

SPOUSAL MAINTENANCE IN SCOTS FAMILY LAW

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I.THE ROLE OF PERIODICAL ALLOWANCE.....	602
II.THE MODERN LAW OF FINANCIAL PROVISION IN SCOTLAND .	604
A. <i>Section 9(1)</i>	606
B. <i>The Relevant Date</i>	607
C. <i>Quantum . . . s9(1)(a)</i>	608
D. <i>Quantum . . . s9(1)(b)</i>	611
E. <i>Quantum . . . s9(1)(c)</i>	613
F. <i>Quantum . . . s9(1)(d) & (e)</i>	614
III.CHANGE OF CIRCUMSTANCES - VARIATION	620
IV.PRIVATE ORDERING.....	620
V.CHALLENGES TO PRE- OR POST- MARITAL AGREEMENTS BETWEEN SPOUSES	623
VI.STATE FUNDING OF SEPARATED PARTIES.	625
VII.CONCLUSION	627

Scots Law is proud of its system of financial provision on divorce. The system put in place by the Family Law (Scotland) Act 1985 has remained in place, minimally amended, since it came into force in September 1986. This has not been the result of

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legislative inertia but rather the effect of the strength of the statute and its practical blend of certainty and flexibility. We should not be so proud of the system it replaced, nor of the fact that that older system lasted so long.

This article begins with an analysis of current law from a historical perspective before turning to the statutory basis for periodical allowance and ‘the five principles.’ Afterward, the article will describe the statute’s central concept—the Relevant Date.

I. THE ROLE OF PERIODICAL ALLOWANCE

Modern Scots Law relegates spousal maintenance (which we call periodical allowance) to a subsidiary role. The court should make no order for periodical allowance at all unless the circumstances of the case make it impossible to achieve a just solution by the payment of a capital sum, a property transfer order, a pension share, or a combination of these. The policy underlying this is the discouragement of any return to the court for any change to the order following a material change of the parties’ circumstances. Modern Scots Family Law loves certainty, but it adores the Clean Break.

Before 1964, Scottish law had no provision for periodical allowance following divorce.¹ Instead, the court had only the power to award a capital sum.² If the paying spouse was wealthy then the court had scope to do justice, but if he (and it was almost invariably a ‘he’) was without capital then no award at all could be made, even though he may have been a high earner.³ The law treated the ‘innocent’ spouse as if the “guilty” spouse had died, leaving the ‘innocent’ spouse with what would have been the “guilty” spouse’s intestate estate.⁴

The Divorce (Scotland) Act 1964 brought the matter more up

1. Kenneth Mck Norrie, *Marital Agreements and Private Autonomy in Scotland*, MARITAL AGREEMENTS AND PRIVATE AUTONOMY IN COMPARATIVE PERSPECTIVE 289, 293 (Jens M. Scherpe ed., 2012).

2. *Id.*

3. ELAINE E. SUTHERLAND, *CHILD AND FAMILY LAW 1207* (2nd ed. 2008).

4. Norrie, *supra* note 1, at 292.

to date but still rendered it impossible for the 'guilty' spouse to receive any financial provision at all.⁵ The result remained unsatisfactory because of the difficulty of assigning guilt between the parties. As any experienced family law practitioner knows, both spouses typically deserve at least some degree of fault, and it can be an arid task to assess those degrees.

Under the 1964 Act, however, the task became a necessary one.⁶ The court had discretion to award either a capital sum, a periodical allowance, both, or neither, based on the behaviour of the parties.⁷ In one example, the court awarded the wife a capital sum which was restricted because she induced her husband into the marriage by falsely stating that she was pregnant with his child.⁸ A defender's actual income was the relevant factor.⁹ His potential earnings could be considered, but there was no requirement on the man to maximise his income.¹⁰

Contemporary commentary addressed the loss of pension rights on divorce, but the courts in Scotland did not consider that issue.¹¹ Periodical allowance did form part of the post-1964 divorce landscape and that fact was undoubtedly a step forward for those innocent parties whose spouses were capital-poor and income-rich. The Divorce (Scotland) Act 1976 introduced grounds of divorce for periods of non-cohabitation for two years with consent and five years without the need for consent.¹² Fault-based

5. See SUTHERLAND, *supra* note 3, at 1208 (explaining that the 1964 Act maintained the old common law practice of allowing "only the innocent spouse . . . [to] seek an award.").

6. *Family Law: Report on Aliment and Financial Provision* (Scot. Law Com. No. 67, 1981) para. 3.11 (explaining that the Divorce (Scotland) Act 1976 removed the 1964 Act's requirement of establishing 'guilt' before awarding financial provision).

7. Norrie, *supra* note 1, at 292.

8. ERIC M. CLIVE AND JOHN G. WILSON, *THE LAW OF HUSBAND AND WIFE IN SCOTLAND* 555 (1974).

9. See SUTHERLAND, *supra* note 3, at 1208 ("In making an award, the court was directed to consider 'the respective means of the parties. . .'").

