defined as the date, not later than the date of raising the action of divorce, when the parties last cohabited as husband and wife, but where the parties ceased to cohabit for 90 days or more and thereafter resumed cohabitation for

a period or periods of less than 90 days in all, such period or periods should be ignored for the purposes of this recommendation. (Paragraph 3.90; Clause 10(2) and (6).)

Fair recognition of contributions and disadvantages

33. (*a*) The principle of fair recognition of contributions and disadvantages is that where one party has made contributions which have been to the economic benefit of the other party or has sustained economic disadvantages in the interests of the other party or of the family, he should receive due recognition of those contributions or disadvantages.

(*b*) In applying this principle the court should have regard to the extent to which such contributions or disadvantages made or sustained by one party have been balanced by contributions or disadvantages made or sustained by the other party, and to the extent to which the contributions or disadvantages have been, or will be, recognised by a share in the net value of the matrimonial property or otherwise.

(*c*) The court should take into account relevant contributions or disadvantages made or sustained before the marriage.

(*d*) "Contributions" should include contributions, whether financial or non-financial, direct or indirect and in particular should include contributions made by looking after the home or caring for the family.

(Paragraphs 3.91 to 3.99; Clauses 9(1)(*b*) and (2), 11(2).)

Fair sharing of economic burden of child-care

34. (*a*) The principle of fair sharing of the economic burden of child-care is that the economic burden of caring for a dependent child of the marriage after the divorce should be shared fairly between the parties to the marriage.

(*b*) In applying this principle the court should have regard

(i) to any arrangements made or to be made for aliment for the child;

(ii) to any expense or loss of earning capacity caused by the need to care for the child;

(iii) to the age and health of the child, to the educational, financial and other circumstances of the child, to the availability and cost of suitable child-care facilities or services, to the needs and resources, actual and foreseeable, of the parties, including the need for suitable accommodation for any dependent child of the marriage, and to the other circumstances of the case.

(*c*) In this recommendation:

"dependent child of the marriage" means a child under the age of 16 who is (i) a child of the marriage or (ii) a child, other than a child boarded out by a public or local authority or a voluntary organisation, who has been accepted by both parties as a child of the family.

(Paragraphs 3.100 to 3.106; Clauses 9(1)(*c*) and (2), 11(3).)

Fair provision for adjustment to independence

35. (*a*) The principle of fair provision for adjustment to independence is that where one party to the marriage has been financially dependent on the other and that dependence has come to an end on divorce, the dependent party should receive such financial provision as is fair and reasonable to enable him to adjust, over a period of not more than three years from the date of divorce, to the cessation of that dependence.

(*b*) In deciding what financial provision is fair and reasonable under this recommendation the court should have regard to the age, health and earning capacity of the applicant, to the duration and extent of the applicant's past dependency on the payer, to any intention of the applicant to undertake a course of education or training, to the needs and resources, actual or foreseeable, of the parties, and to the other circumstances of the case.

(Paragraphs 3.107 to 3.109; Clauses 9(1)(*d*), 11(4).)

Relief of grave financial hardship

36. (*a*) The principle of relief of grave financial hardship is that where it is established at the time of the divorce that one party to the marriage is likely to suffer grave financial hardship in consequence of the divorce, that party should receive such financial provision as is fair and reasonable in the circumstances to relieve that hardship, over such period as the court may determine.

(*b*) In deciding what financial provision would be fair and reasonable to give effect to this principle the court should have regard to the age, health and earning capacity of the claimant, to the needs and resources, actual or foreseeable, of the parties, to the duration of the marriage, to the standard of living enjoyed by the parties during the marriage, and to all the circumstances of the case.

(Paragraphs 3.110 to 3.112; Clauses 9(1)(*e*), 11(5).)

Orders which may be made

37. An order for financial provision should mean any one or more of the following orders:—

(*a*) an order that one party should pay a capital sum to the other;

(*b*) an order that one party should transfer property to the other;

(*c*) an order that one party should pay a periodical allowance to the other;

(*d*) an incidental order.

(Paragraph 3.113; Clause 8.)

Orders for payment of a capital sum or transfer of property

38. (*a*) For the purposes of Recommendation 37(*b*) "property" should include a tenancy (other than a tenancy which is transferable under the Matrimonial Homes (Family Protection) (Scotland) (Bill).

(Paragraph 3.115; Clause 12(5).)

(*b*) The court should have power to make an order for payment of a capital sum or transfer of property (i) on granting decree of divorce, or (ii) within such time thereafter as it may allow (by continuing the action) on granting decree of divorce.

(Paragraph 3.116; Clause 12(1).)

(*c*) The court should have power:—

(i) to order a capital sum to be paid by instalments

(Clause 12(3).)

(ii) to make an order for payment of a capital sum or transfer of property at a future date.

(Clause 12(2).)

(Paragraphs 3.117 to 3.118.)

(*d*) The court should have power to vary, on a change of circumstances, the date or method of payment or the date of transfer specified in an order for payment of a capital sum or transfer of property, but should have no other power to vary such an order.

(Paragraph 3.119; Clause 12(4).)

Orders for periodical payments

39. (*a*) The court should not make an order for a periodical allowance unless it is satisfied that an order for payment of a capital sum (whether by instalments or otherwise) or transfer of property would not by itself be appropriate or sufficient to give effect to the principles laid down in Recommendation 31.

(Paragraph 3.121; Clause 13(1).)

(*b*) Without prejudice to the court's power to order a capital sum to be paid by instalments, a periodical allowance should not be awarded for a longer period than three years from the date of the divorce, unless the payments are required in accordance with the principles laid down in Recommendations 34 and 36, in which case the award should be for such period as the court may determine in the application of those principles.

(Paragraph 3.123; Clause 13(3).)

(*c*) The court should have power to make an order for a periodical allowance (i) on granting decree of divorce or (ii) within such time thereafter as it may allow (by continuing the action) on granting decree of divorce or (iii) at any time after the decree on an application by either party on a change of circumstances.

(Paragraph 3.124; Clause 13(2).)

(*d*) The court should have power, if satisfied that there has been a change of circumstances since the date of the order

(i) to vary or recall an order for a periodical allowance;

(ii) to backdate such variation or recall to the date of the application for variation or recall or, on cause shown, to an earlier date and to order repayment of any amounts overpaid;

(iii) to convert an order for a periodical allowance into an order for payment of a capital sum or transfer of property.

(Paragraph 3.125; Clause 13(4) and (5).)

(*e*) An order for a periodical allowance should cease to have effect on the death or remarriage of the payee.
(Paragraph 3.126; Clause 13(6)(*b*).)

(*f*) An order for a periodical allowance should not, if it still subsists, cease to have effect on the death of the payer, although the death may justify an application for variation, recall or conversion.
(Paragraph 3.126; Clause 13(6)(*a*).)

Incidental orders

40. (*a*) An incidental order means any one or more of the following orders:—

(i) an order for the sale of property
(Paragraphs 3.129; 3.146);

(ii) an order for the valuation of property
(Paragraphs 3.130; 3.146);

(iii) an order resolving any dispute between the parties, by granting decree of declarator or otherwise, as to their respective rights in any property
(Paragraphs 3.131; 3.146);

(iv) an order regulating the occupation of the matrimonial home and the use of furniture and plenishings in it
(Paragraphs 3.133; 3.146);

(v) an order regulating liability, as between the parties, for outgoings on or in relation to the matrimonial home or the furniture and plenishings in it
(Paragraphs 3.134; 3.146);

(vi) an order that security should be provided for any financial provision
(Paragraphs 3.135; 3.146);

(vii) an order that payments should be made or property transferred to any curator bonis or trustee or other person for the benefit of the other party to the marriage
(Paragraphs 3.136; 3.146);

(viii) an order varying any term in an antenuptial or postnuptial marriage contract or settlement
(Paragraphs 3.137 to 3.138; 3.146);

(ix) an order that interest should run from any date on any sum awarded as financial provision on divorce
(Paragraphs 3.139; 3.146);

(x) an order that either party should furnish information about his or her financial affairs
(Paragraphs 3.140; 3.146);

(xi) any other incidental order which is necessary or expedient in order to give effect to the principles governing an award of financial provision or to any order for financial provision.
(Paragraphs 3.141; 3.146);

(Clauses 14(2) and (5); 20.)

(*b*) The court should have power to make an incidental order in a divorce action at any time, whether before, on or after decree of

divorce, but rules of court may restrict the categories of order which may be made as interim orders.
(Paragraphs 3.142 and 3.143; 3.146; Clause 14(1) and (6).)

(*c*) The court should have power to vary or recall an incidental order on cause shown.
(Paragraphs 3.144; 3.146; Clause 14(3).)

(*d*) Where the court has made an order giving one party the right to occupy a matrimonial home or to use furniture and plenishings therein that party should have, so long as the order is in force and except to the extent that it provides otherwise, the subsidiary and consequential rights conferred by clause 2 of the Matrimonial Homes (Family Protection) (Scotland) Bill: clause 2 should govern the situation, with any necessary modifications, as if the parties were still married.
(Paragraphs 3.145; 3.146; Clause 14(4).)

Orders counteracting avoidance transactions

41. The court should continue to have power to counteract transactions intended to defeat claims for financial provision on divorce but

(i) the power to counteract past transactions should extend to transactions entered into within 5 years before the claim for financial provision is made (instead of 3 years as under the present law) and should include power to set aside transactions and transfers of property (even if not effected by a written disposition or settlement); and

(ii) the power to interdict or set aside transactions should extend to any transaction which has the effect of, or is likely to have the effect of, defeating the applicant's claim (even if it cannot be proved that it was or is intended to do so).

(Paragraphs 3.147 to 3.151; Clause 18.)

Inhibition and arrestment on the dependence

42. (*a*) The court should have power, on cause shown, to grant warrant for inhibition or arrestment on the dependence of a divorce action;

(*b*) rules of court should lay down the procedure for obtaining such warrants (the suggested procedure being by motion intimated to the other party); and

(*c*) it should be competent to restrict such warrants to specific items of property or to funds not exceeding a certain value.

(Paragraphs 3.152 to 3.155; Clause 19.)

Rights of third parties

43. (*a*) Third parties who have in good faith acquired property for value should continue to be protected against the effect of an order designed to counteract avoidance transactions, and it should be made clear that the protection extends to third parties who have in good faith entered into a binding agreement to purchase the property.
(Paragraphs 3.156; 3.171; Clause 18(2).)

(*b*) Landlords should continue to have a right to be heard before any order is made transferring the tenancy of a matrimonial home under the Matrimonial Homes (Family Protection) (Scotland) Bill.
(Paragraphs 3.156; 3.171.)

(*c*) The court should not order one spouse to transfer property or a tenancy (other than one transferable under the Matrimonial Homes (Family Protection) (Scotland) Bill) to the other spouse if the consent or concurrence of any third party is required under any voluntary obligation, enactment or rule of law and if that consent or concurrence is not given.
(Paragraphs 3.160; 3.167; 3.171; Clause 15(1).)

(*d*) Where property is subject to a security then, even in a case where the creditor's consent is not required under the foregoing paragraph, the court should not order the property to be transferred without the creditor's consent unless he has been given an opportunity of being heard.
(Paragraphs 3.157 to 3.158; 3.167; 3.171; Clause 15(2).)

(*e*) Neither an incidental order, nor any rights conferred by such an order, should prejudice any third party rights existing at the date of the order.
(Paragraphs 3.168; 3.171; Clause 15(3).)

