

**NATIONAL REPORT: SCOTLAND**  
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 Scotland  
*August 2008*

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**A. GENERAL**

**1. Are there special rules concerning the property relationship between spouses (explaining what is meant by spouses)?**

**If so, briefly indicate the current sources of these rules.**

**a. upon marriage**

Scots law has a system of separate property during marriage and consequently marriage in itself has no effect on the property of the spouses. This general principle is currently set out in S. 24 of the Scots Family Law Act 1985 which provides that marriage in itself does not affect the property of either spouse. In general, the approach of Scots law is to treat husband and wife as 'strangers'<sup>1</sup> in terms of their property, focusing on their property rights rather than on their matrimonial relationship. The term 'spouses' is understood in Scots law as applying only to husband and wife.

**b. during marriage**

The act of marriage does not automatically affect the property of the spouses subject to the exceptions discussed below and, similarly, during the existence of the marriage, the general principle is that the system of separate property continues to apply.<sup>2</sup> There are a limited number of exceptions to this general principle where special rules apply in respect of spouses. These are in respect of matrimonial homes; tenancies; household goods; money or property derived from housekeeping allowance and insurance policies. These exceptions represent minimal modifications of the general principle where strict application of separate property might result in unfairness.

*The matrimonial home*

Strict application of the principle of separate property as set out in S. 24 of the Scots Family Law Act 1985 has given rise to unfairness and a lack of adequate protection in particular within the context of the matrimonial home. According to Scots law, if title to the property is taken in the name of only one spouse, the other spouse is in the vulnerable position of being entitled to remain in the property solely at the discretion of the owner or tenant. This was seen as being unsatisfactory as it placed the spouses in a very unequal position but also it gave rise to particular concerns in relation to domestic abuse. In an attempt to improve the security of the non-entitled spouse and also to provide a framework for regulation of the matrimonial home where one spouse is being subjected to abuse by the other, the Scots Matrimonial Homes (Family Protection) Act 1981 was introduced. This legislation does not deal with rights of ownership but instead focuses on the practical notion of occupancy. In doing so, however, it does restrict significantly the normal consequences of ownership or tenancy. The 1981 Act<sup>3</sup> gives a non-entitled spouse<sup>4</sup> the right to occupy, or to enter and occupy, the matrimonial home. By means of S. 3, the court has power to regulate occupancy of the matrimonial home together with the power under S. 4 to grant an exclusion order where it is necessary in order to protect the applicant spouse or any child of the family from

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<sup>1</sup> Millar v Millar 1940 SC 56.

<sup>2</sup> Scots Family Law Act 1985, S. 24.

<sup>3</sup> S. 1.

<sup>4</sup> I.e. a spouse who does not have legal title to the matrimonial home.

any conduct<sup>5</sup> of the other spouse 'which is or would be injurious to the physical or mental health of the applicant or child.'<sup>6</sup> Regulatory and exclusion orders may be sought where only one spouse is legally entitled to the property or where they are jointly entitled. As such, although the 1981 Act does not interfere with the actual right of ownership it does significantly restrict the normal rights of the owner.

#### *Tenancy*

There are a number of special rules which apply in respect of spouses where one spouse is the tenant of the matrimonial home. These are in addition to the regulation of occupancy outlined above in terms of the Matrimonial Homes legislation. Under S. 2(8) of the Scots Matrimonial Homes (Family Protection) Act 1981, where the spouse who is the legal tenant leaves the matrimonial home, the non-entitled spouse is able to continue the tenancy by remaining in the property. Where the spouse who is the tenant dies, there are also special rules which allow the surviving spouse to succeed to the tenancy on the spouse's death.<sup>7</sup>

#### *Household goods*

S. 25 of the Scots Family Law Act 1985 provides an exception to the general rule that marriage has no effect on the property of the spouses in that it sets out a presumption in favour of equal ownership of household assets. This is simply a presumption in favour of equal ownership, which may be overturned by evidence of agreement to the contrary, but it is specifically provided that it will not be rebutted merely as a result of the goods being bought by one spouse only or by both but in unequal shares.<sup>8</sup> Household goods are defined as

'goods (including decorative or ornamental goods) kept or used at any time during the marriage ... in any family home for the joint domestic purposes of the parties to the marriage, other than -

- (a) money or securities ;
- (b) any motor car, caravan or other road vehicle ;
- (c) any domestic animal.'<sup>9</sup>

#### *Savings from household allowance*

There is a further exception to the separate property rule in S. 26 of the Scots Family Law Act 1985 which sets out a presumption to the effect that any money or property derived from an allowance made by one spouse to the other 'for their joint household expenses or for similar expenses' is treated as belonging to each spouse in equal shares unless there is an agreement between them to the contrary.

#### *Insurance policies*

There is a further modification of the separate property rule in respect of an insurance policy taken out by one spouse in favour of the other, or a child of the family. The normal rule, to the effect that such a policy must be delivered in order to be effective, is amended in the case of husband and wife<sup>10</sup> so that the policy will vest in the spouse as soon as it is made without the need for delivery.<sup>11</sup>

### **c. upon separation**

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<sup>5</sup> Including threatened or reasonably apprehended conduct : S. 4(2).

<sup>6</sup> **Ibid.**

<sup>7</sup> Scots Rent Act 1984, Sched 1 para 2 (private tenancy) ; Scots Housing Act 1987, S. 52(1) (public sector secure tenancy). These provisions are not limited to spouses but extend to cover a member of the tenant's family.

<sup>8</sup> Scots Family Law Act 1985, S. 25(2)(b).

<sup>9</sup> Scots Family Law Act 1985, S. 25(3).

<sup>10</sup> Now also extended to civil partners : Scots Civil Partnership Act 2004, S. 132.

<sup>11</sup> Scots Married Women's Policies of Assurance Act 1880, S. 2.

Marriage in itself does not affect the property of the spouses and therefore separation is of little impact. Separation may be informal in nature, ie an agreement between the parties not to live together. This may or may not be given effect by means of a written separation agreement. In any event, the general rule is that informal separation has no effect on the legal consequences or legal status of marriage and will not affect the property of the spouses. With respect to financial provision on divorce, the date at which a couple cease to cohabit is relevant in assessing the value of the matrimonial property to be divided and therefore the date of separation may be of subsequent relevance to their property settlement. For the purposes of financial provision on divorce, the value of the matrimonial property is assessed 'at the relevant date' which according to S. 10(3) of the Scots Family Law Act 1985 is the earlier of two dates : either the date at which the couple ceased to cohabit (S. 10(3)(a)) or the date of service of the summons in the action for divorce.<sup>12</sup> Therefore, if a couple separate prior to divorce, the date of their separation will generally be the date at which their property will be valued for the purposes of financial provision on divorce.

A couple may seek a formal legal separation, known as a judicial separation. This is available on the same grounds as apply in respect of divorce.<sup>13</sup> A decree of judicial separation has little legal significance and nowadays it is rarely sought. It will provide evidence to the effect that a couple has ceased to cohabit which may be relevant in terms of subsequent financial provision on divorce, as outlined above. Until recently it had some impact in respect of succession. It was provided by means of S. 6 of the Scots Conjugal Rights Amendment Act 1861, that any property which a wife acquired after the date of judicial separation would, if she died intestate, pass to her legal heirs and representatives as if she was unmarried : in other words, the legal rights which her husband would have had in respect of such property would be lost. This provision applied only in respect of married women and there was no equivalent provision in respect of property acquired by the husband after separation. The 1861 Act has now been repealed by the Scots Family Law Act 2006 and therefore this consequence of judicial separation no longer applies.

#### **d. upon death**

Although marriage in itself has very little effect on the property of the spouses, its dissolution by death has significant consequences. Succession is governed by the Succession (Scotland) 1964 which provides rights for a surviving spouse in the event of the death, either testate or intestate, of his or her partner. Where a person dies without leaving a will, his or her surviving spouse is entitled to both Prior Rights comprising a dwelling house, furniture and plenishings and financial provision and to Legal Rights which are paid from any remaining moveable estate of the deceased.<sup>14</sup> Where the deceased has made a will, the surviving spouse is entitled only to Legal Rights or, where provision has been made in the will, he or she may elect to claim either Legal Rights or the testamentary provision.

#### **e. upon divorce**

Scots law is sometimes described as operating a system of deferred community of acquests in that while there is separation of property during the existence of the marriage relationship, on divorce the matrimonial property is shared between the parties. Matrimonial property, both during marriage and on its dissolution by divorce, was extensively considered by the Scottish Law Commission in the 1980s and it was decided to retain the principle of separation of property, with some limited exceptions, and to provide a comprehensive new system of financial provision on divorce. The key objectives of this system were to ensure, where possible, a clean financial break between the parties on divorce but at the same time to recognise the contribution of both parties to the marriage and the accumulation of

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<sup>12</sup> Scots Family Law Act 1985, S. 10(3)(b).

<sup>13</sup> Scots Divorce Act 1976, S. 1.