10. *Compare id.*, with *Brandt v. Brandt*, 36 Misc. 2d 901, 904 (N.Y. Sup. Ct. 1962) (finding that "with proper application" defendant had the "capab[ility] of earning sufficient moneys to enable him to maintain himself and also to adequately provide for his wife and infant child").

11. CLIVE AND WILSON, *supra* note 8, at 556.

12. Divorce (Scotland) Act 1976, § 1(2)(d)-(e).

grounds of adultery, behaviour and desertion remained¹³, but the statute demonstrates a clear move away from fault as a requirement for divorce. However, that did not change the position in respect of financial provision.

The law in respect of financial provision was still in an unsatisfactory state and the Scots Law Commission undertook a review of the law in an attempt to bring it up to date and to establish a balance between reasonable certainty and appropriate judicial discretion. Many attribute the success of the Commission's work to one of the Commissioners, Dr. Eric Clive, an academic at Edinburgh University.¹⁴ The Commission's report in 1981 recognized that the wide range of types of people and types of marriage and of reasons for family breakdown and financial circumstances made it impossible to create a one-size-fits-all solution.¹⁵ The Commission wanted an answer: "capable of applying to many different types of marriage—whether long or short, with children or without, with property or without, whether housewife marriages or two-career marriages, whether entered into one year ago or forty years ago."¹⁶

The Commission's work ultimately resulted in the Family Law (Scotland) Act 1985. Over time, the 1985 Act has proven successful, and become the envy of family law practitioners in the rest of the UK, evidenced by attempts by the House of Lords to adopt the principles of the Scottish system in England & Wales.

II. THE MODERN LAW OF FINANCIAL PROVISION IN SCOTLAND

Periodical Allowance in Scotland derives from section 8(1) of the Family Law (Scotland) Act 1985 which provides that in an action of divorce either party to the marriage may apply to the court for one or more of the following orders: "a) an order for the payment of a capital sum; aa) an order for the transfer of

13. Divorce (Scotland) Act 1976, § 1(2)(a)-(c).

14. Brenda Hale, Lecture at the Edinburgh Conference for Eric Clive, Reforming Family Law 1, 8, 18 (April 14, 2016), available at http://www.law.ed.ac.uk/_data/assets/pdf_file/0019/211852/Baroness_Hale_Lecture_-_Eric_Clive_conference.pdf.

15. *Family Law: Report on the Aliment and Financial Provisions*, supra note 6, ¶ 1.4.

16. *Id.* ¶ 3.63.

property; b) an order for the making of a periodical allowance; baa) a pension sharing order; ba) an order under s 12(A) (2) or (3); c) an incidental order.”¹⁷

Section 8(2) goes on to provide that where an application has been made for any of these orders, the court shall make such order, if any, as is: “a) justified by the principles set out in s9 of this Act; and b) reasonable having regard to the resources of the parties.”¹⁸

Section 8(2)(c), the periodical allowance provision, plays a very small part in Scots family law due to a deliberate policy of Scots law before and after the birth of the Scottish Parliament in 1999. That policy is expressed in section 13(2) of the Family Law Scotland Act 1985 which provides that:

the court shall not make an order for periodical allowance under s8(2) of this Act unless—

- a) the order is justified by a principle set out in para c), d) or e) of s9(1) of this Act; and
- b) it is satisfied that an order for a payment of a capital sum or for transfer of property, or a pension sharing order, under that section would be inappropriate or insufficient to satisfy the requirements of s8(2)¹⁹

Although a form of spousal maintenance does exist in Scotland, that statute has relegated it to a subsidiary role. Thus, to understand periodical allowance, it must be viewed within the broader context of the financial provision.

An order for periodical allowance must consider not only parties’ resources but must also meet the requirements of section 9(1). We must look at all of these five principles when taking any view about periodical allowance in Scotland.

17. Divorce (Scotland) Act 1985, § 8(1). Between the Relevant Date and the date of the divorce either spouse may have a financial obligation to the other in the form of aliment. *Id.* The aliment is payable in the same way and subject to the same criteria as aliment for children and will depend on the financial positions of the respective parties, including foreseeable financial positions, and “generally all the circumstances of the case.” *Id.* §§ 1, 4.

18. *Id.* § 8(2).

19. *Id.* § 13(2).