(*f*) The provisions of the Matrimonial Homes (Family Protection) (Scotland) Bill which protect a spouse's occupancy rights or rights to use furniture and plenishings against subsequent adverse dealings or arrangements by the other spouse should apply, with any necessary modifications, to occupancy rights in the matrimonial home, and rights to use the furniture and plenishings therein, granted by the court in a divorce action.
(Paragraphs 3.169 to 3.171; Clause 14(4).)

Conduct

44. In applying the principles laid down in Recommendation 31, the conduct of the parties, except where it has affected the economic basis of the claim for financial provision, should be taken into account only in relation to the principles of fair provision for adjustment to independence and relief of grave financial hardship, and then only if it would be manifestly inequitable to leave that conduct out of account.
(Paragraphs 3.172 to 3.187; Clause 11(7).)

Needs and resources of parties

45. In having regard to the needs and resources of the parties and the circumstances of the case the court should be able, if it thinks fit, to take account of the responsibilities of the party from whom the financial provision is claimed towards any dependent member of his household (whether or not the dependant is a person to whom that party owes an obligation of aliment).
(Paragraphs 3.188 to 3.189; Clause 11(6).)

Agreements on financial provision

46. (*a*) The court should have power, on the application of either party, to vary an agreement for the payment of a periodical allowance after divorce if the agreement expressly so provides.
(Paragraph 3.194; Clause 16(1)(*a*).)

(*b*) On the application of either party the court should have power, (i) on granting decree of divorce, or (ii) within such time thereafter as it may allow (by continuing the action) on granting decree of divorce, to vary or set aside any agreement on financial provision on divorce if the agreement was not fair and reasonable at the time it was made.
(Paragraphs 3.195 to 3.197; Clause 16(1)(*b*) and 2(*b*).)

(*c*) Any term of an agreement purporting to exclude the right to apply for an order under paragraph (*b*) should be void.
(Paragraph 3.198; Clause 16(3).)

Nullity

47. A court granting a decree of declarator of nullity of marriage should have the same powers in relation to financial provision as a court granting a decree of divorce.
(Paragraphs 3.201 to 3.203; Clause 17.)

APPENDIX A

Family Law (Financial Provision) (Scotland) Bill

ARRANGEMENT OF CLAUSES

SCHEDULES

DRAFT

OF A

BILL

TO

Make fresh provision in the law of Scotland as to aliment and the power of the court to award aliment; to amend the law as to financial provision arising out of divorce or declarator of nullity of marriage and the power of the court to make orders relating to such financial provision, including the transfer of property and incidental orders; and to amend the law as to further orders and expenses in certain actions between spouses and as to avoidance transactions; and for purposes connected with the matters aforesaid.

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:—

Aliment

Obligation of aliment.

1.—(1) As from the commencement of this Act, an obligation of aliment shall be owed by, and only by—

(*a*) a husband to his wife;

(*b*) a wife to her husband;

(*c*) a father or mother to his or her child;

(*d*) a person to a child (other than a child who has been boarded out with him by a public or local authority or a voluntary organisation) who has been accepted by him as a child of his family.

Clause 1

This clause implements Recommendations 1 to 5 of the Report.

Subsection (1)

Paragraphs (*a*) and (*b*) implement Recommendation 1. They remove doubts which exist in the present law as to whether a wife's liability to her husband is identical to a husband's liability to his wife (see paragraph 2.6).

Paragraphs (*a*) and (*b*), as read with the definitions of "husband" and "wife" in subsection (4), implement Recommendation 2.

Paragraphs (*c*) and (*d*) implement Recommendation 3. The present reciprocal obligation of aliment between parent and legitimate child is abolished (see paragraphs 2.8 to 2.11). No alteration is made in the law as regards illegitimate children, who are not reciprocally bound to support either parent (see paragraph 2.13). Adopted children are not specifically mentioned, as other legislation provides that they are to be treated in law as the legitimate children of the adopter and of no other person (Children Act 1975, section 8 and Schedule 2; Adoption (Scotland) Act 1978, section 39 *prosp.*—see paragraph 2.12).

Paragraph (*c*), as read with the definition of "child" in subsection (4), implements Recommendation 4. It restricts the alimentary obligation of a parent towards a child to the date when the child attains the age of 18 or a later age (not exceeding 25) if education or training is continuing (see paragraphs 2.31 to 2.33). It represents a change in the law as regards legitimate children, there being at present no age limit on their entitlement to aliment. The parents of an illegitimate child are, by statute, bound to support him until a maximum age of 21 (Affiliation Orders Act 1952, section 3), but may be liable for an unlimited period at common law if the child is incapable of self-support. This provision would treat all children—legitimate, illegitimate, adopted and "accepted"—in the same way. The word "employment" is used to make clear that the extension up to the age of 25 is not confined to one of the traditionally recognised trades or professions. The instruction or training need not be full-time (see paragraph 2.33, and especially the footnote attached thereto).

Paragraph (*d*) creates, for the first time, a direct alimentary relationship between a person and a child accepted by him as a child of his family. "Family" includes a one-parent family (see paragraph 2.21 and the definition of "family" in clause 24). This paragraph replaces the limited discretionary power introduced by section 7 of the Matrimonial Proceedings (Children) Act 1958 whereby the court may make orders providing for the maintenance of such children (see paragraphs 2.18 to 2.30). The exception in the case of children boarded out by a public or local authority or a voluntary organisation is similar to that contained in the corresponding English legislation (Matrimonial Causes Act 1973, section 52(1)), with the additional reference to public authorities. The exception would therefore extend to arrangements made by the appropriate authorities for the care of children of British subjects serving abroad in an official capacity. The exception is designed to ensure that foster parents do not incur alimentary liability (see paragraph 2.28).

Subsection (1) does not create any alimentary obligation, reciprocal or otherwise, between the parents of an illegitimate child. The father's present statutory liability for the mother's inlying expenses is replaced by a provision in clause 3(1)(*b*) categorising inlying expenses as alimentary payments of an occasional or special nature for which an alimentary obligant may be liable. These expenses will be recoverable to the extent that they can be regarded as the needs of the child (see paragraphs 2.16 and 2.86).

Subsection (1) also implements Recommendation 5, by abolishing the other existing alimentary relationships between grandparent and grandchild and remoter ascendants and descendants in the legitimate line (which arise only if the intermediate generation is unable to provide support—see paragraphs 2.34 and 2.35).

(2) Any obligation of aliment arising under a decree or by operation of law and subsisting immediately before the commencement of this Act shall, except insofar as consistent with this section, cease to have effect as from the commencement of this Act.

(3) Nothing in this section shall affect any arrears due under a decree at the date of termination or cessation of an obligation of aliment, nor any right to claim aliment from the executor of a deceased person or from any person enriched by the succession to his estate.

(4) In this section—

"child" means a person under the age of 18 years, or a person over that age but under the age of 25 years who is reasonably and appropriately undergoing instruction at an educational establishment or training for employment or for a trade, profession or vocation; and includes an illegitimate child;

"husband" and "wife" include the parties to a valid polygamous marriage.

Subsection (2)

Under the present law the obligation of aliment terminates when the relevant alimentary relationship terminates. This principle is implicit in the wording of subsection (1). Subsection (2) is designed to make clear that an alimentary obligation subsisting immediately before the legislation comes into effect, which is not retained by subsection (1), ceases to have effect, even if the liability arises under a court decree (see paragraph 2.55).

Subsection (3)

Subsection (3) makes clear that, if there are arrears of aliment due at the time when an alimentary obligation ceases by virtue of this clause, the arrears are recoverable. The subsection also preserves, pending a forthcoming examination of the law of succession, the right of an alimentary creditor, who has not been properly provided for on the death of a liable relative, to claim aliment out of the relative's estate or from his beneficiaries (see paragraph 2.153).

Actions for aliment.

2.—(1) An action for aliment may be brought in the Court of Session or the sheriff court against any person owing an obligation of aliment and, subject to the following provisions of this Act, the court may, if it thinks fit, grant decree in such action.

Clause 2

This clause implements Recommendations 6, 9(*a*), and 11 to 16, and partly implements Recommendation 10.

Subsection (1)

This subsection, in specifying that an action for aliment may be brought in the Court of Session or the sheriff court, implements Recommendation 9(*a*). The subsection removes one anomaly in the present law. An action for aliment between husband and wife is at present competent in the sheriff court only if it is an action "of separation and aliment, adherence and aliment, or interim aliment" (Sheriff Courts (Scotland) Act 1907, section 5(2)). The historical distinction between interim aliment and permanent aliment (explained at paragraph 2.57) is now insubstantial, but can still give rise to difficulties. If, for example, a wife has obtained a decree of separation but has not sought an award of aliment at the time because her circumstances made that unnecessary, she will probably be unable to raise an action for aliment alone in the sheriff court at a later stage. The anomaly will be removed by this clause and by the suggested amendment to section 5(2) of the 1907 Act (see Schedule 1). The technical meaning of "interim aliment" under the present law is removed by the amendments to section 5(2) of the 1907 Act and by the wide definition of "action for aliment" in clause 24, which in practice includes all claims for aliment. It is not thought necessary to incorporate a specific provision stating that an action for interim aliment shall henceforth be known as an action for aliment. The term "interim aliment" will henceforth be confined to aliment *pendente lite*—see clause 6.

In stating that an action may be brought against any person owing an obligation of aliment, the subsection partly implements Recommendation 10 (see also clause 4(2)).

The words "if it thinks fit" are intended to stress the flexible and discretionary nature of the court's power in making an award of aliment. There may, for example, be a number of reasons for refusing a decree—for example a valid defence under subsections (4) to (6); or the absence of need on the part of the claimant or of resources on the part of the obligant. For the avoidance of doubt the court is given express power under clause 3(1)(*d*) to award less than the amount claimed. A claim may be reduced or disallowed on the ground of serious misconduct (see clause 4(3)(*b*)).

(2) An action for aliment under this section may be brought—

(*a*) by a person (including a child) to whom the obligation of aliment is owed;

(*b*) by the curator bonis of an incapax or the curator of a minor who is an incapax;

(*c*) on behalf of a child, by—

(i) the father or mother of the child;

(ii) the tutor of a pupil;

(iii) a person entitled to, seeking or having custody or care of a child.

(3) A woman (whether married or not) may bring an action for aliment on behalf of her unborn child as if the child had been born, but no such action shall be heard or disposed of prior to the birth of the child.

(4) It shall be a defence to an action for aliment that, in a case where the defender is living in the same household as the person for or on behalf of whom aliment is being claimed, the defender is fulfilling and will continue to fulfil the obligation of aliment.

Subsection (2)

This subsection implements Recommendations 11 and 14 and partly implements Recommendation 10.

Paragraph (*a*), in stating the general principle that any alimentary creditor may raise an action for aliment, partly implements Recommendation 10. In practice, if the creditor is below the age of majority, the action will usually be raised by someone else on his behalf. However, a minor (i.e. a girl of 12 or over or a boy of 14 or over) who has no curator would be able to raise an action on his own behalf; so would a minor who has a curator, provided that his curator consents. If the curator has a contrary interest, a curator *ad litem* can be appointed (see paragraph 2.65). In this context, "child" means a person up to the age of 18 or 25, as the case may be—see subsection (8) and clause 1(4).

Paragraph (*b*), in making provision for the case where the alimentary creditor is incapax, implements Recommendation 14. It seems clear under the present law that a curator bonis has a title to sue on behalf of his adult ward, and in this respect the paragraph makes no change in the law. It extends the rule to a minor ward (see paragraph 2.70).