<sup>14</sup> Scots Succession Act 1964, S. 8 and 9.

matrimonial property and to provide for compensation in the event of disadvantage incurred during the relationship. Financial provision on divorce is governed by a statutory framework which is set out in the Scots Family Law Act 1985. The 1985 Act provides that either party to the marriage may apply to the court for one or more of the orders set out in S. 8: a capital sum payment order; an order for the transfer of property; a order for periodical allowance; a pension sharing order or an order for the payment of a pension lump sum.<sup>15</sup> The court is directed to make one or more of these orders only where it is justified by the principles set out in S. 9 of the Act and where it is reasonable with regard to the resources of the parties.<sup>16</sup>

Central to the operation of financial provision on divorce are the principles set out in S. 9 of the 1985 Act. These are as follows:

- S. 9(1)(a)- fair sharing of the net value of the matrimonial property.
- S. 9(1)(b) - fair account should be taken of any economic advantage derived by either person from the contributions of the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family;
- S. 9(1)(c) - any economic burden of caring after divorce for a child of the marriage under 16 should be shared fairly between the persons;
- S. 9(1)(d) - a person who has been dependent to a substantial degree on the financial support of the other person should be awarded such financial provision as is reasonable to adjust over a period of not more than three years from the date of the decree of divorce to the loss of that support on divorce;
- S. 9(1)(e) - a person who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

In making these orders, there is a clear statutory preference for capital sum or property transfer orders, with periodical allowance orders being used as a last resort and only where permitted by principles 9(1)(c), (d) or (e).<sup>17</sup>

**f. upon annulment?**

Where a marriage has been set aside by means of a declarator of nullity, the court may make an order for financial provision in the same way as it could on divorce.<sup>18</sup>

**2. Give a brief history of the main developments and most recent reforms of the rules regarding the property relationship between spouses.**

The system of matrimonial property in Scotland is characterised by the shift, beginning in the late 19<sup>th</sup> Century, from a system of community property to one of strict separation. At common law, the property of husband and wife was consolidated into one fund which was to some extent owned and entirely administered by the husband. By virtue of the *jus mariti* the husband obtained ownership of all of his wife's moveable property, however it had been acquired either prior to or during marriage. The husband's right extended to any income which the wife might earn and while the wife was entitled to claim maintenance from her husband,<sup>19</sup> her claim ranked second to any of his creditors.<sup>20</sup> On marriage the husband became liable for any of his wife's ante-nuptial debts to the extent that they related to her moveable property.<sup>21</sup> Since a married woman lacked legal capacity to enter into any personal

<sup>15</sup> Scots Family Law Act 1985, S. 8(1).

<sup>16</sup> Scots Family Law Act 1985, S. 8(2).

<sup>17</sup> Scots Family Law Act 1985.

<sup>18</sup> Scots Family Law Act 1985, S. 17(1).

<sup>19</sup> Fraser, Husband and Wife, Vol 1, 837.

<sup>20</sup> Murray, The Property of Married Persons, (1891) 8.

<sup>21</sup> Fraser, Husband and Wife, Vol 1, 586.

legal obligation she had no post-nuptial debts. The heritable property of a married woman was controlled and managed by the husband by means of his right of administration although he did not acquire ownership of such property.<sup>22</sup>

Beginning in the late 19<sup>th</sup> Century, this position was gradually reformed by means of a series of statutes. The most significant reforms were the Married Women's Property (Scotland) Acts of 1881 and 1920 which abolished the *jus mariti* and right of administration respectively. The result of these reforms was broadly to leave no system of matrimonial property but instead to provide for the treatment of husband and wife according to the normal rules of property. This is exemplified in the words of the Lord President in *Millar v Millar*<sup>23</sup> to the effect that, in considering a question concerning occupation of the matrimonial home, the property question "should be dealt with from the patrimonial point of view ... without consideration of their relationship as husband and wife" and that the court should consider the property issue "in exactly the same way as when it arises between strangers."

This strict separation of property has been recognised on several occasions as potentially leading to injustice in particular where the spouses are economically unequal. The position has therefore been modified in a number of respects: the most significant being in respect of occupancy of the matrimonial home during the existence of the relationship<sup>24</sup> and the division of assets on divorce.<sup>25</sup> Matrimonial property was considered by the Scottish Law Commission in the 1980s and this led to the introduction of the Scots Family Law Act 1985. In respect of property relations during marriage, it gave statutory effect to the general principle that marriage does not affect the property of the spouses, while providing very limited exceptions to this strict rule<sup>26</sup> in order to reflect expectations of married couples and avoid extreme injustice. In respect of divorce, it introduced a new framework for financial provision which gives the court the power to make a range of orders under S. 8 which must be justified by the principles set out in S. 9. In introducing this framework, the Scottish Law Commission sought to maintain the principle of separate property and move away from the notion of ongoing dependency and maintenance between the parties after divorce whilst recognising that strict application of separate property without acknowledging the variety of ways in which couples may live their lives and organise their finance and property may result in considerable inequality and unfairness on divorce.

Although husband and wife are largely treated in the same way as other property owners during the existence of marriage, there is a detailed regime governing succession where a marriage is terminated by the death of one of the spouses. This area of the law was substantially reformed and is currently set out in the Scots Succession Act 1964.

**3. Are there any recent proposals (e.g. parliament, reform bodies, academic community) for reform in this area?**

The Scottish Law Commission issued a Discussion Paper on Succession<sup>27</sup> in August 2007 in which they sought views on a range of issues relating to both testate and intestate succession. At present, no clear proposals have emerged for reform.

**4. Briefly explain whether or not the rules regarding the property relationship between spouses also apply to registered or civil partnerships?**

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<sup>22</sup> Fraser, Husband and Wife, Vol 1,, 796.

<sup>23</sup> 1940 SC 56.

<sup>24</sup> Scots Matrimonial Homes (Family Protection) Act 1981.

<sup>25</sup> Scots Family Law Act 1985.

<sup>26</sup> Scots Family Law Act 1985, S. 25 and 26.

<sup>27</sup> No. 136.

Civil partnership was introduced in Scotland by means of the Scots Civil Partnership Act 2004. The relationship is open only to same sex couples and it very closely matches the provisions which apply to marriage. All of the legislation governing property during marriage, on divorce and on death has been extended to apply equally to civil partners.

**5. Are the rules concerning the matrimonial property relationship between spouses exclusive or are there other mechanisms of property law, such as joint ownership, which also play a role in relation between spouses?**

In the absence of a detailed regime of matrimonial property, the normal rules and mechanisms of property law apply equally to spouses. It is therefore open to the couple to arrange their affairs and to buy property jointly in the same way as could be done by two unrelated parties. Where a couple buy their home, it is increasingly common that they will do so in joint names. This is particularly common where the purchase is financed by means of a bank loan or mortgage.

**6. What is the relationship, if any, between the law regarding the property relationship between spouses and the law of succession?**

Marriage is of considerable significance to the law of succession in that husbands and wives are entitled to rights on intestate and testate succession from their deceased spouse but the systems themselves are largely distinct. Regulation of property during marriage and on divorce is dealt with principally by the Scots Family Law Act 1985 whereas succession is governed by the and there is relatively little consistency or interaction between these two statutes.

**7. Are there distinct rules concerning general rights and duties of the spouses (as referred to in section B) that are independent of the specific property relationship of the spouses (matrimonial property regimes as referred to in section C)?**

As outlined above, Scots law might be described as having no specific matrimonial regime. Subject to limited exceptions, spouses and their property rights and obligations are dealt with according to the normal rules of property. Provision is made in respect of occupancy, rather than ownership, of the matrimonial home by means of the Scots Matrimonial Homes (Family Protection) Act 1981 and there is limited provision for sharing of household assets<sup>28</sup> and savings from housekeeping allowance<sup>29</sup> but otherwise the rights and duties are those of property owners rather than spouses. Therefore there is no clear distinction in Scots law between 'general rights and duties of the spouses' and 'the specific property relationship.'

**B. GENERAL RIGHTS AND DUTIES OF SPOUSES CONCERNING HOUSEHOLD EXPENSES, TRANSACTIONS IN RESPECT TO THE MATRIMONIAL HOME AND OTHER MATTERS IRRESPECTIVE OF THE SINGEL MATRIMONIAL PROPERTY REGIME**

**8. What, if any, are the obligations of spouses to contribute to the costs and expenses of the family household? In answering this question, briefly explain what your system understands by "costs and expenses of the family household".**

There is no provision in Scots law regarding contribution to the costs and expenses of the family household. Spouses do owe each other an obligation of aliment or support during the marriage.<sup>30</sup> The obligation is to provide "such support as is reasonable in the

<sup>28</sup> Scots Family Law Act 1985, S. 25.

<sup>29</sup> Scots Family Law Act 1985, S. 26.

<sup>30</sup> Scots Family Law Act 1985, S. 1(1). This obligation now applies equally to civil partners.

circumstances”.<sup>31</sup> In most cases, this support is provided voluntarily but where that does not happen an action for aliment may be raised in the sheriff court or Court of Session<sup>32</sup> and it may be raised even where the parties continue to cohabit<sup>33</sup> although such actions are rare, with aliment more likely to be sought as an interim measure prior to divorce. The obligation of aliment ceases on divorce.