A. Section 9(1)

The core of the Scottish system of financial provision on divorce is found in a single subsection of section 9 of the 1985 Act. It has stood the test of more than 30 years of radical social change and has proved flexible enough to account for these changes while remaining rigid enough to discourage the speculative litigation of some neighbouring jurisdictions:

S9(1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that –

(a) The net value of the matrimonial property should be shared fairly between the parties to the marriage . . . ;

(b) Fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other of the family;

(c) Any economic burden of caring, after divorce, (i) for a child of the marriage under the age of 16 years should be shared fairly between the persons . . . ;

(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 enable him to adjust, over a period of not more than 3 years from the date of decree of divorce to the loss of that support on divorce;

(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.²⁰

Parallel provisions are in place in respect of the parties to a

20. Divorce (Scotland) Act 1985, § 9(1). And note the gendered pronoun in (d) & (e)

dissolved civil partnership.²¹

B. *The Relevant Date*

The linchpin of the Act is the “Relevant Date,” which refers to the date when the parties cease to cohabit as husband and wife.²² Even after physical separation, it can be months or even years before a court will rule that couples ceased to cohabit as husband and wife for purposes of establishing the “Relevant Date.”²³ Although establishing the Relevant Date can radically affect the calculation of the matrimonial property, there has been surprisingly little litigation on the issue.²⁴

Matrimonial property does not include property independently owned by either party before marriage.²⁵ If, for example, a couple marry and live for many years in a house that belonged to the husband before the marriage and had not been bought as a family home for himself and his present wife, then that house does not form part of the matrimonial property which is to be divided on the parties’ eventual divorce once the three children have grown up and gone. This is so despite the fact that the wife may have lived in the property for many years, properly regarding it as her home, and anticipating that its value would form part of the couple’s retirement provision in due course.

Matrimonial property also excludes inherited property, whether real or moveable, unless it has changed its nature between the date of the marriage and the Relevant Date.²⁶ This matter will be considered again below in respect of the role of

21. *Id.* § 2(2)e.

22. *Id.* § 10(3)(a).

23. *See, e.g.,* Banks v. Banks [2005] CSOH 144 [33] (Scot.) (exemplifying the length in time from ceasing to cohabit to a court’s decision stating as much, in this case over four years from ceasing to cohabit until a judicial decision was made).

24. Two honest parties can disagree on exactly when their marriage finally ended because legal dissolution requires mental as well as physical separation. *Compare* Banks v. Banks [2005] CSOH 144 [33] (Scot.) (where the parties disagreed to the extent of eight years about the Relevant Date), *with* Carrick v. Carrick [2008] CSOH 122 [7] (Scot.) (where the wife left her husband to live in another country but insisted that the Relevant Date was some considerable time after her departure).

25. Divorce (Scotland) Act 1985, § 10(4).

26. *Id.*

private ordering in Scotland. On the other hand, a house bought before marriage by one of the parties for use as a family home for both of the parties becomes matrimonial property on marriage, whether or not marriage had been in either of the parties' contemplation at the time of the purchase.²⁷

A change of nature can be simple or complicated. The simplest change occurs when one party deposits an independently owned inheritance into the joint spousal account, rendering the property matrimonial. If the inheriting party instead deposits the inherited property into an independently owned account, it remains outside the bounds of matrimonial property.

However, if the inheritor uses the inherited property to buy a house, painting, or a block of shares in his own name, it remains non-matrimonial property under section 10(4).²⁸ This latter situation might result in a 'source of funds' dispute under section 10(6)(b).²⁹ There was an unusual illustration of this provision in *B v B* in 2011, in which an Australian woman who had substantial liquid assets married a Scots laird who was asset-rich but cash poor.³⁰ In order to alleviate the cash flow issues of the laird's estate she bought one of the farms on the estate.³¹ That farm, which had previously been left out of account in the matrimonial assets, then became a matrimonial asset owned by the wife but against which the husband had a claim as it had become matrimonial property.³²

C. *Quantum . . . s9(1)(a)*

Fair division of matrimonial property under section 9(1)(a) is the most important part of the scheme of financial provision in divorce in Scotland. Matrimonial property is rather narrowly defined in s10(4) as:

[A]ll the property belonging to the parties or to

27. Divorce (Scotland) Act 1985, § 10(4)(a).

28. *Id.*

29. *Id.* § 10(6)(b).

30. *B. v. B.* [2011] Fam LR 91 [91] (Scot.).

31. *Id.*

32. *Id.*

either of them at the Relevant Date which was acquired by them or him (otherwise than by gift or succession from a third party) before the marriage for use by them as a family home or as furniture or furnishings for such a home; or during the marriage but before the Relevant Date.³³

Fair sharing is in turn defined in section 10(1) as equal sharing “or in such other proportions as are justified by special circumstances.”³⁴ When deciding what is justified by special circumstances, the Scottish courts still stress fair sharing.³⁵ These special circumstances are non-exhaustively listed, but do include any previous agreement between the parties and the source of the funds used to acquire the property.³⁶ Each of these is discussed below.

Section 10(6)(a) provides that the court may look at the terms of any agreement between the parties on the ownership or division of any of the matrimonial property.³⁷ The Scottish courts strongly prefer to honour the terms of any such agreement, subject to the requirements of section 16 of the 1985 Act.³⁸

Section 10(6)(b) provides that the court may look at the source of funds or assets used to acquire the matrimonial property if it was not wholly derived from the efforts of the parties between the date of marriage and the Relevant Date.³⁹ A common example would be an unequal contribution out of pre-marital funds for the purchase of the matrimonial home. Under section 10(4), the

33. Family Law (Scotland) Act 1985, c. 37, § 10(4).

34. Family Law (Scotland) Act 1985, c. 37, § 10(4) (explaining that even if any or all of these special circumstances exist, there will not necessarily be a departure from equal sharing).