Paragraph (*c*), which implements Recommendation 11, replaces a complex set of common law and statutory rules dealing with actions for aliment on behalf of children (see paragraph 2.61). Title to sue is not confined to legal custody (see paragraph 2.62). Thus a grandparent who is bringing up a grandchild but does not wish to claim sole legal custody would be able to sue, as would a tutor appointed by a deceased parent to act for a child who is in an institution. More generally, a court will not be obliged unnecessarily to determine questions of legal custody when the real issue between a child's parents is liability for aliment (see paragraph 2.63). The words "on behalf of" make it clear that the true creditor is the child and not the person who may be bringing the action. The title of any adult to sue on behalf of a child subsists until the child is 18 (see subsection (8) and paragraph 2.67). No distinction is drawn between legitimate and illegitimate children. The Bill does not state specifically whether the age limit applies at the date of raising the action or the date of decree: the court will not grant decree to a person other than the child if, on the latter date, the child has already attained the age of 18. The paragraph is without prejudice to any right conferred by statute on any public or local authority to recover contributions from liable relatives in relation to children being supported out of public funds (see Supplementary Benefits Act 1976, sections 18 and 19; Social Work (Scotland) Act 1968, sections 78 to 82).

Subsection (3)

This subsection implements Recommendation 13. It replaces an existing statutory provision which, however, relates only to illegitimate children (Illegitimate Children (Scotland) Act 1930, section 3). It enables any pregnant woman, whether married or not, to raise an action if it appears likely that the father is likely to decamp, and it may enable her in certain circumstances to obtain aliment more quickly (see paragraph 2.69).

Subsection (4)

This subsection implements Recommendation 15. Under the present law severe limitations are placed on the right to recover aliment from a person who is living in the same household as the claimant (see paragraphs 2.75 to 2.78). The onus of proof under this subsection rests on the defender.

(5) It shall be a defence to an action for aliment that the defender is making a genuine and reasonable offer to receive into his household the person (not being a child) for or on behalf of whom aliment is being claimed and to fulfil the obligation of aliment.

(6) An offer such as is mentioned in subsection (5) above shall not be regarded as reasonable if, on account of any conduct, condition, decree or other circumstance, it would be unreasonable to expect the person for or on behalf of whom aliment is being claimed to live in the same household as the defender; but the fact that a husband and wife have agreed to live apart shall not of itself be regarded as making it unreasonable to expect the person for or on behalf of whom aliment is being claimed to live in the same household as the defender.

(7) A person bringing an action for aliment on behalf of a child may give a good receipt for aliment paid under the decree in the action.

(8) In subsection (2) above, "child", in paragraph (*a*), has the same meaning as in section 1(4) above, and, in paragraph (*c*), means a child, including an illegitimate child, under the age of 18 years; and in subsection (5) above, "child" means a child, including an illegitimate child, under the age of 16 years.

Subsections (5) *and* (6)

These subsections implement Recommendation 16. They restate in a simplified form, by way of a defence, a series of complex common law and statutory rules (see paragraphs 2.79 to 2.82). They do not seek to alter the substance of the present law, contained in section 7(1) of the Divorce (Scotland) Act 1976, on willingness to adhere as a condition of entitlement to aliment between spouses. Under the present law, if the parties to a marriage have voluntarily agreed to live apart, either party may call upon the other to return (provided that there is no circumstance justifying non-adherence) and thereby defeat a claim for aliment in legal proceedings. This principle is expressly saved by subsection (6). The subsections do not attempt to define with precision the various circumstances in which an offer to provide support in the home would be regarded as unreasonable. These circumstances would include, as between husband and wife, a matrimonial offence such as adultery, behaviour or desertion, or the existence of a decree of separation. The defence would not be available in the case of a claim by or on behalf of a child under 16 (see subsection (8)): any dispute about the residence of a child under 16 should be settled in custody proceedings before the question of aliment is decided.

Subsection (7)

This subsection implements Recommendation 12 (see paragraph 2.66). It serves to emphasise that the creditor is the child, and regulates the position of the payee.

Powers of court.

3.—(1) In granting decree in an action for aliment the court shall have power—

(*a*) to order the making of periodical payments, whether for a definite or indefinite period or until the happening of a specific event;

(*b*) to order the making of alimentary payments of an occasional or special nature, including payments in respect of inlying, funeral or educational expenses;

(*c*) to backdate an award of aliment under this Act—

(i) to the date of the bringing of the action or to such later date as the court thinks fit; or

(ii) on special cause shown, to a date prior to the bringing of the action;

(*d*) to award less than the amount claimed even if the claim is undisputed.

(2) Nothing in this section shall empower the court to substitute a lump sum for a periodical payment.

Clause 3

This clause implements Recommendation 17(*a*) to (*d*). (Recommendation 17(*e*) is implemented by clause 20.)

Subsection (1)

Paragraph (*a*) restates the general rule that an award in actions for aliment takes the form of an award of periodical payments of money. Such an award need not be for an indefinite period (see paragraph 2.84).

Paragraph (*b*) makes clear that the court may order payment of sums to cover alimentary needs of an occasional or special nature, such as inlying, funeral or educational expenses. The court's power does not, however, extend to awarding a lump sum as a substitute for continuing liability (see paragraph 2.86 and subsection (2)). A claim for inlying expenses would cover the cost of such items as "garments, toilet articles, a cot, bedding and a pram for the child": (*Freer* v. *Taggart* 1975 S.L.T. (Sh. Ct.) 13, referred to at paragraph 2.15).

The reference to funeral expenses replaces a statutory provision in the Illegitimate Children (Scotland) Act 1930, section 5. This provision, which is limited to illegitimate children under the age of 16, imposes liability on the child's parents. This paragraph characterises funeral expenses as alimentary expenses, which seems to be implicit in the present law, and in effect extends the principle contained in the 1930 Act to all alimentary obligants. In practice contractual liability will usually be incurred by one or more members of the deceased's immediate family.

Paragraph (*c*) introduces a power to backdate awards (see paragraph 2.87). It is not intended that backdating should be the normal practice, and a claimant would in any event have to show special cause before an award could be backdated to a date prior to the bringing of the action (subparagraph (ii)). Such "cause" might, e.g., be the pursuer's inability to trace an absconding defender.

Paragraph (*d*) restates a general principle of the law and extends it to certain actions, such as actions of affiliation and aliment, in which the court is at present bound to grant decree for the sum sued for if the defender does not contest the claim (see paragraph 2.92).

Amount of aliment.

4.—(1) In determining the amount of aliment to award in an action for aliment, the court shall, subject to subsection (3) below, have regard—

(*a*) to the needs and resources of the parties;

(*b*) to the earning capacities of the parties; and

(*c*) generally to all the circumstances of the case.

(2) Where two or more persons owe an obligation of aliment to another person, there shall be no order of liability *inter se,* but the court, in deciding how much, if any, aliment to award against any of those persons, shall have regard, among the other circumstances of the case, to the obligation of aliment owed by any other person.

(3) In having regard under subsection (1)(*c*) above generally to all the circumstances of the case, the court—

(*a*) may, if it thinks fit, take account of the responsibilities of the defender in the action towards any dependent member of his household whether or not that member is a person to whom the defender owes an obligation of aliment; and

(*b*) shall take account of any conduct of a party only if it would be manifestly inequitable to leave it out of account.

Clause 4

Subsections (1) *and* (3)

These subsections implement Recommendation 19. An obligation of aliment is defined in clause 24 (thereby implementing Recommendation 7) to mean an obligation to provide such support as is reasonable in the circumstances, having regard to the provisions contained in this clause. As a general principle, the law already has regard to the needs and resources of the parties to the action, and to this extent the clause makes no change in the law. Similarly, under the present law, the needs and resources of third parties are irrelevant to the quantification of aliment. In one respect, however, the clause removes a restriction on the court's discretion: the court may take account of the defender's responsibilities towards dependent members of his household, even if they do not stand in an alimentary relationship towards him. This provision is designed to obviate the difficulties which arose in, e.g., *Henry* v. *Henry* 1972 S.L.T. (Notes) 26 (see paragraph 2.100). It will also enable the court to take into account a person's responsibilities to care for an aged parent if, as is proposed in clause 1, such responsibilities are no longer legally enforceable. The new provision concentrates on the responsibilities of the defender rather than on the requirements of the dependant (see paragraph 2.101). A corresponding provision in relation to financial provision on divorce appears in clause 11(6).

Earning capacity is specified as a relevant factor (subsection (1)(*b*)), but the way in which it may be taken into account is left to the discretion of the court (see paragraph 2.103).

The test for the relevance of conduct in determining the amount of aliment (subsection (3)(*b*)) is the same as that proposed for certain principles applying to financial provision on divorce which involve a measure of future support (see clause 11(7)). Subsection (3)(*b*) does not preclude the court from assessing an award at nil if the degree of misconduct so warrants (see the words "if it thinks fit" in clause 2(1)), although the Bill contains no provision which in terms disentitles a person to aliment on the ground of misconduct.

Subsection (2)

This subsection implements Recommendation 8. It abolishes various rules in the present law which determine the order of liability of alimentary debtors. In particular, the subsection discards the rule whereby the father is primarily liable to support his legitimate child and the mother only becomes liable if the father is unable to provide support (see paragraph 2.47). The court is not, however, precluded from taking into account the existence of other alimentary debtors (see paragraph 2.49). (See also clause 2(1), in so far as it provides that an action for aliment may be brought against any person owing an obligation of aliment.)

Variation or recall of decree of aliment.

5.—(1) A decree granted in an action for aliment brought before or after the commencement of this Act may, on an application by or on behalf of either party to the action, be varied or recalled by an order of the court if since the date of the decree there has been a change of circumstances.

(2) The provisions of this Act shall apply to an application or order under subsection (1) above as they apply to an action for aliment or decree in such action, subject to any necessary modifications.

(3) On an application under subsection (1) above, the court may, pending determination of the application, make such interim order as it thinks fit.

(4) Where the court backdates an order under subsection (1) above, the court may order any sums paid under the decree to be repaid.

Clause 5

This clause implements Recommendations 20 to 22.

Subsection (1)

This subsection implements Recommendation 20. It restates the general rule (which at present is subject to one statutory exception, in section 9 of the Conjugal Rights (Scotland) Amendment Act 1861) that a decree for aliment is always subject to variation or recall on a change of circumstances of either party (see paragraph 2.111). This is one of only two instances where the provisions of the Bill relating to aliment alone have retrospective effect, the other being clause 7 on agreements (see paragraph 2.157).

Subsections (2) *and* (4)

These subsections implement Recommendation 22. Subsection (4) specifically authorises the court to order any sum paid under a decree to be repaid (see paragraph 2.116).

Subsection (3)

This subsection implements Recommendation 21. It represents the present law, since an Act of Sederunt in 1977 removed doubts as to the competence of interim orders in the sheriff courts (see paragraph 2.113). The subsection does not apply to summary cause procedure: by Act of Sederunt applications for variation or recall have to be made by summons (see paragraph 2.113).

Interim aliment.

6.—(1) In an action for aliment or a consistorial action, either party to the action who avers that the other party owes an obligation of aliment to him or to any child on whose behalf he claims aliment may claim an award of interim aliment for himself or on behalf of the child against the other party.

(2) Where a claim under subsection (1) above has been made, then, whether or not the claim is disputed, the court may award by way of interim aliment the sum claimed or any lesser sum or may refuse to make such an award.

(3) An award under subsection (2) above shall consist of an award of periodical payments to be made only until the date of the disposal of the action in which the award was made or such earlier date as the court may specify.

(4) An award under subsection (2) above may be varied or recalled by an order of the court; and the provisions of this section shall apply to an award so varied and to the claim therefor as they applied to the original award and the claim therefor.