**9. Is one spouse liable for the household debts incurred by the other? And if so, to what extent?**

The general rule is that spouses are not liable for each other’s debts, including household debts. The Scots Law Reform (Husband and Wife) Act 1984<sup>34</sup> abolished the wife’s *praepositura* by which the husband was presumed to have put his wife in control of household affairs and as such he was liable for debts contracted by her. The wife continues to be entitled to ‘pledge her husband’s credit for necessities’<sup>35</sup> although this rule is now of little if any practical significance. Otherwise, spouses are treated as separate individuals and as such are personally liable for their debts.

**10. To what extent, if at all, are there specific rules governing acquisition and/or transactions in respect of the matrimonial/family home irrespective of the matrimonial property regime? In answering this question, briefly explain what your system understands by “matrimonial/family home”.**

Acquisition of the matrimonial home is regulated according to the normal rules regarding the transfer and registration of title to heritable property. There are no special rules governing the acquisition of the matrimonial home although it is increasingly common for couples to purchase their home in joint names. The Scots Matrimonial Homes (Family Protection) Act 1981, although it does not give ownership rights in respect of the matrimonial home, does provide occupancy rights<sup>36</sup> to a spouse who does not otherwise have legal title to the house (the non-entitled spouse). These rights arise automatically on marriage whenever there is a matrimonial home and they continue to exist throughout the relationship. Occupancy rights may be renounced in writing by the non-entitled spouse in respect of a particular matrimonial home and where there has been no cohabitation for a continuous period of two years and the non-entitled spouse has not during that time occupied the matrimonial home, then the occupancy rights of the non-entitled spouse shall cease.<sup>37</sup>

For the purposes of the 1981 Act, a matrimonial home is defined in S. 22 as “any house, caravan, houseboat or other structure which has been provided or has been made available by one or both spouses as, or has become, a family residence”.

The 1981 Act includes a number of provisions designed to deal with the situation where one or both spouses wish to sell the matrimonial home, including situations where there is an entitled and a non-entitled spouse or where there are jointly entitled spouses. S. 6(1)(a) provides protection for the occupancy rights of the non-entitled spouse where the entitled spouse enters into any ‘dealing’ with the matrimonial home. ‘Dealing’ is defined by S. 6(2) to include sale, lease, grant of heritable security or creation of a trust over it. In the event of any such dealing, the non-entitled spouse’s rights are protected and the purchaser has no right to occupy the home. This protection is extended by means of S. 9(1) to cover jointly entitled spouses.

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<sup>31</sup> Scots Family Law Act 1985, S. 4(1).

<sup>32</sup> Scots Family Law Act 1985, S. 2 and 27(1).

<sup>33</sup> Scots Family Law Act 1985, S. 2(6).

<sup>34</sup> S. 7.

<sup>35</sup> Stair I,4,10.

<sup>36</sup> Scots Matrimonial Homes (Family Protection) Act 1981, S. 1.

<sup>37</sup> Scots Matrimonial Homes (Family Protection) Act 1981, S. 1(7).



There was considerable concern about the practical implications of the 1981 Act in terms of conveyancing and therefore a number of possibilities exist in respect of the S. 6 protections in order to give some security to the third party involved in the dealings. Where a non-entitled spouse has consented in the appropriate form to the dealings, then the protection in S. 6 will not apply. The court has power to dispense with the need for the non-entitled spouse's consent<sup>38</sup> where, for example, it is being withheld unreasonably, the spouse is incapable of giving consent or the spouse cannot be found. It is also possible for a non-entitled spouse to renounce his or her occupancy rights in respect of a particular matrimonial home but this must be done in writing in the presence of a notary public.<sup>39</sup>

Further protection is provided for the purchaser by means of S. 6(3)(e). Where there has been a transfer for value, the third party who acquires the property will not be prejudiced by a non-entitled spouse's occupancy rights provided that the third party acted in good faith and the transferor provides either a written declaration to the effect that the property is not a matrimonial home in respect of which a spouse of the transferor either has or had occupancy rights or a written renunciation of occupancy rights or written consent to the dealing by the non-entitled spouse.<sup>40</sup>

**11. To what extent, if at all, are there specific rules governing acquisition and/or transactions in respect of household goods irrespective of the matrimonial property regime? In answering this question, briefly explain what your system understands by "household assets".**

There are no specific rules governing the acquisition of household goods. Moveable property belongs to the party who bought or otherwise acquired the asset and this rule in general applies equally to assets which are purchased for use in the matrimonial or family home. The application of the separate property approach in this context was considered to be out of step with the expectation of many spouses and therefore a modification of the general principle was introduced by means of S. 25 of the Scots Family Law Act 1985 which provides for a presumption of equal shares in household goods. This presumption applies during the existence of marriage in respect of "any household goods obtained in prospect of the marriage other than by gift or succession from a third party".<sup>41</sup> Such items are presumed to be owned in equal shares unless the contrary is proved and the simple fact that they were not purchased equally will not in itself be sufficient to rebut that presumption.<sup>42</sup> Household goods are defined as goods "(including decorative or ornamental goods) kept or used at any time during the marriage ... for the joint domestic purposes of the parties".<sup>43</sup> This provision has had relatively little practical impact which is partly explained by the important exceptions to the definition of household goods which do not include money or securities, motor vehicles or domestic animals.<sup>44</sup>

**12. To what extent, if at all, are there other rules governing transactions entered into by one spouse irrespective of the matrimonial property regime (e.g. entering into guarantees, incurring debts...)?**

As a general principle, there are no other rules governing such transactions. Spouses are free to enter into transactions in the same way as unmarried persons. Specific issues have arisen in relation to cautionary obligations (guarantees) in a number of recent cases but in general the

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<sup>38</sup> Scots Matrimonial Homes (Family Protection) Act 1981, S. 7.

<sup>39</sup> Scots Matrimonial Homes (Family Protection) Act 1981, S. 6(3)(a)(ii).

<sup>40</sup> As outlined above.

<sup>41</sup> S. 25(1).

<sup>42</sup> S. 25(2).

<sup>43</sup> S. 25(3).

<sup>44</sup> S. 25(3).

Scottish courts remain reluctant to apply special rules in respect of spouses.<sup>45</sup> With the continued rise in home ownership, it has become increasingly common for borrowing to be secured by means of the grant of a standard security over the family home. In particular, there have been a number of important cases in recent years where a wife has granted security to the bank in respect of her husband's borrowing. It is clear from the Scottish decisions, that the courts take a relatively strict approach to these situations once more on the basis of the principle that husband and wife are separate individuals and that, in general, in deciding matters of property, the focus should be on the property issues and not on the matrimonial relationship of the parties. The mere existence of the marriage relationship does not raise a presumption of undue influence or of misrepresentation and it appears to be sufficient for the creditor to advise the person granting caution of the possible consequences of granting the obligation and to advise them to seek independent legal advice.<sup>46</sup>

**13. To what extent, if at all, are there specific rules concerning one spouse acting as agent for the other?**

At common law the wife had a *praepositura* by which she was presumed to have been placed in charge of the household and that consequently the husband would be liable for all household debts incurred in this capacity. This was abolished by the Scots Law Reform (Husband and Wife) Act 1984, S. 7. As mentioned above, a wife continues to be entitled to pledge her husband's credit for necessities but as in modern society few if any shops continue to provide credit, then this provision is of little modern relevance. It is possible for a husband or wife to authorise their spouse to act as their agent but this is governed by the normal rules of agency.

**14. What restrictions or limitations, if any, are there concerning transactions between spouses irrespective of the matrimonial property regime (e.g. gifts...).**

In general, the normal rules of property apply in respect of transactions between spouses. The common law rule which permitted either spouse to revoke gifts to the other spouse during their lifetime was abolished by the Scots Married Women's Property Act 1920.<sup>47</sup> There is in general a presumption against donation in property law and this applies equally in the context of marriage although it is relatively easy to rebut such a presumption within a close personal relationship.<sup>48</sup>

**C. MATRIMONIAL PROPERTY REGIMES**

**C.1. General issues**

**15. Are spouses entitled to make a contract regarding their matrimonial property regime?**

The general principle of Scots law is that marriage does not by itself affect the property or legal capacity of the spouses.<sup>49</sup> Therefore, in the same way that strangers can regulate their affairs by means of contract, so can spouses. Ante-nuptial contracts are only rarely used in Scotland but couples are encouraged to reach their own agreement about the division of

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<sup>45</sup> See e.g. *Barclay's Bank v O'Brien* [1994] 1AC 180 ; *Smith v Bank of Scotland* 1997 SC (HL) 111 ; *Royal Bank of Scotland v Etridge (No. 2)* [2001] 4 All ER 449 ; *Clydesdale Bank plc v Black* 2002 SLT 764 ; *Royal Bank of Scotland v Wilson* 2003 SLT 910.

<sup>46</sup> See in particular *Smith v Bank of Scotland* 1997 SC (HL) 111.

<sup>47</sup> S. 5.

<sup>48</sup> *Jamieson v McLeod* (1880) 7R 1131; *Smith v Smith's Trustees* (1884) 12R 186.

<sup>49</sup> Scots Family Law Act 1985, S. 24.

property in the context of divorce. Such agreements, which are known as Minutes of Agreement or Joint Minutes of Agreement are used in a substantial number of divorces.<sup>50</sup>

Agreements are binding and enforceable and can be used to settle financial provision on divorce in terms quite different to those which would result from application of the S. 9 principles in the Scots Family Law Act 1985. The agreement may be challenged, varied or set aside by the court in terms of S. 16(1)(b) of the 1985 Act where it was not "fair and reasonable at the time it was entered into".