35. *See, e.g.*, Jacques v. Jacques [1995] CSOH 678 [678] (Scot.) (clarifying that while there are some constraints on the court’s discretion based on special circumstances, the principle goal is to achieve a fair result).

36. *See* Family Law (Scotland) Act 1985, c. 37, § 10(6) (providing a list of what “special circumstances” from subsection 1 may include).

37. *Id.* § 10(6)(a).

38. *See, e.g.*, Gillon v. Gillon [1994] SC 162 (Scot.) (finding that an earlier agreement was fair and reasonable at the time of its execution). *See also* discussion *infra* Section: Private Ordering.

39. Family Law (Scotland) Act 1985, c. 37, § 10(6)(b).

matrimonial home is considered matrimonial property, but section 10(6)(b) can restore fairness, especially in a short marriage.⁴⁰ The longer the time between the pre-marital contribution and the Relevant Date, the less weight will be given to this provision.⁴¹

Section 10(6)(c) permits the Court to look at any destruction, dissipation or alienation of property by either party.⁴² The Court may wish to consider the radical diminution of the matrimonial property as a result of gambling or other excessive expenditure by either party to the prejudice of the other. However, there has to be a positive act to bring this provision into play, and that act has to have adversely impacted the parties' living standards or resources.⁴³

Section 10(6)(d) considers the nature and use of the property, including use as business premises.⁴⁴ For instance, where the matrimonial assets which are to be divided comprise the business premises essential for one party's continuing income, it can be difficult to determine what is fair. The Court may address this situation by requiring a capital award to the other party. Capital awards are generally paid in one sum but may be paid in instalments to allow the business to continue and thus for money to be earned for the benefit of both parties.

Section 10(6)(e) allows the Court to look at the expenses, or prospective expenses of valuation or transfer.⁴⁵ However, when the value of the property is low, or where the nature of the property is complicated, the expenses of valuation and transfer can be disproportionately high and that may explain why this provision has not been used very often.⁴⁶

The important factor to remember about section 10(6) is that the list of special circumstances is not comprehensive and

40. *Id.*; see also *id.* § 10(4).

41. *Harris v. Harris* [2013] Fam LR 122 [¶ 33] (Scot.).

42. Family Law (Scotland) Act 1985, c. 37, § 10(6)(c).

43. *G v. G* [2016] CSOH 32 [¶ 45–47] (Scot.).

44. Family Law (Scotland) Act 1985, c. 37, § 10(6)(d).

45. *Id.* § 10(6)(e).

46. See, e.g., *Miller v. Miller* 2006 WL 1333360 1 [5] (Scot.) (doubting the utility and extreme expense of valuation and investigations into different valuations).

discretion lies with the Court.⁴⁷ In any given case, if the Court takes the view that fair sharing is not represented by equal sharing, then unequal sharing may be ordered even though the case doesn't easily fit into any one of the listed circumstances.

D. Quantum . . . s9(1)(b)

The restrictive definition for matrimonial property has the potential to be harshly applied. The statute requires a fair division of the property, but the identification of the property to be divided is narrow. A spouse that reasonably believed the couple's wealth included assets owned by the other spouse prior to the marriage, may have thought she (and it usually is she) need not earn a pension interest nor put aside capital against a possible divorce.

S9(1)(b) addresses this issue by providing that her economic contributions and disadvantages—whether before or after the date of the parties' marriage—are to be taken into account in assessing a fair division.⁴⁸ The paradigm example of 9(1)(b)'s relevance is the young professional couple—let's say that both of them are lawyers—who cohabit and later marry. Each has a good potential for earning and for building a career and pension. They decide, as many still do, that when the children are born she will take a career break in order to bring up the family and to care for home and hearth. This traditional pattern can work well and in the interests of both parties. But if the parties divorce, and she may find that whereas her husband now has a well-developed career including an equity partnership and a good pension, she has lost her place in the profession, is professionally out of date and has only a minimal pension interest in her own name.

The pension is not such a problem, because her husband's whole pension interest insofar as it has accrued between marriage and Relevant Date, is part of matrimonial property in which she will be entitled to share. Her earning capacity, though, is much

47. See *Jacques v. Jacques* [1997] SCLR 108 [110] (Scot.) (explaining that legislation cannot reasonably provide for the many different eventualities coming from the variety of individual cases).

48. Family Law (Scotland) Act 1985, c. 37, § 9(1)(b).

more restricted. She has suffered economic disadvantage and he has had corresponding economic advantage, and this is what section 9(1)(b) addresses. It's common in Scotland for a wife in these circumstances to be awarded 55% or 60% of the matrimonial property in order to rebalance this unfairness.⁴⁹ The unequal split can be greater than that, and there are cases in which the wife is given 100% of the matrimonial property.⁵⁰ As always, the aim is to achieve a fair division in all the circumstances including, where appropriate, a periodical allowance.