Clause 6

This clause implements Recommendation 24. The clause sets out the range of interim powers which will be available to the court. These are not so extensive as the powers available at the stage of a final award when the facts have been ascertained (see paragraph 2.131). Thus (subsection (3)) the court does not have interim power to order payment of lump sums to meet alimentary needs of an occasional or special nature, to backdate awards, or to counteract avoidance transactions (see clauses 3(1)(*b*) and (*c*), and 18). A party can only apply for an award of interim aliment if, on his own averments, there is a relevant alimentary relationship (subsection (1)): thus the pursuer in an action of declarator of nullity of marriage would not be able to claim interim aliment (see paragraph 2.132). An application would, however, be theoretically competent in a divorce action if there were manifestly no grounds for the divorce (see paragraph 2.134).

Agreements on aliment.

7.—(1) Any provision in an agreement which purports to exclude future liability for aliment or to restrict any right to bring an action for aliment shall have no effect unless the provision was fair and reasonable at the time the agreement was entered into.

(2) Where a person who owes an obligation of aliment to another person has entered into an agreement to pay aliment to or for the benefit of the other person, either person may, on a change of circumstances, apply to the court for variation of the amount payable under the agreement or for termination of the agreement.

(3) Subsections (5) and (6) of section 2 above shall apply to an action to enforce such an agreement as they apply to an action for aliment.

(4) The court shall have jurisdiction under subsection (2) above in respect of parties to an agreement where it would have had jurisdiction in an action for aliment between the parties.

(5) In this section, "agreement" means an agreement entered into before or after the commencement of this Act; and includes a unilateral voluntary obligation.

Clause 7

Subsection (1)

This subsection implements Recommendation 25. It introduces the "fair and reasonable" test which is applied to contracts for the supply of goods and services by the Unfair Contract Terms Act 1977 (see especially paragraph 2.142). The time selected for determining whether a provision in an agreement was fair and reasonable is the same as that contained in the 1977 Act—the time when the agreement was entered into. Unlike the 1977 Act, the Bill does not suggest any factors which the court may or ought to take into account in determining whether a particular provision was fair and reasonable. Any provision in an agreement, even if valid, would not affect the statutory liability of a person to maintain his spouse and children under the age of 16 (Supplementary Benefits Act 1976, section 17).

Subsection (2)

This subsection implements Recommendation 26. The subsection replaces the somewhat unclear and unsatisfactory rules described at paragraphs 2.136 to 2.140. The principal defect of the existing law is that an agreement may have binding contractual effect on the debtor and may not be variable if his circumstances change for the worse.

Subsection (3)

Under the present law, if the parties to a marriage have voluntarily agreed to live apart, either party may call upon the other to return (provided there is no circumstance justifying non-adherence). No change is proposed in this rule. Accordingly, the same defence—that the defender is making a genuine and reasonable offer to support the alimentary creditor in his home—should be available to the defender in an action to enforce an agreement as it is proposed should be available in an action for aliment.

Subsection (4)

This subsection is inserted, as otherwise there would be uncertainty as to the grounds of jurisdiction in an action brought under subsection (2): such an action would probably not be regarded as an "action for aliment" (see Sheriff Courts Act (Scotland) 1907, section 5(2), as it would be amended by Schedule 1; and paragraph 2.142).

Subsection (5)

The above provisions are applied to a binding unilateral voluntary obligation, such as a bond of annuity by a husband in favour of his separated wife.

Financial provision on divorce, etc.

Orders for financial provision.

8.—(1) In an action for divorce, either party to the marriage may apply to the court for any one or more of the following orders—

(*a*) an order for the payment of a capital sum or the transfer of property to him by the other party to the marriage;

(*b*) an order for the making of a periodical allowance to him by the other party to the marriage;

(*c*) an incidental order.

(2) Subject to sections 10 to 15 below, where an application has been made under subsection (1) above for an order, the court shall make such order, if any, as is—

(*a*) justified by the principles set out in section 9 below; and

(*b*) reasonable having regard to the resources of the parties.

An order made under this subsection is in this Act referred to as "an order for financial provision".

Clause 8

This clause implements Recommendations 30 and 31 (see paragraphs 3.34 and 3.64).

Subsection (1)

This subsection preserves the right of either party (introduced by section 5 of the Divorce (Scotland) Act 1976) to apply for financial provision, irrespective of that party's contribution to the breakdown of the marriage. The subsection briefly describes the type of order which the court may make: these orders are explained in more detail in clauses 12 to 14. At present (with one minor exception, discussed under clause 14(2)(*h*)) the court's power is confined to making an order for the payment of a capital sum or a periodical allowance. Any order—including an incidental order—comes under the general designation of "an order for financial provision" (see subsection (2)). The term "periodical allowance" is retained in this context, and is to be contrasted with the use of the term "periodical payments" in the context of aliment (see clause 3(1)(*a*)). The court's power is not restricted to making only one of the orders described in paragraphs (*a*), (*b*) and (*c*)—an order for financial provision may take the form of a combination of a capital sum, transfer of property, periodical allowance and incidental order—nor does the Bill stipulate that a claim under any particular principle set out in clause 9 must be satisfied in a particular form (although the court is directed by clause 13(1) below not to make an order for a periodical allowance unless it is satisfied that an order for payment of a capital sum or for transfer of property would be inappropriate or insufficient).

Subsection (2)

This subsection sets out two criteria which must be satisfied before the court may make an order for financial provision. First, a claim must be justified by one of the principles contained in clause 9 and elaborated in clauses 10 and 11; the present law contains no such principles, depending entirely on the exercise of judicial discretion (Divorce (Scotland) Act 1976, section 5). Second, the total amount of the claim arrived at must be reasonable having regard to the resources of the parties. Paragraph (*b*) deliberately does not refer to the "needs" of either party: it is intended simply to ensure that the court does not feel obliged to make an award which is economically unrealistic, particularly in the light of the payer's resources. It may, however, take into account the prospect that the payer's resources may increase in the future (see the definition of "resources" in clause 24(1)).

Principles to be applied.

9.—(1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are—

(*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.

Clause 9

This clause describes briefly the principles which are to apply to an award of financial provision. It partly implements Recommendations 32 to 36.

Subsection (1)

Paragraph (*a*), along with clause 10, implements Recommendation 32. This principle is concerned not with the division of specific items of property, but with the assessment of the net value of the matrimonial property (see paragraph 3.65). The court's power is not restricted to ordering the transfer of matrimonial property; it may order the satisfaction of an order for financial provision out of any funds or assets, even if they do not fall within the definition of "the matrimonial property" (in clause 10(3) below).

Paragraph (*b*), along with subsection (2) and clause 11(2), implements Recommendation 33. This principle is to be applied where a share of the value of the matrimonial property would not be sufficient recognition of contributions and economic disadvantages (see paragraph 3.91 and clause 11(2)). It would, therefore, be particularly relevant where there was no matrimonial property or where it was of little value. Irrespective of which party applies for financial provision under this principle, there may well be relevant contributions made and economic disadvantages sustained by both parties, and the court is directed by clause 11(2) to take this into account (see paragraph 3.96). The word "otherwise" at the end of clause 11(2)(*b*) includes the application of the principles set out in paragraphs (*c*) to (*e*) of clause 9(1), or any agreement on financial provision between the parties. Subsection (2) defines "contributions" so as to include indirect and non-financial contributions. This principle is not, therefore, restricted to the case where a wife has contributed directly to the joint income of the parties during the marriage, for example by seeking employment herself or by assisting her husband in his business. In appropriate circumstances contributions made and economic disadvantages sustained before the marriage may be taken into account. This is to make suitable allowance for the exceptional circumstances which arose, for example, in the case of *Kokosinski* v. *Kokosinski* [1980] 1 All E.R. 1106 (see paragraph 3.98). The reference to marriage in this principle makes clear that there must at some stage be a marriage before a relevant claim for financial provision under this head may be made. This principle is looking to past, not future, contributions and disadvantages (see paragraph 3.97): it therefore omits such factors as the needs and resources of the parties.

Paragraph (*c*), along with subsection (2) and clause 11(3), implements Recommendation 34. This principle is distinct from a claim for aliment by or on behalf of a child, but the court is directed to have regard to any decree for aliment or arrangement made by the parties themselves for the child's aliment (see clause 11(3)(*a*)). The principle recognises that the burden of caring for young children will usually affect a spouse's expenses or earning capacity. The Bill does not attempt to specify when loss of earning capacity is the result of a need to care for a dependent child rather than of a voluntary decision not to work (see paragraph 3.102): this is left to depend on the circumstances of the case. This principle will not necessarily be satisfied by the award of a periodical allowance: it may, for example, be satisfied by an incidental order regulating the occupation of the matrimonial home (see factor (*c*) in clause 11(3), and clause 14(2)(*d*)). In this, as in the two succeeding principles, the needs and resources of the parties are specified, as these principles look towards the future rather than towards the past. A "child of the marriage" means a dependent child under 16 (see subsection (2)), including a child accepted by both parties as a child of the family. The age of 16 is selected *inter alia* because that is the age at which a decree awarding custody ceases to have effect (see paragraph 3.104). A similar exclusion from the definition of "accepted" children to that contained in clause 1 is made in respect of boarded-out children.

Paragraph (*d*), along with clause 11(4), implements Recommendation 35. The maximum period of three years is regarded as sufficient to provide for any necessary adjustment to independence after divorce. The period is to run from the date of decree of divorce, even where the award is made after decree of divorce in terms of clause 12(1)(*b*) or clause 13(2)(*b*) or (*c*). An award under this principle need not necessarily take the form of a periodical allowance, and indeed the court is directed by clause

(2) In subsection (1)(*b*) above, "contributions" means contributions made whether before or during the marriage and includes indirect and non-financial contributions and, in particular, any such contribution made by virtue of looking after the family home or caring for the family, and "disadvantages" means disadvantages sustained whether before or during the marriage; and in subsection (1)(*c*) above, "child of the marriage" means a child under the age of 16 years who is a child of the marriage or who is a child, other than a child boarded out by a public or local authority or a voluntary organisation, who has been accepted by both parties as a child of the family.

13(1) not to make an order for a periodical allowance unless it is satisfied that an order for payment of a capital sum or a transfer of property would be inappropriate or insufficient. The needs and resources of the parties are here specified, as this principle looks towards the future rather than towards the past (cf. paragraphs (*c*) and (*e*)).

Paragraph (*e*), along with clause 11(5), implements Recommendation 36. The previous four principles would not always ensure that a spouse who suffered severe financial hardship as a result of the divorce could recover some financial provision in appropriate cases (see paragraph 3.110). The term "grave financial hardship" indicates that an award under this principle should be the exception rather than the rule; it is the term used in section 1(5) of the Divorce (Scotland) Act 1976 as a ground for the refusal of decree of divorce in an action founded on five years' non-cohabitation. An award under this principle need not take the form of a periodical allowance (see clause 13(1))—a suitable alternative in many cases may be a capital sum payable by instalments under clause 12(3). If a periodical allowance is awarded, it need not be for an indefinite period (or until the pursuer dies or remarries—see clause 13(6)(*b*)). The principle excludes the possibility of an award on the ground of supervening hardship (see paragraph 3.110): only hardship which, at the time of divorce, seems likely to arise as a result of the divorce, can be taken into account. As with the two previous principles, the needs and resources of the parties are specified, as this principle looks towards the future rather than towards the past.

Sharing of value of matrimonial property.

10.—(1) In applying the principle set out in section 9(1)(*a*) above, the net value of the matrimonial property shall be taken to be shared fairly between the parties to the marriage when it is shared equally or in such other proportions as are justified by special circumstances.

(2) The net value of the matrimonial property shall be the value of the property at the date on which the parties ceased to cohabit or, where the parties have not ceased to cohabit at the date of service of the summons in the action for divorce, at that date, in either case after deduction of any debts incurred by the parties or either of them—

(*a*) before the marriage so far as they relate to the matrimonial property, and

(*b*) during the marriage,

which are outstanding at the date to which this subsection refers.