**16. What regime is applicable, using the list below, if spouses have not made a contract (default regime) or are not allowed to make a contract or are not allowed to make a contract with binding effect?**

Regime V – Separation of property with distribution by the competent authority – best describes the rules which apply in Scots law.

**17. Using the list above, are there other alternative matrimonial property regimes regulated by statute for which spouses can opt besides the default regime (where applicable)?**

No.

**18. Briefly describe the regimes indicated in the answers to:**

**a. Question 16.**

The regime which operates in Scots law is split between separation of property during marriage itself and provision for division of property by the courts in the event of divorce. The general principle of separation of property is set out in S. 24 of the Scots Family Law Act 1985, subject to a limited number of modifications. The legal framework for financial provision on divorce is contained in the 1985 Act, S.s 8 to 16. It is to some extent misleading to describe Scots law as having a matrimonial property regime as during marriage it has, in effect, no regime. Marriage does not affect either the property or the legal capacity of the spouses and therefore there are in most cases no special rules applying to spouses but instead the ordinary rules of property which apply to all individuals.

**b. Question 17.**

Not relevant.

**19. Indicate the frequency of the use made of the regimes (where possible by reference to statistical data) referred to in Questions 16 and 17.**

Not relevant – there is only one system.

## **C.2. Specific regimes**

### **I. Community of property**

Not relevant.

### **II. Community of accrued gains/Participation in acquisitions**

<sup>50</sup> It is estimated that such agreements are used in approximately one third of the annual number of divorces : see Edwards and Griffiths, Family Law (2<sup>nd</sup> ed), 2006, W.Green, para 15-06.

Not relevant.

### III. Deferred Community

Not relevant.

### IV. Separation of property

Not relevant.

### V. Separation of property with distribution by the competent authority

#### V.1. Assets

#### 161. Describe the system. Indicate the different categories of assets involved.

It is to some extent misleading to speak of a system or regime in respect of the property of spouses. Instead there is an absence of any such system – the general principle being that husband and wife are treated as any other separate individuals in respect of their property. The system is encapsulated in S. 24 of the Scots Family Law Act 1985 which provides that :

‘marriage .... shall not of itself affect –

(a) the respective rights of the parties to the marriage ... in relation to their property ;

(b) the legal capacity of those parties’.

The system of separate property is modified in respect of household goods<sup>51</sup> and savings from household allowances<sup>52</sup> where there is a presumption in favour of equal ownership.

#### 162. What assets comprise the separate property of the spouses?

As stated above, marriage in itself does not affect the property of the spouses and therefore, during the existence of the relationship all property belongs to the party who owns it according to the normal rules of property.<sup>53</sup> Any property owned individually by either spouse is therefore treated as separate property. Ownership of the matrimonial home will depend on the normal rules of property but regulation of the house is provided by means of the Scots Matrimonial Homes (Family Protection) Act 1981. Household goods and savings from household allowances are presumed to be owned in equal shares in the absence of agreement to the contrary and therefore these categories constitute exceptions to the principle of separate property. In practice, however, these exceptions may be regarded as of relatively little importance. This is particularly so in respect of the definition of household goods which excludes money, securities and motor vehicles.<sup>54</sup>

#### 163. Can spouses acquire assets jointly? If so, what rules apply?

No special rules apply to spouses. They can acquire property jointly according to the normal rules of property and increasingly where spouses are purchasing a matrimonial home they will do so in joint names.

There are some special rules included in the Scots Matrimonial Homes (Family Protection) Act 1981 which provide additional protection to the rights of spouses who jointly own the matrimonial home. Where two parties are common owners of property, each is entitled to sell

<sup>51</sup> Scots Family Law Act 1985, S. 25.

<sup>52</sup> Scots Family Law Act 1985, S. 26.

<sup>53</sup> Scots Family Law Act 1985, S. 24.

<sup>54</sup> Scots Family Law Act 1985, S. 25.

his or her own half *pro indiviso* share of the property without the agreement of the other. In the case of spouses, the 1981 Act provides that, the purchaser will not be entitled to occupy the matrimonial home and that 'the rights in that home of one spouse shall not be prejudiced by reason only of any dealing of the other spouse.'<sup>55</sup>

Where property is owned in common, the normal position is that either party is entitled to apply to the court for an order of division and sale and the court has no discretion to refuse. This general principle could clearly pose problems in respect of a jointly owned matrimonial home and so its strict application has again been modified by means of the 1981 Act. According to S. 19, where a matrimonial home is owned by the spouses in common and one of them applies for an order of division and sale, the court does have discretion to refuse or postpone the order or to grant it subject to conditions. In exercising this discretion the court must consider what is reasonable in the circumstances with particular regard to whether or not the spouse seeking the decree has offered to make available suitable alternative accommodation<sup>56</sup> and to the following matters specified in S. 3(3) of the Act:<sup>57</sup>

- The conduct of spouses in relation to each other and otherwise ;
- The respective needs and financial resources of the spouses ;
- The needs of any child of the family ;
- The extent (if any) to which the matrimonial home is used in connection with a trade, business or profession of either spouse.

#### **164. What is the position of pension rights and claims and insurance rights?**

Pension rights and insurance rights are treated as separate property in the same way as other assets. The issue of pensions is one of increasing importance as in many marriages the wife continues to be less well provided for than the husband in terms of occupational pension rights. Money and securities are expressly excluded from the definition of household goods in S. 25 of the Scots Family Law Act 1985 and therefore they are not covered by the presumption in favour of equal ownership. Pensions are however included within the definition of matrimonial property which applies in the context of financial provision on divorce.<sup>58</sup>

There is limited special provision for insurance policies taken out by one spouse for the benefit of the other. The normal rule to the effect that such a policy must be delivered is amended in the case of husband and wife<sup>59</sup> so that the policy will vest in the spouse as soon as it is made without the need for delivery.<sup>60</sup>

#### **165. Can a third party make a disposition (e.g. a gift or a bequest) so as to avoid the competent authority's power over the spouses' assets?**

Where a third party makes a gift or bequest to a married couple or to an individual spouse then the ownership of that property will be decided according to the normal rules of property. Issues may arise in a number of specific situations.

##### *Household goods*

The presumption of equal ownership of household goods as set out in S. 25 of the Scots Family Law Act 1985 does not apply to any goods acquired 'by gift or succession from a third party'.

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<sup>55</sup> 1981 Act, S. 9(1).

<sup>56</sup> S. 19(b).

<sup>57</sup> S. 19(a).

<sup>58</sup> Scots Family Law Act 1985, S. 25.

<sup>59</sup> Now also extended to civil partners : Scots Civil Partnership Act 2004, S. 132.

<sup>60</sup> Married Women's Policies of Assurance (Scotland) Act 1880, S. 2.

*Financial provision on divorce*

A similar exclusion applies within the context of financial provision on divorce. The starting point for the court is to consider making an order under the principle set out in S. 9(1)(a) of the Scots Family Law Act 1985. It provides that the matrimonial property should be shared fairly between the parties. 'Matrimonial property' is defined in S. 10(4) and it excludes any property acquired by gift or succession from a third party. It has been made clear that it is the only the initial gift or bequest which is excluded whereas if that is used to acquire new property then those assets will be treated as matrimonial property.<sup>61</sup>

A further protection for property acquired by gift or succession exists in respect of the fair sharing of matrimonial property principle.<sup>62</sup> According to S. 10(1), fair sharing will be equal sharing except where justified by special circumstances. One of the special circumstances listed in S. 10(6) is the source of the funds or assets used to acquire any of the matrimonial property where they are not derived from the income or effort of either party. Thus if one spouse received a gift of money from his parents during the marriage (not matrimonial property) and then used that money to purchase a car (matrimonial property), on divorce in deciding how the value of that car should be shared, the court could take into account the source of the money initially used in its purchase.

In these ways there is some protection for property which is a gift or bequest from a third party.

**166. How is the ownership of the assets proved as between the spouses? Are there rebuttable presumptions?**

The general approach is that ownership will be established in accordance with the normal rules of property. There are, however, a few exceptions. S. 25 of the Scots Family Law Act 1985 sets out a presumption of equal shares in household goods acquired in prospect of or during the marriage other than by gift or bequest from a third party. They are presumed to be owned in equal shares unless it is proved to the contrary and it will not be sufficient proof to show that they were purchased from a third party in unequal shares. Household goods are defined in S. 25(3) as 'any goods (including decorative or ornamental goods) kept or used at any time during the marriage in any family home for the joint domestic purposes' of the couple. The definition expressly excludes money or securities, motor vehicles and domestic pets. While this presumption was welcomed at the time of its introduction as an acknowledgement of the expectations of many married couples, in practice it is of relatively little consequence.

There is also a presumption in favour of equal shares in money, or property acquired with that money, which is derived from an allowance provided for 'joint household expenses'.<sup>63</sup> This presumption was introduced to address the unfairness which could result from a situation where, for example, a husband gave a housekeeping allowance to his wife who through her careful economy managed to save money from the allowance. According to the rules of property, those savings would remain the property of the husband.<sup>64</sup> Initially the presumption was introduced only in respect of an allowance made by a husband to his wife<sup>65</sup> but it now applies equally to husbands and wives.