The scope of section 9(1)(b) is qualified by section 11 which provides that any economic disadvantage suffered by the party seeking financial provision must be set off against any corresponding economic advantage gained by her, and the other party's economic disadvantage, if any must be set off against his economic advantage.⁵¹ Unless the marriage is a very short one, it would be unusual for there to be nothing to set off. Section 9(1)(b) is particularly useful in cases where there is wealth but very little matrimonial property. The paradigm example is the "farmer's wife" case in which the substantial capital wealth is in the form of an interest in a farm which is inherited and falls outside the scope of matrimonial property.⁵²

49. See, e.g., *Burnside v. Burnside* [2007] Fam LR 144 [144] (Scot.) (awarding the defender 60 per cent of the net value of matrimonial property, including the value of the pension, to reflect the fact that she gave up her career to look after the children as a result of which she had no pension provision); *Marshall v. Marshall* [2007] Fam LR 48 [48] (Scot.) (concluding that there are special circumstances justifying the award of a larger proportion of the total value of the assets to the defender to represent her fair share of the net value of the matrimonial property and awarding three-quarters of the matrimonial property); *Hodge v. Hodge* [2008] Fam LR 51 [51] (Scot.) (awarding a capital sum in addition to a fair split of marital assets in order to redress the economic imbalance between the parties).

50. See, e.g., *Farrell v. Farrell* [1990] SCLR 717 [726-27] (Scot.) (ordering the transfer of the defender's share of the matrimonial home and furniture plus a capital sum to cover transfer costs).

51. Family Law (Scotland) Act 1985, c. 37, § 11(2).

52. See, e.g., *De Winton v. De Winton* [1998] FamLR 110 [114-16] (Scot.) (awarding a capital payment to the wife for her contributions to the husband's heritable property during the marriage).

E. Quantum . . . s9(1)(c)

Section 9(1)c) is less important in practice than it looks. It is not intended to replace nor even to enhance child aliment (maintenance for children). It is generally used by the court to recognise the practical costs of child holiday clubs and after-school clubs which the carer of the children has to incur in order to enable her to earn a living, and to be less in need of spousal maintenance.⁵³

It is sometimes wrongly thought that sub subsections (c), (d) and (e) are the provisions which allow periodic allowances, or spousal maintenance.⁵⁴ However, that is not how the Scottish system works. Sums awarded under the term “such financial provision” in subsections (c), (d), and (e) are to be capitalised, if at all possible, by virtue of s13(2) of the same Act.⁵⁵

The system for maintenance of children is separate from the provisions of the 1985 Act. The entire statutory child support system began in the Child Support Act of 1991 and has been significantly amended since its enactment. It applies a mathematical formula to a restricted number of factors in order to produce a calculation of liability. There is no consideration of “all the circumstances of the case” as there is in aliment for a spouse pending divorce. For example, the income and resources of the parent with whom the child lives are wholly irrelevant, as are the housing costs of the other parent. The calculation is based on the income (not the capital) of the non-resident parent. The statutory system applies only to biological and adopted children. Aliment for step-children is calculated in terms of the 1985 Act in respect of which the court may take all and any circumstances into account, including any liability of the paying parent to make child support payments to other children.

For example, if the court should decide that a party should

53. See, e.g., *Maclachlan v. Maclachlan* [1997] FamLR 55 [60] (Scot.) (recognizing the Child Support Act as the appropriate provision to seek maintenance payments for child expenses).

54. See, e.g., *Porter v. Porter* [2009] WL 6525 1 [25] (Scot.) (finding the principles of Section 9(c) and (d) met but requiring a lump sum instead of a periodic allowance); see also discussion *infra* Section: The role of periodical allowance.

55. Family Law (Scotland) Act 1985, c. 37, § 13(2).

receive £1,000 per month for three years it is much more likely that the capital sum will be enhanced by £36,000 if that is practicable. That capital sum may be discounted to take account of early settlement though in times of very low inflation discounting is less of a feature. If it is not practicable to order a single immediate capital payment, then and only then, the regular payment of spousal maintenance may be ordered. The use of the phrase 'or insufficient' allows the practical solution of a combination of capital and income remedies in a given case where there may be not enough capital to satisfy a single award. The court can take advantage, as a further discouragement to variation, of section 13(3) which provides that, "An order under section 8(2) of this Act for a periodical allowance may be for a definite of an indefinite period or until the happening of a specified event."⁵⁶

F. Quantum . . . s9(1)(d) & (e)

The scope of Section 9(1)(d) is limited. On the criteria of justice or of need, there is no open season in Scottish periodical allowance such as we see in some common law jurisdictions. The entitlement is restricted to those who have been "*dependent to a substantial degree . . . other person.*"⁵⁷ Thus, when a couple have lived apart for a year or two and no payment of spousal maintenance has been made nor sought, then it will be difficult for the weaker financial party to claim that she requires spousal maintenance in terms of the first criterion of Section 9(1)(d). For instance, in *Gray v Gray*, the wife had been substantially dependent on her husband throughout the marriage.⁵⁸ After the separation and before the time of the divorce she had, through her own efforts, adjusted to her new circumstances and had not sought periodical payments from the husband.⁵⁹ Therefore, under section 9(1)(d), the Court denied her application for periodical

56. Family Law (Scotland) Act 1985, c. 37, § 13(3).

57. *Id.* § 9(1)(d).