(3) Subject to the following provisions of this section, "the matrimonial property" shall mean all the property belonging to the parties or either of them at the date to which subsection (2) above refers which was acquired by them or him (otherwise than by way of gift or succession from a third party)—

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

(*b*) during the marriage but before the date to which subsection (2) above refers.

(4) The proportion of any rights or interests of either party under a life policy or occupational pension scheme or similar arrangement referable to the period to which subsection (3)(*b*) above refers shall be taken to form part of the matrimonial property.

Clause 10

This clause implements the detailed proposals on sharing of the value of the matrimonial property contained in Recommendation 32.

Subsection (1)

This subsection states the normal rule that the net value of the matrimonial property should be shared equally. The Report rejects (at paragraph 3.67) any other division as the normal rule: there is, for example, no valid analogy with the law of succession. The subsection preserves, however, the power of the court to depart from the norm of equal sharing where special circumstances so warrant (see subsection (5)).

Subsections (2) *and* (6)

These subsections provide that the net value of the matrimonial property is to be ascertained at the date when the parties ceased to cohabit. The expression "cohabit" is defined in clause 24(3). The definition is the same as that in section 13(2) of the Divorce (Scotland) Act 1976—the parties to a marriage shall be held to cohabit with one another only when they are in fact living together as man and wife. It would be possible for the parties to have ceased to cohabit as man and wife even if they continued to live physically under the same roof. The date of final separation is selected as being the date when the marriage partnership comes to an end (see paragraph 3.87), any acquisitions or losses after that date being regarded as irrelevant. Subsection (6) covers the case where there has been a long separation (i.e. of 90 days or more) and the separated parties resume cohabitation for a short time, perhaps in an unsuccessful attempt at reconciliation. The effect is that a short resumption of cohabitation will not postpone the date of final separation. If the parties are still cohabiting at the date of raising the divorce action, that date is taken as the date of final separation (see paragraph 3.90).

Subsection (3)

This subsection defines "the matrimonial property" (see paragraphs 3.69 to 3.72). With one exception the matrimonial property is to exclude property acquired before the date of the marriage. The exception is where property was acquired before the marriage for use as a family home or as furniture or plenishings therein. Thus a house acquired and occupied by one party before marriage would not necessarily be regarded as matrimonial property simply because the parties happened to live in it after their marriage. Similarly, property acquired by gift or succession during the marriage is not to be regarded as matrimonial property. The definition does not in terms exclude property acquired during the marriage from funds or assets which belonged to one or other of the parties before the marriage. The problems inherent in tracing property owned at the date of final separation to funds or assets owned by either party before the marriage make it undesirable to introduce this factor into the definition itself. However, it is open to either party to adduce evidence of the source of the funds or assets as a special factor justifying departure from the norm of equal sharing (see subsection (5)(*b*)).

Subsection (4)

Rights under life policies, pension funds and similar arrangements are often built up over many years. This subsection makes it clear that the proportion referable to the period from the marriage to the final separation is to be regarded as matrimonial property and subject to the same rules as any other item of matrimonial property (see paragraph 3.73). The value of a life policy at the date of final separation will often be the surrender value, but a party would not be precluded from leading evidence that a higher value is appropriate in the circumstances—for example, where a policy has only a short time to run, the discounted maturity value may be more realistic (see paragraph 3.76).

(5) In subsection (1) above, "special circumstances" shall, if the court thinks fit, include—

(*a*) the terms of any agreement between the parties on the ownership or division of any of the matrimonial property;

(*b*) the source of the funds or assets used to acquire any of the matrimonial property where those funds or assets were not derived from the income or efforts of the parties during the marriage;

(*c*) any destruction, dissipation or alienation of any of the matrimonial property by either party;

(*d*) the nature of the property, the use made of it (including use for business purposes or as a matrimonial home) and the extent to which it is reasonable to expect it to be realised or divided or used as security;

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

(6) For the purposes of subsection (2) above no account shall be taken of any cessation of cohabitation where the parties thereafter resumed cohabitation, except where the parties ceased to cohabit for a continuous period of 90 days or more before resuming cohabitation for a period or periods of less than 90 days in all.

Subsection (5)

This subsection lists some of the special circumstances which may justify a departure from the norm of equal sharing. This list is not exhaustive, and the court is not obliged to depart from the norm.

Paragraph (*a*) specifically enables the court to have regard to the terms of an agreement between the parties on the ownership or division of matrimonial property (see paragraph 3.78): the terms in which title to property was taken would not, in themselves, necessarily constitute an agreement.

Paragraph (*b*) covers, among other cases, the case where property bought after the marriage is derived from funds or assets owned by one party at the time of the marriage (see note to subsection (3)).

Paragraph (*c*) should be read with clause 11(7) which enables conduct to be taken into account when it has affected the economic basis of the claim for financial provision (see paragraph 3.80).

Paragraph (*d*) directs the court's attention to the nature of the property and the use made of it. The court may, for example, wish to depart from a strictly equal division if the property could not reasonably be used as a source of money for payment of a capital sum—e.g. a business or a farm (see paragraph 3.81), or where it is desirable to retain a home for the children of the marriage (see paragraph 3.82).

Paragraph (*e*) directs attention to the important question of liability for valuation and conveyancing expenses in connection with property redistribution on divorce (see paragraph 3.84). If these are to be borne by one party alone that may be taken into account in dividing the value of the property. This paragraph should be read with clause 22, which abolishes the rule that the expenses of a wife in a divorce action are necessaries for which her husband is liable.

Factors to be taken into account.

11.—(1) In applying the principles set out in section 9(1) above, the following provisions of this section shall have effect.

(2) For the purposes of section 9(1)(*b*) above, the court shall have regard to the extent to which—

(*a*) contributions by, or economic disadvantages sustained by, either party have been balanced by contributions by, or economic disadvantages sustained by, the other party, and

(*b*) any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property or otherwise.

(3) For the purposes of section 9(1)(*c*) above, the court shall have regard to—

(*a*) any decree or arrangement for aliment for the child;

(*b*) any expenditure or loss of earning capacity caused by the need to care for the child;

(*c*) the need to provide suitable accommodation for the child;

(*d*) the age and health of the child;

(*e*) the educational, financial and other circumstances of the child;

(*f*) the availability and cost of suitable child-care facilities or services;

(*g*) the needs and resources of the parties; and

(*h*) all the other circumstances of the case.

(4) For the purposes of section 9(1)(*d*) above, the court shall have regard to—

(*a*) the age, health and earning capacity of the party who is claiming the financial provision;

(*b*) the duration and extent of the dependence of that party prior to divorce;

(*c*) any intention of that party to undertake a course of education or training;

(*d*) the needs and resources of the parties; and

(*e*) all the other circumstances of the case.

(5) For the purposes of section 9(1)(*e*) above, the court shall have regard to—

(*a*) the age, health and earning capacity of the party who is claiming the financial provision;

(*b*) the duration of the marriage;

(*c*) the standard of living of the parties during the marriage;

(*d*) the needs and resources of the parties; and

(*e*) all the other circumstances of the case.

Clause 11

Subsections (2) *to* (5)

For notes on these subsections, see the appropriate heading under clause 9.

(6) In having regard under subsections (3) to (5) above to all the other circumstances of the case, the court may, if it thinks fit, take account of the responsibilities of the party who is to make the financial provision towards any dependent member of his household whether or not that member is a person to whom that party owes an obligation of aliment.

(7) The court shall not take account of the conduct of either party except where—

(*a*) that conduct has affected the economic basis of the claim for financial provision; or

(*b*) in relation to section 9(1)(*d*) or (*e*) above, it would be manifestly inequitable to leave that conduct out of account.

Subsection (6)

See note to clause 4 (subsections (1) and (3)).

Subsection (7)

This subsection implements Recommendation 44. It states the extent to which conduct should be taken into account, if at all, in the assessment of a claim for financial provision. The approach of the Report is to examine the role of conduct separately in relation to each governing principle (see paragraph 3.178). Thus in general a distinction is drawn between those principles which seek to recognise what has been or will be "earned"—e.g. a share of the value of the matrimonial property, or a claim based on contributions made and economic disadvantages sustained during the marriage—and those which are based on the relief of short- or long-term difficulty or hardship. In the former case conduct is to be relevant only if it has affected the economic basis of the claim. Thus an extreme form of misconduct which would justify reduction of a party's share in the value of the matrimonial property would be destruction, dissipation or alienation of property (see clause 10(5)(*c*)); although other forms of conduct affecting the value of the matrimonial property might also be relevant (see paragraph 3.179). The role of conduct is implicit in the principle that there should be due recognition of contributions made or economic disadvantages sustained. A similar approach is adopted towards the principle of fair sharing of the economic burden of child-care, where the responsibility of either party for the breakdown of the marriage is irrelevant (see paragraph 3.183): the justification for an award under this head is the assumption of the future care of a child of the marriage. In regard to the remaining principles, the test is the same as that proposed for aliment (see clause 4(3)(*b*)).

Orders for payment of capital sum or transfer of property.

12.—(1) The court may under section 8(2) above make an order for payment of a capital sum or transfer of property in an action for divorce—

(*a*) on granting decree of divorce; or

(*b*) within such period as the court on granting decree of divorce may specify.

(2) The court, on making an order under subsection (1) above, may stipulate that it shall come into effect at a specified future date.

(3) The court, on making an order for payment of a capital sum, may order that the capital sum shall be payable by instalments.

(4) Where an order under subsection (1) above has been made, the court may, on an application by either party to the marriage on a change of circumstances, vary the date or method of payment of the capital sum or the date of transfer of property.

(5) In this section, "property" shall include a tenancy other than a tenancy transferable under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

Clause 12

This clause implements Recommendation 38. While the purpose of the Bill is that the powers of the court should be as wide and as flexible as possible, it is proposed that an order for financial provision would, wherever possible, be fulfilled primarily by an order under this clause (see especially clause 13(1) and (3)). For the purposes of this clause, capital sum and transfer of property are not defined.

Subsection (1)

This subsection impliedly retains the principle of the present law that an application for payment of a capital sum must be made before decree of divorce is granted (see section 5 of the Divorce (Scotland) Act 1976), and extends the principle to orders for the transfer of property (see paragraph 3.116). Along with clause 13(2)(*b*) it changes the present law by permitting the court to make an order for financial provision not only *on* granting decree of divorce but also within such time *after* granting decree as the court may allow at the time of the divorce. Where it wishes to exercise its powers after decree the court will be able to grant decree of divorce and continue the action for a specified time to allow financial provision to be dealt with. At present an order for payment of a capital sum can be made only on granting decree of divorce.

Subsections (2) *and* (3)

These subsections expressly widen the court's powers to cover the case where assets may not be immediately available or realisable. Subsection (2) might, for example, be particularly appropriate if a husband is due to receive a lump sum under an occupational pension scheme at an ascertainable future date. These subsections will also enable the court the more easily to apply clause 13(1).

Subsection (4)

This subsection specifies the only circumstances in which an order under this clause may be varied. The court is not empowered to alter, in the future, the amount of liability already fixed under this clause. If, however, the circumstances of either party have changed, the court may accelerate or defer payment or transfer, especially where the original order had provided for payments by instalments (see subsection (3)) and the payer had subsequently acquired funds which would enable him to discharge his liability, either immediately or in fewer instalments (see paragraph 3.119). It follows from the terms of this subsection that the death or remarriage of either party does not affect the amount of liability, though the death of the payer will usually constitute a change of circumstances which would enable the court to vary the date or method of payment or transfer (cf. clause 13(6)(*a*)).