There is a general presumption in property law against donation which applies equally to married couples. It is, however, relatively easy to rebut the presumption within the context of a close relationship where the exchange of gifts would be seen as something to be expected.

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<sup>61</sup> *Latter v Latter* 1990 SLT 805.

<sup>62</sup> Scots Family Law Act 1985, S. 9(1)(a).

<sup>63</sup> Scots Family Law Act 1985, S. 26.

<sup>64</sup> *Preston v Preston* 1950 SC 23.

<sup>65</sup> Married Women's Property Act 1964.

Money held in joint bank accounts can also give rise to particular problems but there is no special rule for spouses. Many couples assume that because money is held in a joint account that it is owned equally but according to the rules of property, the money will belong to the person who contributed it to the account and the account itself is simply a banking facility which allows either party to draw on the funds. The Scottish Law Commission considered introducing a presumption of joint ownership in this situation prior to the 1985 Scots Family Law Act but decided against it.

**167. How is the ownership of the assets proved as against third parties? Are there rebuttable presumptions?**

There are no special rules which apply in respect of spouses with the exceptions of the presumptions in S. 25 and 26 of Scots the Family Law Act which apply in any question of ownership.

**168. Which debts are personal debts?**

Marriage has no effect on the legal capacity of either spouse and therefore no effect for personal liability. The common law rule that a husband was liable for the ante-nuptial debts of his wife was repealed by the Scots Law Reform (Husband and Wife) Act 1984, S. 6 and the wife's praepositura by means of which she was presumed to be her husband's agent in matters of the household was repealed by S. 7 of the same Act. These reforms together with the general principle set out in S. 24 of the 1985 Scots Family Law Act to the effect that marriage has no effect on the legal capacity of the spouses mean that husband and wife have no liability for each other's debts.

**169. Which debts are joint debts?**

Marriage by itself does not affect the liability of husband and wife and therefore debts will be joint only where the parties have specifically incurred joint liability.

**170. On which assets can the creditor recover personal debts?**

As explained above, marriage has no automatic effect on liability and therefore a creditor may seek to recover debts on any assets belonging to the debtor.

There is some protection for families against creditors in respect of the family home. Where a creditor holds a standard security over residential property, then either the debtor or the non-entitled spouse of the debtor may apply to the court for suspension of exercise of the creditor's rights for a reasonable period.<sup>66</sup> This affords protection against the possibility of the debtor or the debtor's family being evicted from their family home.

**171. On which assets can the creditor recover joint debts?**

As explained above, marriage has no automatic effect on liability and therefore a creditor may seek to recover debts on any assets belonging to the debtor.

**V.2. Administration of assets**

**172. How are assets administered?**

At common law, a husband, by means of his right of administration, had the right to control and administer all of his wife's property, both heritable and moveable. With the abolition of this right by the Scots Married Women's Property Act 1920, no specific rules in respect of

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<sup>66</sup> Scots Mortgage Rights Act 2001, S. 2.

administration of assets exist. Marriage in itself has no effect on the property of the spouses and husband and wife are treated as separate individuals who are free to manage and administer their property as they wish. There is no distinct fund of matrimonial property during marriage and accordingly no rules exist in respect of administration.

One particular problem which may arise is where the matrimonial home is owned in the name of one spouse solely. Under the Scots Matrimonial Homes Act 1981, the non-entitled spouse has the right to occupy the home but this right may prove of limited value if the entitled spouse fails to pay rent or mortgage payments in respect of the property or to carry out necessary repairs. In order to address this situation, S. 2(1) of the 1981 Act gives the non-entitled spouse the right to take such action "for the purpose of securing" his or her occupancy rights.

**173. Can one spouse mandate the other to administer the assets?**

No special rules apply in respect of spouses although it is open to either spouse to appoint the other as his or her agent according to the normal rules of agency.

**174. Are there important acts concerning assets (e.g. significant gifts, disposal of the matrimonial/family home or other immovable property) that require the consent of the other spouse?**

The starting point is that as marriage does not affect the legal capacity of the spouses then there are no such requirements in Scots family law.<sup>67</sup> The Scots Matrimonial Homes (Family Protection) Act 1981 does, however, provide protection where one spouse enters into 'dealings' with the matrimonial home. 'Dealing' is defined by S. 6(2) to include sale, lease, grant of heritable security or creation of a trust over it. In the event of any such dealing, the non-entitled spouse's rights are protected and the purchaser has no right to occupy the home. This protection is extended by means of S. 9(1) to cover jointly entitled spouses. Where a non-entitled spouse has consented in the appropriate form to the dealings then the protection in S. 6 will not apply. The court has power to dispense with the need for the non-entitled spouse's consent<sup>68</sup> where, for example, it is being withheld unreasonably, the spouse is incapable of giving consent or the spouse cannot be found. It is also possible for a non-entitled spouse to renounce his or her occupancy rights in respect of a particular matrimonial home but this must be done in writing in the presence of a notary public.<sup>69</sup>

**175. Are there special rules for the administration of professional assets?**

No.

**176. Is there a duty for one spouse to provide information to the other about the administration of the assets?**

No.

**177. How are disputes between the spouses concerning the administration of assets resolved?**

No special rules exist for the resolution of such disputes.

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<sup>67</sup> Scots Family Law Act 1985, S. 24.

<sup>68</sup> Scots Family Law Act 1985, S. 7.

<sup>69</sup> Scots Family Law Act 1985, S. 6(3)(a)(ii).



**178. What are the possible consequences when a spouse violates the rules governing the administration of assets? What are the possible consequences in other cases of maladministration of the assets?**

There are no specific rules governing the administration of assets but there may be some implications within the context of financial provision on divorce if it can be argued that the maladministration of one spouse has affected the value of the proeprty which is available for sharing on divorce. Where a court is making an award of financial provision on divorce, S. 9(1)(a) of the Scots Family Law Act 1985 provides that the net value of the matrimonial property should be shared fairly between the parties and the starting point is that shared 'fairly' will mean shared 'equally' except where there are special circumstances.<sup>70</sup> One of the special circumstances to which there is specific reference in the 1985 Act<sup>71</sup> is where the property has been destroyed, dissipated or alienated by either party. Therefore, if either spouse has disposed of property, that could be taken into account by the court when deciding how to share the matrimonial property on divorce. There is a further general provision in S. 18 of the 1985 Act which deals with avoidance transactions. Where financial provision has been made in terms of the 1985 Act, within a year of the date of disposal of the claim, the party who sought financial provision may apply to the court for an order setting aside or varying any property transaction brought about by the other party within the previous five years.<sup>72</sup> The court will make such an order where it is satisfied that the transaction had the effect or is likely to have the effect of defeating in whole or in part any claim for financial provision.<sup>73</sup>

**179. What are the possible consequences if a spouse is incapable of administering the assets?**

There are no specific rules applying to spouses in this situation. Marriage has no effect on the legal capacity of the spouses.<sup>74</sup>

**V.3. Distribution of assets upon dissolution**

**180. When do the competent authority's powers of redistribution arise, e.g. on separation, death of a spouse or divorce?**

The court has power under the Scots Family Law Act 1985 to grant a range of orders in respect of financial provision on divorce. No similar powers exist in respect of separation although the court might make an order for aliment (maintenance).<sup>75</sup>

The laws of succession make provision for a spouse on the death of his or her partner. This is currently governed by the Scots Succession Act 1964 and there are separate rules depending on whether the deceased dies with (testate succession) or without (intestate succession).

**181. What powers does the competent authority have to redistribute the spouses' assets?**

*On death*

On death, provision is made for inheritance by the surviving spouse in terms of both testate and intestate succession as follows.

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<sup>70</sup> Scots Family Law Act 1985, S. 10(1).

<sup>71</sup> Scots Family Law Act 1985, S. 10(6),

<sup>72</sup> Scots Family Law Act 1985, S. 18(1),

<sup>73</sup> Scots Family Law Act 1985, S. 18(2),

<sup>74</sup> Scots Family Law Act 1985, S. 24.

<sup>75</sup> Scots Family Law Act 1985, S. 1.

### *Intestate succession*

In relation to intestate succession, a surviving spouse is entitled to both Prior and Legal Rights. Prior rights cover the dwellinghouse, its furniture and plenishings and financial provision. The surviving spouse is entitled to a dwellinghouse in which he or she was ordinarily resident at the time of the deceased's death and in which the deceased had a relevant interest.<sup>76</sup> This is subject to a maximum limit on value which is currently set at £300,000. If the value of the property exceeds that limit then he or she is entitled to the sum of £300,000. In addition to the house, the surviving spouse is entitled to furniture and plenishings up to the value of £24,000. According to S. 9 of the 1964 Act, the surviving spouse is also entitled to financial provision from the deceased's estate, both heritable and moveable. The value of this depends on whether or not the deceased is survived by issue,<sup>77</sup> however remote.<sup>78</sup> The surviving spouse is entitled to £42,000 where there are issue and £75,000 where there are none.