58. *Gray v. Gray* [1991] SCLR 422 [422] (Scot.).

59. *Gray v. Gray* [1991] SCLR 422 [422] (Scot.).

allowance post-divorce.⁶⁰

The part of the Scottish system which has raised most eyebrows in other jurisdictions is the second criterion of sub section (d)—the purpose of the award, whether capitalised or not, is to enable the necessary adjustment over a period of not more than 3 years.⁶¹ Note that the period need not be three years; in fact it is unusual to see awards for so long.⁶² Awards to enable the recipient to undergo training so that she will be able to support herself can be up to three years but are sometimes for as little as six months.⁶³ Indeed, this is one of the criteria for the assessment of the award.⁶⁴

The high degree of certainty which the terms of the 1985 Act provide have been useful to practitioners in predicting, for their clients, the likely outcome of any dispute within fairly narrow parameters. Professor Sutherland has commented that “while keeping lawyers happy should not be seen as the primary objective of legislation, it is important that professionals who use any system find that the system is, in fact, workable.”⁶⁵ Research in 1990 suggested that the Act was then already satisfying that test, and its application since has shown that it leads to predictable and cost effective results.⁶⁶

60. *Id.*

61. Family Law (Scotland) Act 1985, c. 37, § 9(1)(d).

62. *See, e.g.,* Buckle v. Buckle [1995] SCLR 590 [590] (Scot.) (providing a periodic allowance for one year was enough to assist the pursuer in adapting).

63. Elaine E. Sutherland, *Scotland: The Reform Process Continues*, 26 J. FAM. L. 175, 179 (1987-1988) (noting that one of the aims of the Act is to award support for up to three years to allow a spouse time to become financially independent); *Family Law 2019 Scotland*, INT'L COMPARATIVE LEGAL GUIDES, <https://iclg.com/practice-areas/family-laws-and-regulations/scotland> (last visited Mar. 6, 2016); Dever v. Dever [1988] SCLR 352 [353] (Scot.) (awarding support for 6 months, not the full 3 years allowed).

64. Buckle v. Buckle [1995] SCLR 590 [591] (Scot.) (awarding wife £100 per month for one year to allow her time to become financially independent through education in office technology); Wilson v. Wilson [1998] SCLR 1105 [1109] (Scot.) (awarding wife £200 per month for 30 months to allow her time to become financially independent through education as well as awarding a capital sum of £400,000); SUTHERLAND, *supra* note 3, at 1258 (outlining that one criteria for awarding financial support to a dependent spouse is to grant them the ability to become financially independent over time).

65. SUTHERLAND, *supra* note 3, at 1293.

66. *See id.* at 1293 & nn. 545-46 (noting that a majority of solicitors believed the

As Professor Sutherland has further said, “the thrust of the 1985 Act is that a periodical allowance should be the exception rather than the norm.”⁶⁷ The purpose is not compensation, nor any intention to keep the claimant in the same station of life, but rather to enable her to adjust to that loss of support.⁶⁸ The burden of that adjustment is on the claimant and if she chooses not to make sufficient adjustment then she must bear the consequences of that failure.⁶⁹ The time limit of three years counts from the date of decree of divorce, which can be a considerable time after the parties’ cessation of cohabitation.⁷⁰ It is unusual in practice for the given period of readjustment to as long as three years. This emphasises the philosophy of Scots Law that adults who separate should not have any continuing mutual liability if it can be avoided.

As observed above Scots Law looks at financial provision generally and purposively so that the award under (d), while representing a current need for readjustment, need not be in the form of periodical payment. Capitalisation can be simple in a fixed sum with a fixed multiplier or absorbed into the general capital payment.

The reverse is not true. For example, if the court were to wish to award a capital payment of £24,000, it would not be appropriate, even if the capital were not immediately available, to award a periodical allowance of £1000 for two years. The consequences of doing so would include variability on a material change of circumstance and that is something which the court would wish to avoid. A capital sum can be awarded and ordered to be paid in fixed circumstances over time. In those

Act “represented an improvement to the legislative framework governing divorce”); See, e.g., JANE MAIR, ET AL., *BUILT TO LAST: THE FAMILY LAW (SCOTLAND) ACT 1985 – 30 YEARS OF FINANCIAL PROVISION ON DIVORCE* 17, <http://eprints.gla.ac.uk/117617/1/117617.pdf>.