Subsection (5)

The Matrimonial Homes (Family Protection) (Scotland) Bill will give the courts power to order the transfer of a tenancy of the matrimonial home in granting decree of divorce or nullity of marriage (clause 13(2)). In this Bill, therefore, it is proposed only to refer to other tenancies, although if the proposal is accepted that the court should be able to make an order for transfer of property after granting decree of divorce (see subsection (1)(*b*)), clause 13(2) of the Matrimonial Homes (Family Protection) (Scotland) Bill will require a slight consequential amendment. Because that Bill has not yet received the Royal Assent, the various references to it in these clauses should be regarded as provisional (see also clauses 14(4) and 15(1)).

Orders for periodical allowance.

13.—(1) The court shall not under subsection (2) of section 8 above make an order for a periodical allowance in an action for divorce unless it is satisfied that an order for payment of a capital sum or for transfer of property under that section would be inappropriate or insufficient to satisfy the requirements of that subsection.

(2) The court may under section 8(2) above make an order for a periodical allowance in an action for divorce—

(*a*) on granting decree of divorce;

(*b*) within such period as the court on granting decree of divorce may specify; or

(*c*) after decree of divorce where—

(i) no such order has been made previously;

(ii) application for the order has been made after the date of decree; and

(iii) since the date of decree there has been a change of circumstances.

(3) An order for a periodical allowance in an action for divorce shall not be made so as to subsist for a period of more than three years from the date of decree of divorce except where, in applying the principle set out in section 9(1)(*c*) or (*e*) above, the court thinks it proper to provide that such order shall subsist for a longer period.

(4) Where an order for a periodical allowance has been made in an action for divorce and since the date of the order there has been a change of circumstances, the court shall, on an application by or on behalf of either party to the marriage, have power by subsequent order—

(*a*) to vary or recall the order for a periodical allowance;

(*b*) to backdate such variation or recall to the date of the application therefor or, on cause shown, to an earlier date;

(*c*) to convert the order into an order for payment of a capital sum or for a transfer of property.

(5) Where the court backdates an order under subsection (4)(*b*) above, the court may order any sums paid by way of periodical allowance to be repaid.

Clause 13

This clause implements Recommendation 39.

Subsections (1) *and* (3)

These subsections are among several provisions in the Bill which aim, wherever possible, at a final financial settlement between the parties at or shortly after the granting of decree of divorce (see subsection (2)(*a*) and (*b*)). The subsections are designed, *inter alia,* to reduce the need for subsequent applications to the court where the circumstances of one of the parties change (see paragraph 3.121), or where inflation reduces the value of the original award of a periodical allowance. The subsections do not, however, seek to specify cases where a capital sum or property transfer would be inappropriate or insufficient (see paragraph 3.122). Subsection (3) preserves the power of the court to make an order for a periodical allowance for a longer period than three years where the applicant has the care of the children of the marriage or is likely, at the time of the divorce, to suffer grave financial hardship as a result of the divorce.

Subsection (2)

For paragraph (*b*) see the note on clause 12(1)(*b*).

Paragraph (*c*) deals only with the case where no previous order has been made: it does not cover variation or recall of an order for financial provision, which is dealt with in subsection (4). The paragraph makes no change in substance to section 5(3) of the Divorce (Scotland) Act 1976, but restates it in a different form. An application subsequent to divorce is only competent on a change of circumstances (see paragraph 3.125).

Subsections (4) *and* (5)

Subsection (4) restates the present law in providing that an application for variation or recall is competent on a change of circumstances. The subsections propose to confer two new powers on the court. The first (subsection (4)(*c*)) empowers the court to convert an order for payment of a periodical allowance into an order for payment of a capital sum or for a transfer of property. This would be especially useful on the payer's death, especially as subsection (6) provides that a periodical allowance should not be automatically terminated on such an event. The second (subsection (5)), in consonance with the provisions relating to variation or recall of a decree for aliment (see clauses 3 and 5), empowers the court to backdate the variation or recall and to order repayment of sums paid (see paragraph 3.125).

(6) An order for a periodical allowance in an action for divorce—

(*a*) shall, if subsisting at the death of the party making the payment, continue to operate against that party's estate, but without prejudice to the making of an order under subsection (4) above;

(*b*) shall cease to have effect on the remarriage or death of the party receiving the payment, except in relation to any arrears due under it.

Subsection (6)

This subsection preserves two principles of the present law (see Divorce (Scotland) Act 1976, section 5 and paragraph 3.126). The concluding words of paragraph (*a*) make clear that the death of the payer is a change of circumstances justifying the exercise of the power set out in subsection (4).

Incidental orders.

14.—(1) In an action for divorce, an incidental order under section 8(2) above may be made before, on or after the granting of decree of divorce.

(2) An incidental order means one or more of the following orders—

(*a*) an order for the sale of property;

(*b*) an order for the valuation of property;

(*c*) an order determining any dispute between the parties to the marriage as to their respective property rights by means of a declarator thereof or otherwise;

(*d*) an order regulating the occupation of the matrimonial home or the use of furniture and plenishings therein;

(*e*) an order regulating liability, as between the parties, for outgoings in respect of the matrimonial home or of furniture and plenishings therein;

(*f*) an order that security shall be given for any financial provision;

(*g*) an order that payments shall be made or property transferred to any curator bonis or trustee or other person for the benefit of the party to the marriage by whom or on whose behalf application has been made under section 8(1) above for an incidental order;

(*h*) an order setting aside or varying any term in an antenuptial or postnuptial marriage settlement;

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

(*k*) any other order which is necessary or expedient to give effect to the principles set out in section 9(1) above or to any order made under section 8(2) above.

(3) Where an incidental order has been made in an action for divorce, the court shall have power by subsequent order on cause shown to vary or recall the order.

Clause 14

This clause, which confers incidental powers on the courts, implements Recommendation 40 (except for item (x) of paragraph (*a*), which is implemented by clause 20).

Subsections (1) *and* (3)

These subsections confer a wide discretion on the courts as to when an incidental order may be made, varied or recalled, subject to any restriction which may be made by rules of court (see subsection (6)). The power to make an incidental order after the granting of the original order for financial provision will be of greatest practical importance in relation to the regulation of the occupation of the matrimonial home (see subsection (2)(*d*)). Subsection (3) permits variation or recall on cause shown, rather than on a change of circumstances (cf. clause 12(4) and 13(4)), because incidental orders may take various forms and may require to be varied in diverse circumstances.

Subsection (2)

The incidental powers listed in this subsection are not at present enjoyed by the courts, except for paragraphs (*g*) and (*h*).

Paragraph (*c*) will make it unnecessary to raise separate proceedings in order to resolve disputes over the ownership of property (see paragraph 3.131).

Paragraph (*d*), and subsection (4), use the term "matrimonial home", rather than "family home" (cf. clause 10(3)(*a*)), because of the connection with the Matrimonial Homes (Family Protection) (Scotland) Bill. Substantially the same definition of "matrimonial home" appears in both Bills (see clause 24).

Paragraph (*f*) is phrased in very general terms: in practice, the payer will usually be required to grant a standard security over a house or to convey property to trustees (see paragraph 3.135).

Paragraph (*g*) will be of use in cases where, for example, the applicant is mentally ill (cf. section 5(1) of the Divorce (Scotland) Act 1976, which enables payments to be made to the applicant "or for his benefit"). Rules of court already provide for the appointment of a curator *ad litem* to represent the defender's interests in such a case and this paragraph will ensure that the court can order payments to be made to a curator bonis or trustee or other person for the benefit of the applicant (see paragraph 3.136).

Paragraph (*h*) restates in slightly different terms the present power contained in section 5(1)(*c*) of the Divorce (Scotland) Act 1976, which is rarely used. The words "an antenuptial or postnuptial marriage settlement" are used in order to distinguish such a settlement from an agreement on financial provision (see clause 16) where the court's power to vary is more restricted. The Bill contains no definition of marriage settlement except for the inclusion of a settlement by way of a policy of assurance under section 2 of the Married Women's Policies of Assurance (Scotland) Act 1880 (see subsection (5)). The power to vary cannot be used to deprive children of their rights under marriage contracts, because the rights of third parties are protected by clause 15 (see paragraph 3.137).

Paragraph (*j*) should be useful in cases where one spouse has enjoyed, or will enjoy, the sole use of property in which the other has an interest (see paragraph 3.139).

Paragraph (*k*) is intended to give the courts wide powers to make other incidental orders. These might include, for example, orders remitting a matter to a conveyancer, or directing a clerk of court to execute a deed, or authorising a messenger-at-arms to take possession of, and deliver, corporeal moveables, or attaching conditions to any other order for financial provision (see paragraph 3.141).

(4) So long as an order under subsection (2)(*d*) above granting a party to a marriage the right to occupy a matrimonial home or the right to use furniture and plenishings therein remains in force then—

(*a*) section 2(1), (2), (5)(*a*) and (9) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, and

(*b*) subject to section 15(3) below, sections 6(1), (2) and (3)(*a*) and (*e*), 8, 11 and 12 of the said Act of 1981 and sections 31A and 76A of the Bankruptcy (Scotland) Act 1913

1913 c.20.

shall, except to the extent that the order otherwise provides, apply in relation to the order—

(i) as if the marriage still subsisted;

(ii) as if that party were a non-entitled spouse and the other party were an entitled spouse within the meaning of section 1(1) or 6(2) of the said Act of 1981 as the case may require;

(iii) as if any reference to occupancy rights in any of the provisions set out in paragraph (*a*) or (*b*) above were a reference to the right to occupy a matrimonial home under the order;

(iv) as if, in section 11 of the said Act of 1981, after the words "section 3(3) or (4) of this Act" there were inserted the words "or under the Family Law (Financial Provision) (Scotland) Act 1981"; and

(v) with any other necessary modifications.

(5) In subsection (2)(*h*) above, "settlement" includes a settlement by way of a policy of assurance to which section 2 of the Married Women's Policies of Assurance (Scotland) Act 1880 relates.

1880 c.26.

(6) Notwithstanding subsection (1) above, the Court of Session may make rules restricting the categories of incidental order which may be made under section 8(2) above before the granting of decree of divorce.

Subsection (4)

This subsection implements Recommendations 40(*d*) and 43(*f*). The relevant subsections of clause 2 of the Matrimonial Homes (Family Protection) (Scotland) Bill confer certain subsidiary rights on a party to the marriage who is granted the right to occupy a matrimonial home or to use furniture belonging to the other party—e.g. to effect essential repairs or to make any essential payments such as rent, rates or repayment of loan instalments. The position where one party is granted a right to occupy the matrimonial home after divorce under this Bill is essentially the same as that where a spouse has occupancy rights during marriage, and this subsection therefore applies the same solutions to the various practical problems which may arise (see paragraph 3.145). The subsection also ensures that any rights of occupation in the matrimonial home and rights to use furniture and plenishings therein conferred by the court on a divorced spouse enjoy the same protection against adverse dealings and other arrangements (such as contrived sequestrations or other contrived diligences) as occupancy rights conferred by statute on a married spouse (see paragraph 3.169).

Subsection (6)

This subsection implements Recommendation 40(*b*) (see paragraph 3.143).

Rights of third parties.

15.—(1) The court shall not make an order under section 8(2) above for the transfer of property or of a tenancy (other than a tenancy transferable under the Matrimonial Homes (Family Protection) (Scotland) Act 1981) if the consent of a third party which is necessary under any obligation, enactment or rule of law is not obtained.

(2) The court shall not make an order under section 8(2) above for the transfer of property subject to a security without the consent of the creditor unless he has been given an opportunity of being heard by the court.