In many case of intestacy, the prior rights will take up a substantial part, if not all, of the deceased's estate but where the estate is sufficiently large the surviving spouse is also entitled to Legal rights. These are taken from the moveable estate only and the level of entitlement again depends on whether or not there are surviving issue. Where there are, the spouse is entitled to one third of the remaining moveable estate and otherwise to one half. The remaining estate, if there is any, is inherited by the heirs who are listed in order of preference in S. 2 of the 1964 Act.

### *Testate succession*

Where the deceased leaves a will which does not provide for the surviving spouse, he or she is still entitled to claim Legal rights and where provision has been made for the spouse, he or she may elect to take such provision or instead claim Legal rights.

### *On divorce*

#### *S. 8 Orders*

On divorce, either party may apply to the court for financial provision in terms of the Scots Family Law Act 1985. The court make may a range of orders which are set out in S. 8 of the Act as follows:

#### *Capital sum payment*

A fixed capital sum payment may be ordered<sup>79</sup> which can be made at the time of the divorce or within a specified period.<sup>80</sup> While the sum must be fixed, it can be paid at some future date<sup>81</sup> or by instalments.<sup>82</sup>

#### *Property transfer order*

The court may order one party to transfer proeprty to the other as part of financial settlement on divorce.<sup>83</sup> This power was introduced by the 1985 Act and is of particular importance in respect of the matrimonial home. The court may now choose to transfer the home to one spouse with perhaps a capital sum payment to the other.

#### *Periodical allowance*

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<sup>76</sup> Scots Succession Act 1964, S. 8.

<sup>77</sup> Scots Succession Act 1964, S. 9

<sup>78</sup> Scots Succession Act 1964. S. 36(1)

<sup>79</sup> S. 8(1)(a)

<sup>80</sup> S. 12

<sup>81</sup> S. 12(2)

<sup>82</sup> S. 12(3)

<sup>83</sup> S. 8(1)(aa)

An order for periodical allowance may be made under S. 8(2) but as one of the principal objectives of the 1985 Act framework was to move away from ongoing maintenance between ex-spouses, this is regarded as the least favourable option and before making such an order the court must be satisfied that orders for payment of a capital sum or transfer of property would be inappropriate or inadequate in the circumstances.<sup>84</sup> Any order made by the court must be justified by one of the principles set out in S. 9 and a periodical allowance is only permitted in terms of the principles in S. 9(1)(c) (fair sharing of the ongoing burden of childcare), S. 9(1)(d) (period of adjustment subject to maximum of three years for a spouse who has been financially dependent on the other to a substantial degree) or S. 9(1)(e) (relief of serious financial hardship).

#### *Pension orders*

Under S. 12A of the 1985 Act, the court may make an order for payment of a pension lump sum. If one spouse is entitled to a pension payment, then a portion of this may be set aside for payment to the other. This order is directed to the trustees of the pension fund itself rather than to the spouse. This may be used where the court is making a capital sum payment order under S. 8(1). An alternative option is that the court might make a pension sharing order under S. 8(1)(baa) or the parties may reach agreement about pension sharing.<sup>85</sup> An agreement must be a 'qualifying' agreement' which must have been intimated to the trustees of the pension scheme and registered in the Books of Council and Session.<sup>86</sup> These orders are useful ways of funding an award of financial settlement where there are few realisable assets at the time of divorce.

#### *Incidental orders*

The court can also make a range of incidental orders which are set out in S. 14 and which include an order for the sale or valuation of property, regulating occupation of the matrimonial home, requiring the provision of security for financial provision, setting aside any term in an ante-nuptial or post-nuptial marriage settlement or setting the date from which interest will run on any award of financial provision.

### *S. 9 Principles*

The court has a wide range of orders which it can make in financial provision but it can only make such an order where it is justified by one of the principles set out in S. 9 of the 1985 Act. Any order must also be reasonable with regard to the resources of the parties.<sup>87</sup> There are five principles in S. 9 and the court should begin with the first and most important principle in S. 9(1)(a) before considering the others. In many cases, any orders made are based on the first principle alone.

#### *Principle 1 (S. 9(1)(a) – Fair sharing of matrimonial property*

The first and most important principle is that the net value<sup>88</sup> of the matrimonial property<sup>89</sup> should be shared fairly between the parties, with fair sharing being taken to be equal sharing<sup>90</sup> except where sharing in other proportions is justified by special circumstances.<sup>91</sup> This principle represents a very significant change from the position

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<sup>84</sup> S. 13(2).

<sup>85</sup> Welfare Reform and Pensions Act 1999, S. 28(1)(f) ; Pensions on Divorce etc (Pension Sharing) (Scotland) Regulations 2000, SI 2000/1051, regs 3 and 5.

<sup>86</sup> Welfare Reform and Pensions Act 1999, S. 28(3)(b).

<sup>87</sup> Scots Family Law Act 1985, S. 8(2).

<sup>88</sup> Scots Family Law Act 1985, S. 10(2).

<sup>89</sup> Defined in S. 10(4).

<sup>90</sup> Scots Family Law Act 1985, S. 10(1).

<sup>91</sup> Scots Family Law Act 1985, S. 10(6).

during marriage where the spouses continue to own their individual property. On divorce, in calculating the matrimonial property, the question of who owns the property is largely irrelevant but instead the focus is on property which has been acquired during the existence of the marriage relationship.

*Principle 2 (S. 9(1)(b) – Balancing of economic advantage/ disadvantage*

The second principle requires the court to consider whether one party has derived an economic advantage from the contributions of the other or has suffered an economic disadvantage in the interests of the other party or of the family. This principle can be used where one party has, for example, invested in the business of the other<sup>92</sup>. It was specifically intended to protect the wife who had given up paid employment in order to care for her husband and their family and it is provided in S. 9(2) that contributions include 'indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for her family.' The use of this principle has been disappointing and this is partly explained by the fact that under S. 119(2) the court must consider whether the disadvantage of one has already been balanced by the advantage of the other. In other words, has the wife who gave up work already benefited during the marriage from the increased earning capacity of her husband?<sup>93</sup> Although, S. 9(1)(b) is intended to be additional to the first principle, the court will also consider to what extent the imbalance has already been corrected by the sharing of property in terms of the first principle in S. 9(1)(a).<sup>94</sup>

*Principle 3 (S. 9(1)(c) – Fair sharing of economic burden of childcare*

Separate provision will be made for the maintenance of children following divorce but the third principle requires the court to consider whether any order for financial provision should be made to take account of the ongoing burden of childcare. This applies in respect of children under the age of 16 and the principle is that the economic burden should be shared fairly. Unlike the first two principles, an order here may take the form of a periodical allowance if a capital sum payment or transfer of property would be inappropriate or insufficient. In making any such order the court will take into account a range of factors, including the age, health and needs of the child and the loss of earning capacity of the custodial parent.<sup>95</sup>

*Principle 4 (S. 9(1)(d) – Period of adjustment*

The principal objective of financial provision on divorce is that there should be a clean financial break between the parties. It is recognised, however, that this is not always possible particularly where one party has been substantially dependent on the other during the marriage. There is however no long term expectation of maintenance and therefore the parties are encouraged to adjust to their new status and this is reflected in the fourth principle which provides for financial provision for a period of readjustment of no more than three years from the date of the divorce. This is to enable a spouse who has been dependent to a substantial degree on the support of the other to readjust to the loss of that support. As with the third principle, an order of periodical allowance may be made where the other types of order would be inappropriate or insufficient. Any provision under S. 9(1)(d) is additional to that made under the previous principles but the court must take into account a range of factors including age, health and earning capacity of the applicant and the extent of their dependence during marriage.<sup>96</sup>

*Principle 5 (S. 9(1)(e) – Relief of hardship*

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<sup>92</sup> See e.g. Davidson v Davidson 1994 SLT 506.

<sup>93</sup> See e.g. Coyle v Coyle 2004 FamLR 2.

<sup>94</sup> Scots Family Law Act 1985, S. 11(2)(b).

<sup>95</sup> Scots Family Law Act 1985, S. 11(3).

<sup>96</sup> Scots Family Law Act 1985, S. 11(4).

A clean financial break is the clear objective of the 1985 Act but it is recognised that in a small number of cases that may not be possible and therefore it is provided in the final principle that there may be provision of reasonable financial provision in order to relieve hardship. In common with the third and fourth principles, a periodical allowance may be used. This principle is only intended to be used in exceptional circumstances and it should be used only where the hardship results from the divorce. In making any order, the court will take into account a range of factors set out in S. 11(5) which include the age, health and earning capacity of the applicant, the duration of the marriage and the standard of living of the parties during the marriage.

**182. What assets are taken into account? Are e.g. premarital assets and debts, assets acquired by gift, will or inheritance and debts related those assets, the increase in value of the spouses' property and debts related to that property, pension rights and claims and insurance rights taken into account? How are they valued?**

The first principle, in S. 9(1)(a), is that the matrimonial property should be shared fairly between the parties and this is the starting point in an application for financial provision on divorce. 'Matrimonial property' is defined in S. 10(4) as:

'all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by gift or succession from a third party) –  
(a) before the marriage for use by them as a family home or as furniture or furnishings for such home; or  
(b) during the marriage but before the relevant date.'