67. SUTHERLAND, *supra* note 3, at 1267.

68. *Id.*

69. SCOTTISH LAW COMMISSION, *FAMILY LAW REPORT ON ALIMENT AND FINANCIAL PROVISION* 110 (1981) [hereinafter *FAMILY LAW REPORT ON ALIMENT AND FINANCIAL PROVISION*] (noting that the three-year limit on spousal maintenance is to ensure that dependence after divorce is not indefinite and that the financial link between the parties is timely severed).

70. *Id.*

circumstances the rate of payment would be variable on a change of circumstances, but the capital sum itself would not be variable. On the other hand, if the criteria of (c), (d) and (e) were satisfied, the court could make a variable order for regular payments or else a capitalised PA.

The decision about the amount of periodical allowance, if not agreed between the parties, is always the decision of the court.⁷¹ There is no one-size-fits-all mathematical formula for spousal maintenance in Scotland. There is, however, such a formula for child maintenance in the statutory child support system which has been through many changes since its enactment as the Child Support Act in 1991.⁷² The child support formula takes into account a restricted number of factors which would be regarded by any system of subjective justice as relevant.⁷³ However, it does not consider the income and resources of the receiving parent, no matter how great these resources may be in comparison with those of the paying parent.⁷⁴ Although the child support system does not take into account any payments of spousal maintenance being made or contemplated,⁷⁵ any calculation of child support maintenance can be treated by a court as a material change of circumstances, allowing reconsideration of any liability, whether contractual or court-ordered, of periodical allowance.⁷⁶

71. FAMILY LAW REPORT ON ALIMENT AND FINANCIAL PROVISION 110 (noting that the three-year limit on spousal maintenance is to ensure that dependence after divorce is not indefinite and that the financial link between the parties is timely severed).

72. Elaine E. Sutherland, *Scotland Wine Some, Lose Some, But Never Give Up*, 2015 INT'L SURV. FAM. L. 265, 281 (2015).

73. See, e.g., *Family Law 2019 Scotland*, INT'L COMPARATIVE LEGAL GUIDES, <https://iclg.com/practice-areas/family-laws-and-regulations/scotland#chaptercontent5> (last visited Feb. 19, 2019) (listing "paying parents gross weekly income," "nights spent by the child with the paying parent," and "needs, resources, and all relevant circumstances" as factors that the court may consider).

74. Loudon & Connell, *Family law in the UK (Scotland): overview*, THOMSON REUTERS (2019), [https://uk.practicallaw.thomsonreuters.com/8-575-5546?transition-Type=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1#co_anchor_a264738](https://uk.practicallaw.thomsonreuters.com/8-575-5546?transition-Type=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1#co_anchor_a264738) (describing the factors effecting child maintenance payment without any mention of the income of the receiving spouse as relevant).

75. Child Support Maintenance Calculation Regulations 2012 Part 2.

76. Family Law (Scotland) Act 1985 § 4.

The three-year limit, then, is a back-stop for periodical allowance, and it is a back-stop which is rarely used.⁷⁷ The “specified event” can be a remarriage by either party, the gaining of a professional qualification, the sale of a property, or anything else which the court anticipates may happen and which would change the economic landscape of the parties.⁷⁸

The court has some guidance about the amount of the award in section 11(4) of the 1985 Act and should have regard to five factors, the fifth of which is remarkably broad in the context of Scots Law’s tendency to precision and certainty; the “factors to be taken into account [include]:

the age, health and earning capacity of the party who is claiming the financial provision; the duration and extent of the dependence of that party prior to divorce; any intention of that party to undertake a course of education or training for future employment; the needs and resources of the parties; and all the other circumstances of the case.”⁷⁹

In section 11(7)(6) there is further emphasis on the fifth criterion,⁸⁰ though it might have been thought that that criterion could have rendered section 11(6) redundant—“the court may, if it thinks fit, take account of any support, financial or otherwise, given by the party who is to make the financial provision to any person whom he maintains as a dependent in his household whether or not he owes an obligation of aliment to that person.⁸¹ So, in terms of section 11(4), the court could take account of the fact that the payer has an elderly parent living in the home and that this is a direct and consequential expense that possibly

77. *Maintenance For Spouse or Civil Partner In Scotland*, MONEYFORCE, <https://www.moneyforce.org.uk/Life-and-Family/Divorce-and-separation/Maintenance-for-spouse-or-civil-partner-in-Scotland> (last updated Jun. 19, 2017).

78. Child Support (Scotland) Act 1991, §§13(3–7).

79. Family Law (Scotland) Act 1985, §11(4); *see, e.g.*, *Dever v. Dever* [1988] SCLR 352 [353] (Scot.).

80. *See* Family Law (Scotland) Act 1985, §11(6) (placing emphasis on the court’s ability to take into account other circumstances such as financial considerations or other similar support that one spouse is providing to any dependent in the household).