(3) Neither an incidental order, nor any rights conferred by such an order, shall prejudice any rights of any third party insofar as those rights existed immediately before the making of the order.

Clause 15

Subsection (1)

This subsection implements Recommendation 43(*c*).

Subsection (2)

This subsection implements Recommendation 43(*d*). It does not provide an exception to the rule in subsection (1)—in all cases where the consent of a third party must, for whatever reason, be obtained, the court has no power to make an order unless that consent is given. Where, however, the consent of a secured creditor is not required he is still to be given an opportunity to be heard. The subsection is not confined to heritable property, although its main application in practice will be in that area.

Subsection (3)

This subsection implements Recommendation 43(*e*). Thus an order giving a wife the right to occupy a home belonging to her former husband does not affect the rights of a building society or other heritable creditor having a right in security over the house.

Agreements on financial provision.

16.—(1) Where the parties to a marriage have entered into an agreement as to financial provision to be made on divorce, the court may make an order setting aside or varying any term of the agreement—

(*a*) where the term relates to a periodical allowance and the agreement expressly provides for the subsequent setting aside or variation by the court of that term; or

(*b*) where the agreement or any term of it was not fair and reasonable at the time the agreement was entered into.

(2) The court may make an order—

(*a*) under subsection (1)(*a*) above at any time after granting decree of divorce; and

(*b*) under subsection (1)(*b*) above on granting decree of divorce or within such time thereafter as the court may specify on granting decree of divorce.

(3) Any term of an agreement purporting to exclude the right to apply for an order under subsection (1)(*b*) above shall be void.

(4) In this section, "agreement" means an agreement entered into before or after the commencement of this Act.

Financial provision on declarator of nullity of marriage.

17. The provisions of this Act shall apply to actions for declarator of nullity of marriage as they apply to actions for divorce; and in this Act, unless the context otherwise requires, "action for divorce" includes an action for declarator of nullity of marriage and, in relation to such an action, "decree" and "divorce" shall be construed accordingly.

Clause 16

This clause implements Recommendation 46. It seeks to strike a balance between encouraging the parties to reach an agreement without recourse to the courts, while at the same time introducing an appropriate degree of judicial control over agreements. It makes no change in the existing rule that it is not necessary to refer agreements on financial provision to the court for approval.

Subsection (1)

Paragraph (*a*) does not permit the court to vary a term relating to the amount of a capital sum or to the transfer of any property. It is not thought, however, that an agreement would ever in practice provide expressly for variation of such a term.

Paragraph (*b*) introduces the "fair and reasonable" test which is applied to contracts for the supply of goods and services by the Unfair Contract Terms Act 1977 (cf. clause 7). The time selected for determining whether a provision in an agreement was fair and reasonable is the same as that contained in the 1977 Act—the time when the agreement was entered into. Unlike the 1977 Act, the Bill does not suggest any relevant factors for applying the test, although the Report identifies (at paragraph 3.199) such factors as the strength of the bargaining position of the parties relative to each other; whether a party was induced to accept the agreement by threats or other unfair means; whether material facts were withheld by one party from the other; and whether the parties were legally represented. The subsection is without prejudice to the rights of the parties to challenge the agreement on any other ground, such as error, fraud, force and fear. The right to apply to the court for an order under this paragraph cannot be excluded by contract (see subsection (3)).

Subsection (2)(*b*)

The power to set aside or vary a term of an agreement on the ground that it was not fair and reasonable can be exercised only at the time of the divorce (i.e. on granting decree or within such time as may have been specified by the court on granting decree). To allow agreements to be set aside on this ground at any time after the divorce would introduce too much uncertainty (see paragraph 3.197).

Clause 17

Clause 17 implements Recommendation 47. It extends the regime of financial provision on divorce to decrees of declarator of nullity. At present the courts, when granting such a decree, have no power to order financial provision of any kind to either party (see paragraph 3.201). No distinction is drawn between void and voidable marriages (see paragraph 3.202).

Supplemental

Orders relating to avoidance transactions.

18.—(1) Where a claim has been made (whether before or after the commencement of this Act), being—

(*a*) an action for aliment,

(*b*) an application for an order for financial provision, or

(*c*) an application for variation or recall of a decree in such an action or of an order for financial provision,

the party making the claim may, at any time before the expiry of a period of one year from the disposal of the said claim, apply to the court for an order—

(i) setting aside or varying any transfer of, or transaction involving, property effected by the other party at any time after the date occurring five years before the making of the said claim; or

(ii) interdicting the other party from effecting any such transfer or transaction.

(2) On an application for an order under subsection (1) above, the court may make the order or such other order as it thinks fit if it is shown to its satisfaction that the transfer or transaction had the effect of, or is likely to have the effect of, defeating in whole or in part any claim referred to in subsection (1) above:

Provided that an order under this subsection shall not prejudice any rights of a third party in or to the property who has in good faith acquired it or any of it or any rights in relation to it for value, or who derives title to such property or rights from any person who has done so.

(3) Where the court makes an order under this section, it may include in the order such terms and conditions as it thinks fit and, where it is necessary to ensure that the order is effective, may make any incidental order.

Clause 18

This clause implements Recommendation 18 (*quoad* aliment) and Recommendations 41 and 43(*a*) (*quoad* divorce). It restates, with certain modifications, section 6 of the Divorce (Scotland) Act 1976. These modifications are as follows:

(i) The scope of subsection (1) is broadened to include all actions for aliment, not merely actions for aliment between husband and wife, although the most important area of application will continue to be financial claims between spouses.

(ii) Transactions effected within a period of five years before the claim, instead of three years as at present, are open to challenge (subsection (1), paragraph (i)). This change is made to protect spouses who may be divorced against their will on the basis of five years' non-cohabitation (Divorce (Scotland) Act 1976, section 1(2)(*e*)—see paragraph 3.148).

(iii) The clause speaks of "setting aside" rather than "reducing" a transaction (subsection (1), paragraph (i)), because it has been suggested that the phrase "reducing or varying" in the present legislation is confined to written dispositions and transactions and does not extend to, say, a gift of money (see *Maclean* v. *Maclean* 1976 S.L.T. 86 and paragraph 3.149). Similarly, the wording used to denote the type of transaction to which the clause refers has been broadened from "any settlement or disposition of property", in section 6 of the 1976 Act, to "any transfer of, or transaction involving, property".

(iv) The specific reference to interdicting the other party from transferring property out of the jurisdiction has been dropped as unnecessary (subsection (1), paragraph (ii)).

(v) The reference to the intention of the transferor—"wholly or partly for the purpose of defeating in whole or in part any claim"—has been removed and replaced by a purely objective test, viz that the transfer or transaction "had the effect of, or is likely to have the effect of, defeating in whole or in part" the claim (subsection (2)—see paragraph 3.150).

(vi) The rights of a good faith third party acquirer for value, which are preserved by section 6 of the 1976 Act, are also preserved in the present clause (subsection (2)), and are extended to cases where he has not yet acquired a real right—for example where missives for the sale of heritable property have been concluded but a valid disposition has not yet been delivered.

(vii) The court is given power to include such terms and conditions as it thinks fit and to make any incidental order (subsection (3)).

The powers conferred, as under section 6 of the 1976 Act, can only be exercised by the Court of Session (see the definition of "court" in clause 24).

Inhibition and arrestment.

19.—(1) Where a claim has been made, being—

(*a*) an action for aliment, or

(*b*) an application for an order for financial provision,

the court shall have power, on cause shown, to grant warrant for inhibition or warrant for arrestment on the dependence of the action in which the claim is made and, if it thinks fit, to limit the inhibition to any particular property or to limit the arrestment to any particular property or to funds not exceeding a specified value.

(2) In this section, "the court" means the Court of Session in relation to a warrant for inhibition and the Court of Session or the sheriff, as the case may require, in relation to a warrant for arrestment on the dependence.

(3) Nothing in this section shall affect anything contained in section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (wages, pensions, etc., to be exempt from arrestment on the dependence of an action).

1966 c.19.

Clause 19

This clause implements Recommendation 42. As with the preceding clause, it applies to all actions for aliment, not merely actions for aliment between husband and wife, as well as to claims for financial provision; although the most important area of application will be to financial claims between spouses. It is unnecessary, however, to extend this clause to applications for variation or recall (cf. clause 18(1)(*c*)). The difficulties in practice which prompt this reform have been encountered mainly in actions of divorce. At present, the pursuer cannot inhibit or arrest on the dependence of the action unless he avers special circumstances, such as that the defender is verging on insolvency, or is about to decamp, although inhibition is not restricted to these two cases (see *Wilson* v. *Wilson* 1981 S.L.T. 101 and paragraph 3.152). By adopting the test of showing cause it is intended that inhibition and arrestment should be easier to obtain than hitherto, thus reducing the need for interdict, which is a remedy of last resort and will still be available as such (see clause 18(1), paragraph (ii)). A further alteration in the present law is to enable inhibition and arrestment to be restricted to specific items of property (such as the matrimonial home), or to a limited sum of money specified in the warrant (subsection (1); see paragraph 3.154).

Subsection (2)

Subsection (2) reflects the present law, whereby only the Court of Session has jursidiction in relation to a warrant for inhibition, and both the Court of Session and the sheriff courts have jurisdiction in relation to a warrant for arrestment on the dependence.

Provision of details of resources.

20. In an action for aliment or a consistorial action, the court may order either party to provide details of his resources or those relating to a child on whose behalf he is acting.

Award of aliment or custody where divorce or separation refused.

21. Where decree of divorce or separation is refused in a consistorial action, the court shall not, by virtue of such refusal, be prevented from making an order for aliment or an order regulating custody, education or access or an incidental order under section 14(2)(*c*) above determining any dispute between the parties as to their respective property rights.

Expenses of action.

22. The expenses incurred by a party to a marriage in pursuing or defending—

(*a*) an action for aliment brought on his own behalf by either party to the marriage against the other party,

(*b*) a consistorial action, or

(*c*) an application made after the commencement of this Act for variation or recall of—

(i) a decree of aliment granted, or

(ii) an order for financial provision made,

in an action brought before or after the commencement of this Act,

shall not be regarded as necessaries for which the other party to the marriage is liable.

Clause 20

This clause implements Recommendation 17(*e*) and the final sentence of Recommendation 24 (*quoad* aliment); and Recommendation 40(*a*)(x) (*quoad* financial provision on divorce). It applies to all actions with which the Report is concerned (the expression "consistorial action" being defined by section 19 of the Conjugal Rights (Scotland) Amendment Act 1861 to include actions of divorce, declarator of nullity of marriage, separation and adherence). It applies also to claims made in any of these actions for interim aliment, by virtue of the omission of any reference to the time at which the court may make an order. It is envisaged that the court would not make an order *ex proprio motu,* but only on the application of a party to the action. The power will be supplementary to the power to grant commission and diligence for the recovery of documents (see paragraph 2.93), which is not frequently exercised in actions of this kind.

Clause 21

This clause implements Recommendation 27. Under the present law, an order for aliment or regulating custody, education or access can be made in an action for divorce, nullity of marriage or separation, but only if the action is dismissed after proof on the merits has been allowed or decree of absolvitor granted (see paragraphs 2.144 and 2.145); the court's power cannot be exercised if the action is dismissed at an earlier stage, for example on a preliminary plea. The court's extended power is applied also to determining disputes over property rights (see paragraph 3.131).

Clause 22

This clause implements Recommendation 28. Under the present law, expenses incurred by a wife in conducting or contesting an action of divorce or other consistorial action are regarded as "necessaries" for which her husband may be liable by virtue of his alimentary obligation towards her (see paragraph 2.146). The clause abolishes this rule and replaces it, in effect, with the wide discretion which the court already enjoys in awarding expenses in other actions. The term "consistorial" includes actions of divorce, nullity of marriage, separation and adherence.