Matrimonial property is therefore, broadly, property acquired by the parties during the existence of the marriage, with only a house and furnishings bought prior to the marriage being included. In that case, the property must have been purchased with the intention that it will be used as the matrimonial home.<sup>97</sup> Property acquired after the 'relevant date' is also excluded. The relevant date is defined in S. 10(3) as the earlier of two dates; either the date on which the parties ceased to cohabit or the date of service of the summons in the divorce action.

Assets which were acquired by gift or succession from a third party are excluded from the definition of matrimonial property but it is only the initial gift or bequest which is excluded and not any property subsequently bought with it.<sup>98</sup> Where a gift or bequest increases in value during the marriage, the increase is not regarded as matrimonial property.<sup>99</sup>

Pensions and life policy benefits are specifically included within the definition of matrimonial property.<sup>100</sup> The value of the pension is calculated on the basis of the cash equivalent transfer value at the relevant date<sup>101</sup> with the relevant portion for the purposes of matrimonial property being the part which is referable to the period of the marriage.

The value of the property is the net value which means after deduction of any outstanding debts incurred by the parties either during the marriage or before the marriage to the extent that they relate to matrimonial property.

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<sup>97</sup> See e.g. *Mitchell v Mitchell* 1995 SLT 426.

<sup>98</sup> *Latter v Latter* 1990 SLT 805.

<sup>99</sup> *Whittome v Whittome* (No. 1) 1994 SLT 114.

<sup>100</sup> Family Law Scotland Act 1985, S. 10(5).

<sup>101</sup> Pensions on Divorce etc (Pension Sharing) (Scotland) Regulations 2000, SI 2000/1051.

In making any order for financial provision, the court may only make an order which is justified by one of the principles but in addition the order must be reasonable with regard to the resources of the parties.<sup>102</sup> The court is therefore able to take into account other property and resources which the parties have but which do not fall within the definition of matrimonial property.

**183. What are the relevant dates for the determination and valuation of assets? E.g. is the fact that the spouses are living apart before the dissolution of the marriage relevant?**

The value of the matrimonial property is determined either at the 'relevant date'<sup>103</sup> or the 'appropriate valuation date'.<sup>104</sup> The relevant date is the earlier of two dates; either the date at which the couple ceased to cohabit or the date of the service of summons in the divorce action. The date at which the couple cease to cohabit is the date at which they cease to 'live together as husband and wife' although they might possibly still be living in the same house.<sup>105</sup>

A particular problem was highlighted with the use of the 'relevant date' in the case of *Wallis v Wallis*<sup>106</sup> where there was a significant increase in the value of the property between the date when the couple ceased to cohabit and the date of the final order. The parties jointly owned the matrimonial home which was valued at the relevant date at £44,000. By the date of the divorce the value had risen to £68,000. The husband sought a property transfer order by which his wife's half share of the property would be transferred to him. In return he was to make a capital sum payment to his wife of £22,000 which was half the value of the property at the time of valuation. This problem has now been addressed by the Scots Family Law Act 2006<sup>107</sup> which introduced a new concept of 'appropriate valuation date'.<sup>108</sup> As a result of this amendment, where a property transfer order is to be made, the property should be valued either at a date agreed by the parties or at the date on which the order is made. This reform should avoid the problem which occurred in *Wallis*.

**184. What happens if one spouse's assets are used for investments in the other spouse's assets? Is there any right to compensation? If so is this a nominal compensation or is it based on the accrual in value?**

Having applied the first principle of fair sharing set out in S. 9(1)(a), the court can go on to consider whether orders under any of the other S. 9 principles are justified. The principle in S. 9(1)(b) provides for balancing of advantages or disadvantages which may have occurred during the relationship. It requires that fair account be taken of any economic advantage derived by either party from the contributions of the other and of any economic disadvantage suffered by either party in the interests of the other or of the family. Where one party has invested in the assets of the other this could be taken account of in terms of S. 9(1)(b).<sup>109</sup>

This principle has proved relatively disappointing in its application partly because of the difficulties involved in evaluating the advantages or disadvantages and in particular because the court must consider to what extent any imbalance has already been corrected either during the marriage or by fair sharing in terms of S. 9(1)(a).<sup>110</sup>

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<sup>102</sup> Scots Family Law Act 1985, S. 8(2)(a) and (b).

<sup>103</sup> Scots Family Law Act 1985, S. 10(3).

<sup>104</sup> Scots Family Law Act 1985, S. 10(3A).

<sup>105</sup> *Buczynska v Buczynski* 1989 SLT 558.

<sup>106</sup> 1993 SLT 1348.

<sup>107</sup> S. 16.

<sup>108</sup> Scots Family Law Act 1985, S. 10(3A).

<sup>109</sup> e.g. *Davidson v Davidson* 1994 SLT 506.

<sup>110</sup> Scots Family Law Act 1985, S. 11(2).

**185. What happens if one spouse's assets have been used for payment of a debt of the other spouse? Is there a rule of compensation? And if so, how is compensation calculated?**

As in the previous question, the second principle of financial provision may apply in this context. Having applied the first principle of fair sharing set out in S. 9(1)(a), the court can go on to consider whether orders under any of the other S. 9 principles are justified. The principle in S. 9(1)(b) provides for balancing of advantages or disadvantages which may have occurred during the relationship. It requires that fair account be taken of any economic advantage derived by either party from the contributions of the other and of any economic disadvantage suffered by either party in the interests of the other or of the family. Where one party has invested in the assets of the other this could be taken account of in terms of S. 9(1)(b).<sup>111</sup>

This principle has proved relatively disappointing in its application partly because of the difficulties involved in evaluating the advantages or disadvantages and in particular the court must consider to what extent any imbalance has already been corrected by fair sharing in terms of S. 9(1)(a).<sup>112</sup>

**86. Do the spouses have preferential rights over the matrimonial/family home and/or the household's assets?**

These assets are likely to form part of the matrimonial property which will be divided between the spouses in terms of S. 9(1)(a) of the Scots Family Law Act 1985.

**187. Do the spouses have preferential rights over other assets?**

The only significant distinction on divorce is between matrimonial property, which is defined in S. 10(4) of the Scots Family Law Act 1985 and which will be shared fairly between the spouses according to the principle in S. 9(1)(a), and non-matrimonial property which may still be taken into account by the court in terms of the parties other resources.<sup>113</sup>

**188. To what extent, if at all, does the distribution of the assets affect the attribution of maintenance?**

In Scots law, the obligation of maintenance (aliment)<sup>114</sup> ceases on divorce. One of the key aims of the 1985 Act framework for financial provision on divorce was to enable the couple to make a clean financial break on divorce and to avoid continuing maintenance between the parties. There is therefore no right to maintenance on divorce. The intention is that fair sharing of the matrimonial property under S. 9(1)(a) should in many cases be sufficient to enable the parties to live independently. There are, however, further principles in S. 9 which might justify orders for financial provision where fair sharing of the property is not in itself sufficient. The principles in S. 9(1)(c), (d) and (e) allow for a periodical allowance to be made but only where a capital sum payment or property transfer order would be inappropriate or insufficient.

**189. To what extent, if at all, can the competent authority transfer or modify the pension rights and claims of one or both spouses?**

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<sup>111</sup> E.g. Davidson v Davidson 1994 SLT 506.

<sup>112</sup> Scots Family Law Act 1985, S. 11(2).

<sup>113</sup> Scots Family Law Act 1985, S. 8(2).

<sup>114</sup> Scots Family Law Act 1985, S. 1.

In assessing the value of the matrimonial property to be shared under S. 9(1)(a), pension benefits which are referable to the period of the marriage are included within the definition. Where the court decides to make an award of financial provision, they may do so by means of an order relating directly to pension entitlement. Under S. 12A of the 1985 Act, the court may make an order for payment of a pension lump sum. If one spouse is entitled to a lump sum pension payment, then a portion of this may be set aside for payment to the other. This order is directed to the trustees of the pension fund itself rather than to the spouse. This may be used where the court is making a capital sum payment order under s.8(1). An alternative option is that the court might make a pension sharing order under S. 8(1)(baa) or the parties may reach agreement about pension sharing.<sup>115</sup> An agreement must be a 'qualifying' agreement' which must have been intimated to the trustees of the pension scheme and registered in the Books of Council and Session.<sup>116</sup> These orders are useful ways of funding an award of financial settlement where there are few realisable assets at the time of divorce.

**190. Are there, besides the rules of succession, specific rules governing the competent authority's power to redistribute the assets upon the death of one spouse?**

There are no alternative rules allowing redistribution of the assets in respect of the surviving spouse. By means of the Scots Family Law Act 2006,<sup>117</sup> a cohabitant<sup>118</sup> may apply to the court for discretionary provision on the intestate death of his or her partner. Application must be made within six months of the death and the court may order payment out of the deceased's net intestate estate. According to S. 29(10) the net intestate estate means what is left after the payment of various liabilities including the legal and prior rights of any surviving spouse. Therefore while discretionary provision may now be made for a surviving cohabitant, it does not affect the distribution of assets to a surviving spouse by means of the rules of succession.

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<sup>115</sup> Welfare Reform and Pensions Act 1999, S. 28(1)(f); Pensions on Divorce etc (Pension Sharing) (Scotland) Regulations 2000, SI 2000/1051, regs 3 and 5.

<sup>116</sup> Welfare Reform and Pensions Act 1999, S. 28(3)(b).

<sup>117</sup> S. 29.

<sup>118</sup> Defined by S. 25(1) of the 2006 Family Law (Scotland).



## D. MARITAL AGREEMENTS

**191. Are future spouses permitted to make a pre-nuptial agreement regulating their property relationship? If so, is it binding? Or if it is not binding, does it have any effect?**

Couples may enter into a pre-nuptial agreement which is referred to as a Minute of Agreement. The use of such agreements was very common under the common law system whereby the husband gained ownership of his wife's moveable property and control of all of her property. With the repeals of the Married Women's Property (Scotland) Acts from the late 19th Century onwards, the common law system was replaced with the current system of separate property and therefore the need for such agreements became less obvious and they became increasingly rare. While increased wealth, influence from other jurisdictions such as the US and some concern over the possible sharing of assets on divorce have resulted in some, particularly very wealthy, parties entering into pre-nuptial agreements, they remain relatively rare. As marriage has no effect on the property or legal capacity of spouses<sup>119</sup>, the need for a pre-nuptial contract is rarely considered.

If such an agreement is made, however, it is treated as a contract between the parties which will be binding. It may be registered, with the consent of both parties, in the Books of Council and Session or Sheriff Court Books which, in addition to providing evidence of the agreement, will also permit either party easier enforcement by means of summary diligence if one of the parties defaults on the agreement.

**192. Are spouses permitted to make a post-nuptial agreement regulating or changing their property relationship? If so, is it binding? Or if it is not binding, does it have any effect?**

Couples may make post-nuptial agreements – a Minute of Agreement – in the same way as pre-nuptial agreement. Such an agreement is a binding legal contract.<sup>120</sup> Agreements are most often made within the context of divorce where the parties choose to regulate their own financial arrangements rather than asking the court to make orders for financial provision. In this case the agreement is known as a Joint Minute of Agreement. This would be lodged with the court as part of the divorce process and in many cases, the court is requested to interpose authority to the Joint Minute and to grant decree in terms of the Agreement. In that way the Joint Minute of Agreement becomes a binding court decree.

**193. What formal requirements must the pre- and/or post-nuptial agreement fulfil to be valid as between the spouses?**

A Minute of Agreement is a contract between the parties which may be registered, with the consent of both parties, in the Books of Council and Session of the Sheriff Court Books. While registration is not required, it has the benefit of allowing either party to enforce it by means of summary diligence without having to go to court.

**194. What formal requirements must the pre- and/or post-nuptial agreement fulfil to be valid in relation to a third party? Is there a system of registration of pre- and/or post-nuptial agreements? If so describe briefly the system and its effect.**

There are no formal requirements but a Minute of Agreement may be registered in the Books of Council and Session of the Sheriff Court Books. If the agreement has been so registered then it has the benefit of allowing either party to enforce it by means of summary diligence without having to go to court.

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<sup>119</sup> Scots Family Law Act 1985, S. 24.

<sup>120</sup> Anderson v Anderson 1991 SLT (Sh Ct) 11.

**195. Is full disclosure of the spouses' assets and debts necessary for the making of a pre- and/or post-nuptial agreement?**

Minutes of Agreement and Joint Minutes of Agreement are binding but may be challenged in the context of divorce on the basis that they were not 'fair and reasonable at the time it was entered into'.<sup>121</sup> Such a challenge might be raised on the basis that the full extent of the parties' assets and debts were not known at the time when the agreement was made.

**196. If the agreement has to be made before an official (e.g. a notary), is that official obliged to inform the spouses about the content and the consequences of the pre- and/or post-marital agreement? If so, what happens if the official does not fulfil his or her obligation?**

There is no such requirement but it is advisable for both parties to have independent legal advice before making an agreement. Where parties have made an agreement which provides for financial provision on divorce, the terms of that agreement can be set aside or varied by the court as being not fair and reasonable at the time when the agreement was made.<sup>122</sup> In considering a challenge under S. 16, the court will consider whether the parties had independent legal advice prior to making the agreement.<sup>123</sup>

**197. Provide statistical data, if available, regarding the making of pre- and/or post-nuptial agreements.**

Pre-nuptial agreements remain relatively rare in Scotland and are usually entered into only by individuals with considerable personal wealth. The fact that marriage has no effect on the property of the spouses has had the effect that many individuals enter into marriage without considering its implications in terms of finance or property. It is however much more common for couples to make an agreement to regulate the division of assets within the context of divorce. There is a lack of statistical information on such agreements but it 'can be estimated that [agreements] are used to resolve disputes in around one-third of the total number of divorces in any year.'<sup>124</sup>

**198. May spouses through pre- and/or post-nuptial agreements only choose, where applicable, a statutory matrimonial property regime and/or do they have the freedom to modify such a regime or even create their own regime?**

As there is no real matrimonial property regime during the marriage relationship, the parties are free to regulate their property interests as they wish. Minutes of Agreement are, however, relatively rarely used for this purpose. The presumption of equal ownership of household goods may be rebutted where there is evidence of agreement about some other share of ownership and so in this context the existence of an agreement would be important.

Where a Minute of Agreement is used in order to regulate property matters on divorce, the parties are free to modify the provision which might have been made by the court under the Scots Family Law Act 1985. In some cases, the agreements might reflect the statutory framework whereas in others the terms of the agreement might be substantially different. Although agreements can be challenged under S. 16 of the 1985 Act on the basis that they were not fair and reasonable at the time they were made, the simple fact that they provide for

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<sup>121</sup> Scots Family Law Act 1985, S. 16(1)(b).

<sup>122</sup> Scots Family Law Act 1985, S. 16(1)(b).

<sup>123</sup> See e.g. *Gillon v Gillon* (No. 1) 1994 SLT 978 ; *Worth v Worth* 1994 SCLR (Notes) 362.

<sup>124</sup> *Edwards and Griffiths, Family Law* (2<sup>nd</sup> ed), W.Green, 2006, para 15-06.

something other than equal sharing of the matrimonial property<sup>125</sup> will not in itself be sufficient evidence of unfairness or unreasonableness.<sup>126</sup>

Even where the parties ask the court to make orders for financial provision on divorce, the existence of an agreement may be important in deciding on the sharing of assets. S. 9(1)(b) provides for fair sharing of the net value of the matrimonial property and according to S. 10(1) it is assumed that fair sharing will mean equal sharing except where there are special circumstances. S. 10(6) sets out a number of special circumstances, including the existence of an agreement between the parties, and this may result in the court ordering division of the matrimonial property in something other than equal shares.

**199. If spouses can modify through pre- and/or post-nuptial agreements a statutory regime or create their own regime, can those modifications be made to:**

- a. categories of assets;
- b. administration of assets;
- c. distribution of assets;
- d. depend upon the ground of dissolution of the marriage?

The parties are free to make agreements in any of these ways. As discussed above, the use of agreements is relatively rare except in the context of divorce. Here the parties are free to arrange their property and financial position in any way they choose subject only the protection which exists in S. 16 of the 1985 Act which permits either party to challenge an agreement on the basis that it was not fair and reasonable at the time it was entered into.

**200. Are there typical contractual clauses used in practice to modify essential elements of the matrimonial property regime, where applicable, or to achieve a certain result, e.g. that certain rights are excluded only upon divorce but not on death of a spouse?**

Little evidence is available in Scotland of the terms of agreements. The parties are also free to arrange their affairs as they wish and therefore it is difficult to identify any particular clauses as being typical. Where an agreement is used in order to settle affairs on divorce it is standard practice for a clause to be included to the effect that the agreement is in full settlement of all future claims arising from the marriage.

**201. Can the competent authority override, modify or set aside pre- and/or post-nuptial agreements on account of unfairness or any other ground?**

Agreements are contracts and therefore they may be challenged according to the normal rules of contract, including error, misrepresentation and duress.

If a Joint Minute of Agreement is made in the context of divorce, the court may be asked to grant decree in terms of that agreement. In that event, the agreement will take the place of any orders which the court might otherwise have made. In that case, the court has only limited power to vary any terms of the agreement. In general it cannot vary terms relating to fixed capital sum payments or transfers of property but it may vary terms relating to periodical allowance in the situation where the circumstances of the parties have changed materially.<sup>127</sup>

An agreement may also be varied or set aside under S. 16 of the 1985 Act on the basis that it was not fair or reasonable at the time it was entered into. It is not possible to set aside the power of the court under S. 16 by means of a contractual term.<sup>128</sup> In considering<sup>129</sup> a challenge

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<sup>125</sup> Which is the starting point for the court in terms of S. 9(1)(a) of the 1985 Act.

<sup>126</sup> See e.g. *Anderson v Anderson* 1991 SLT (Sh Ct) 11.

<sup>127</sup> Scots Family Law Act 1985, S. 13(4).

<sup>128</sup> Scots Family Law Act 1985, S. 16(4).

the court will take into account the relative positions of the parties and the availability of independent legal advice,<sup>130</sup> together with the overall terms and circumstances of the agreement.

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<sup>129</sup> See e.g. McAfee v McAfee 1990 SCLR (Notes) 805.

<sup>130</sup> See e.g. Gillon v Gillon (No. 1) 1994 SLT 978.