Summary cause. 1963 c.22.

23. For section 3 of the Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963 there shall be substituted the following section:—

"Actions for aliment of small amount.

3.—(1) An action only for aliment under section 2 of the Family Law (Financial Provision) (Scotland) Act 1981 (whether or not expenses are also sought) may be brought before the sheriff as a summary cause if the aliment claimed in the action does not exceed—

(i) in respect of a pursuer who is over the age of 18 years, the sum of £25 per week; and

(ii) in respect of a child, the sum of £7.50 per week;

and any provision in any enactment limiting the jurisdiction of the sheriff in a summary cause by reference to any amount, or limiting the period for which a decree granted by him shall have effect, shall not apply in relation to such an action.

In this subsection, "child" means a child, including an illegitimate child, under the age of 18 years.

(2) Without prejudice to the provisions regarding jurisdiction of any other enactment, the sheriff shall also have jurisdiction in an action for aliment brought as a summary cause by virtue of subsection (1) above if—

(*a*) the pursuer resides within the jurisdiction of the sheriff, and

(*b*) the action could, by virtue of section 6 of the principal Act (which relates to jurisdiction), have been brought in the sheriff court of another sheriffdom.

(3) The Lord Advocate may by order vary the amounts prescribed in paragraphs (i) and (ii) of subsection (1) above.

(4) The power to make an order under subsection (3) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament, and shall include power to vary or revoke any order made thereunder."

Clause 23

This clause implements Recommendation 23. It extends the present statutory provision (which is restricted to actions of interim aliment—i.e. actions for aliment alone between husband and wife) to other actions in which the conclusion is for aliment alone, e.g. actions by or on behalf of children against their parents. The clause does not extend to actions incorporating a substantive conclusion over and above aliment—e.g. separation, adherence or affiliation (see paragraph 2.125). The higher figure of £25 (subsection (1), paragraph (i)) applies to claims by a child between the ages of 18 and 25 against a parent (see clause 1(4)) as well as to claims between spouses. Subsections (2), (3) and (4) restate without amendment the present statutory provisions (see Divorce (Scotland) Act 1976, section 8).

Interpretation.

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

"action" means an action brought after the commencement of this Act;

"action for aliment" includes a claim for aliment contained in other proceedings;

"aliment" does not include aliment *pendente lite* or interim aliment under section 6 above;

"caravan" means a caravan which is mobile or affixed to the land;

"the court" means—

(*a*) in relation to an action for divorce, or to an order under any provision contained in sections 8 to 18 above, the Court of Session;

(*b*) in relation to any other action or order, the Court of Session or the sheriff, as the case may require;

"decree" in an action for aliment includes a court order awarding aliment;

"family" includes a one-parent family;

"marriage", in relation to an action for declarator of nullity of marriage, means purported marriage;

"matrimonial home" means any house, caravan, houseboat or other structure which has been provided or has been made available by one or both of the parties to the marriage as, or has become, a family residence, and includes any garden or other ground or building attached to, and usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure;

"the matrimonial property" has the meaning assigned to it in section 10(3) above;

"needs" means actual and foreseeable needs;

"obligation of aliment" means an obligation to provide such support as is reasonable in the circumstances, having regard to the provisions contained in section 4 above;

Clause 24

"Action for aliment". This includes a claim for aliment made in other proceedings such as proceedings for divorce, separation, adherence, affiliation or custody. The same rules apply to all claims for aliment whether or not they are combined with claims for other remedies.

"Aliment". This term is defined to exclude interim aliment in relation to future actions, because under the Bill the court is to enjoy a restricted range of powers when awarding interim aliment (see clause 6).

"Caravan". This definition is parasitic on the definition of "matrimonial home" below.

"Obligation of aliment". This definition implements Recommendation 7 (see paragraph 2.46).

"order for financial provision" means an order under section 8(2) above but, in section 18(1) above, means an order under section 5(2) of the Divorce (Scotland) Act 1976 or under section 8(2) above;

1976 c.39.

"party to a marriage" and "party to the marriage" include a party to a marriage which has been terminated;

"resources" means actual and foreseeable resources;

"voluntary organisation" means a body, other than a public or local authority, the activities of which are not carried on for profit.

(2) Any reference in this Act to a change of circumstances shall not be taken to include a change in the law resulting from the enactment of this Act.

(3) For the purposes of this Act, the parties to a marriage shall be held to cohabit with one another only when they are in fact living together as man and wife.

"Party to a marriage", and *"party to the marriage"*. This definition is of relevance only to divorce and nullity (see generally clauses 8 to 17). The only application to aliment occurs in clause 22, where the context requires the expression "party to a marriage" to be limited to a party to a subsisting marriage: a divorced spouse is not liable for the necessary expenditure of the other divorced spouse.

Amendments, repeals and savings.

25.—(1) The enactments specified in Schedule 1 to this Act shall have effect subject to the amendments set out therein.

(2) The enactments specified in columns 1 and 2 of Schedule 2 to this Act are hereby repealed to the extent specified in column 3 of that Schedule.

1976 c.39.

(3) Nothing in subsection (2) above shall affect the operation of section 5 (orders for financial provision) of the Divorce (Scotland) Act 1976 in relation to an action for divorce brought before the commencement of this Act; but in the continued operation of that section a change in the law resulting from the enactment of this Act shall not be taken to constitute a change of circumstances.

Citation, commencement and extent.

26.—(1) This Act may be cited as the Family Law (Financial Provision) (Scotland) Act 1981.

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

1950 c.37.
1972 c.18.

(3) So much of section 25 of, and Schedule 1 to, this Act as affects the operation of the Maintenance Orders Act 1950 and the Maintenance Orders (Reciprocal Enforcement) Act 1972 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

SCHEDULES

Schedule 1 — Section 25(1)

Enactments Amended

The Sheriff Courts (Scotland) Act 1907 (c.51)

In section 5, for subsection (2) there shall be substituted the following subsection—

"(2) Actions for aliment, separation or adherence (other than any action mentioned in subsection (2A) below) and actions for regulating the custody of children:"

The Guardianship of Infants Act 1925 (c.45)

In section 3(3), for the words from the beginning to the word "accrue" there shall be substituted the words

"No such order for custody or education shall be enforceable".

The Maintenance Orders Act 1950 (c.37)

In section 16(2)(*b*)(i), at the end there shall be added the words

"or an order for financial provision in the form of a monetary payment under section 8 of the Family Law (Financial Provision) (Scotland) Act 1981".

The Succession (Scotland) Act 1964 (c.41)

In section 33(2) at the end there shall be added the words

"or section 8 of the Family Law (Financial Provision) (Scotland) Act 1981".

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (c.19)

In section 8(1), at the end of paragraph (*c*) there shall be added the words

"or section 8 of the Family Law (Financial Provision) (Scotland) Act 1981".

The Maintenance Orders (Reciprocal Enforcement) Act 1972 (c.18)

In section 31(5), after the words "Act 1976" there shall be inserted the words

"or, as the case may require, subsections (4) to (6) of section 13 of the Family Law (Financial Provision) (Scotland) Act 1981",

and at the end there shall be added the words

"or, as the case may be, section 13 of the said Act of 1981".

Schedule 1

The Sheriff Courts (Scotland) Act 1907

The amendment implements Recommendation 9(*c*) (see paragraph 2.59).

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1966

A sheriff's power under section 8(1) applies only where an order for a periodical allowance has been made. It does not enable a sheriff to make an order for a periodical allowance when none was made at the time of divorce. The amendment will not permit the sheriff to make, vary or recall any incidental order.

The Matrimonial Proceedings (Polygamous Marriages) Act 1972 (c.38)

In section 2(2), for paragraphs (*d*) and (*e*) there shall be substituted the following paragraphs—

"(*d*) a decree of separation or adherence;

(*e*) a decree of aliment;"

and after the word "ancillary" there shall be inserted the words

"or incidental".

The Domicile and Matrimonial Proceedings Act 1973 (c.45)

In Schedule 2, after paragraph 12A, there shall be inserted the following paragraph—

"12B. Section 8 (orders for financial provision) and section 18 (orders relating to avoidance transactions) of the Family Law (Financial Provision) (Scotland) Act 1981."

The Land Registration (Scotland) Act 1979 (c.33)

In section 12(3)(*b*), at the end there shall be added the words

"or has been set aside or varied by an order under section 18(2) (orders relating to avoidance transactions) of the Family Law (Financial Provision) (Scotland) Act 1981".

EXPLANATORY NOTES

Schedule 2 Section 25(2)

Enactments Repealed

Chapter	*Short Title*	*Extent of Repeal*
24 & 25 Vict. c.86.	The Conjugal Rights (Scotland) Amendment Act 1861.	In section 6, the words from "and her husband shall not" to the end of the section. In section 9, the word "maintenance". Section 15.
10 & 11 Geo. 5. c.64.	The Married Women's Property (Scotland) Act 1920.	Section 4.
15 & 16 Geo. 5. c.45.	The Guardianship of Infants Act 1925.	Section 3(2). In section 5(4), the words from "and may further order" to the end of the subsection. Section 8.
20 & 21 Geo. 5. c.33.	The Illegitimate Children (Scotland) Act 1930.	Section 1. In section 2, in subsection (1), the words "or in any action for aliment for an illegitimate child", and subsection (2). Section 3. Section 5.
22 & 23 Geo. 5. c.47.	The Children and Young Persons (Scotland) Act 1932.	Section 73(1)(*b*) and (3).
2 & 3 Geo. 6. c.4.	The Custody of Children (Scotland) Act 1939.	In section 1(1), the word "maintenance", and section 1(2).
14 Geo. 6. c.37.	The Maintenance Orders Act 1950.	Section 6(2). In section 7, the words from "whether" to "maintenance of the pupil child".

Schedule 2

The Conjugal Rights (Scotland) Amendment Act 1861

This repeal implements Recommendation 29 (see paragraph 2.152).

Chapter	*Short Title*	*Extent of Repeal*
15 & 16 Geo. 6 & 1 Eliz. 2. c.41.	The Affiliation Orders Act 1952.	The whole Act.
6 & 7 Eliz. 2. c.40.	The Matrimonial Proceedings (Children) Act 1958.	In section 7, in subsection (1), the word "maintenance", and subsection (2). In section 9(1) and (2), the word "maintenance".
1976 c.39.	The Divorce (Scotland) Act 1976.	Sections 5 to 8.
1978 c.22.	The Domestic Proceedings and Magistrates' Courts Act 1978.	In Schedule 2, para. 1(*a*).

EXPLANATORY NOTES

APPENDIX B

List of those who submitted written comments on Memorandum No. 22

Building Societies Association
Campaign for Justice in Divorce (Scotland)
Church of Scotland, Social Responsibility Committee
Principal Clerk, Court of Session
Crofters Commission
Cumbernauld Development Corporation
The Hon. Lord Dunpark
Edinburgh Gingerbread Group
Edinburgh Women's Aid
Faculty of Advocates
Faculty of Law, University of Glasgow
Finance Houses Association
Kevin J. Gray
Inland Revenue
Institute of Housing (Scottish Branch)
Law Society of Scotland
Jennifer Levin
Judith M. Masson
The Hon. Lord Maxwell
North East Fife District Council
Scottish Home and Health Department
Principal Clerk, Scottish Land Court
Scottish Law Agents Society
Scottish Retail Credit Association
Scottish Special Housing Association
Shelter (Scotland)
Sheriff Court Rules Council
Society of Writers to H.M. Signet
Supplementary Benefits Commission

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