81. *Id.*

restricts earning capacity.⁸²

Section 9(1)(e) acts as a safety net for those cases which are not addressed by (a) – (d) —for those cases in which the iron restriction of three years' maintenance in section 9(1)(d) can be too harsh. As a paradigm example it would be regarded as unreasonable that a 60-year-old wife who has not been employed since giving birth at the age of 21, to the first of the parties' four children should be expected to accept a restriction to 3 years' maintenance to retrain for a new career; it is particularly unreasonable if she is in any way disabled even otherwise than by her age and by her lack of current work experience and skills.⁸³ She may well be regarded as likely to suffer serious financial hardship as a result of the divorce. In such a case "a reasonable period" can be indefinite, though a specific order of payment for the parties' joint lives remains very rare in Scotland.⁸⁴ However, there is not complete judicial discretion in the matter.⁸⁵ The serious financial hardship must be apparent or immediately foreseeable *at the time* of the divorce and must have a causal connection with the divorce itself.⁸⁶ So, for example, a woman who had incapacitating injuries in a road accident before the divorce could have those injuries taken into account under section 9(1)(e). If the injuries were suffered even a day after the divorce then they would be left out of account.⁸⁷ This stresses the

82. Family Law (Scotland) Act 1985, §11(4); SUTHERLAND, *supra* note 3, at 1301–02 (stating that "contribution" by payer might include contributions made for family care, including elder care).

83. *Smith v Smith* [2009] CSOH 1 [2] (Scot.) (awarding an ex-spouse £1,500 per month partially because of her "age and ongoing health problems").

84. See SUTHERLAND, *supra* note 3, at 1268 (explaining that periodical allowances can last until death, but usually last "a much shorter period of time").

85. See *Smith v Smith*, [2009] CSOH 1 [10–11] (Scot.) (giving an example of a judge who awarded ongoing financial provision beyond three years, subject to a factored analysis which included ongoing health issues and standard of living).

86. *Id.* at 13–14 (finding that serious financial hardship did exist because of the wife's limited earning capacity from age and health problems, and because the divorce was directly connected to lowering her accustomed standard of living); see also *Barclay v Barclay*, [1991] SCLR 205 [Notes].

87. *Spousal Maintenance*, THORNTONS L., <https://www.thorntons-law.co.uk/for-you/thorntons-family-law-divorce-solicitors/divorce-and-separation-in-scotland/spousal> (last visited Mar. 18, 2019) (advising that spousal maintenance awards consider changes

Scots position about the financial provision on divorce being related to the period of the marriage.

III. CHANGE OF CIRCUMSTANCES - VARIATION

Although the system of financial provision in divorce in Scotland is deliberately designed to avoid the necessity of variation of periodical allowance, there are some circumstances in which variation, either of a court's decree or of a registered written agreement is necessary. Under section 13(4), a decree may be varied by a competent court if there has been a material change of circumstances.⁸⁸ The change can relate to the circumstances of either party, such as a loss of employment by the payer or receipt of a large inheritance by the payee, especially if the periodical allowance has been ordered for the relief of her financial need.⁸⁹

Clear variation, absent agreement, requires litigation. Because litigation is expensive, it should be avoided where possible. If the facts of the variation can be easily proven, then the parties, if properly advised, ought to be able to agree to the variation in a formal and enforceable manner without recourse through the court. However, if there are disputed facts, then the court is likely to be the only option. As one would expect, one of the court's options is to change the periodical allowance into a capital sum or a transfer of property, thus removing the possibility of future variation.

IV. PRIVATE ORDERING

One consequence of the high degree of certainty in the courts' decisions about periodical allowance is that it encourages the parties to reach their own agreement without going to court. Legal advisers can be confident, up to a point, about the amount

in circumstances that occur before the divorce, but stop immediately when the divorce is final or partnership ends).

88. Family Law (Scotland) Act 1985, § 13(4).

89. Michael Meston, *Grounds For Divorce And Maintenance Between Former Spouses: Scotland*, thesis, 17–18 (University of Aberdeen 2002), <http://ceflonline.net/wp-content/uploads/Scotland-Divorce.pdf>.

of periodical allowance which a court would order and can advise their clients about what amount (by the standards of the court) would be regarded as fair. Indeed, the great majority of cases in Scotland are settled by agreement.⁹⁰ These agreements are expressed, either as a Joint Minute, to which the court will interpose authority, or, more commonly, as a written deed, usually referred to as a Minute of Agreement, which courts almost always treat as binding on the parties.⁹¹ The same applies to pre-nuptial agreements, which are also treated with the same judicial respect given to contracts.⁹² These agreements are particularly useful in Scotland because, once registered, they are summarily enforceable exactly in the manner of a decree of the court.⁹³ There is no judicial oversight with respect to the making nor of the registration of these agreements.⁹⁴ The privity of contract doctrine has always had great weight in the Scottish Courts.⁹⁵

The expected end to negotiations of a pre-nuptial agreement or financial division on divorce is the execution and registration of a Minute of Agreement covering all financial, property and pension matters.⁹⁶ The agreement may also deal with questions of residence and contact in respect of children, but the court is more likely to overturn any provision about residence and contact in the interests of the child.⁹⁷ Child residence and contact matters

90. Lucia Clark, *"The Tartan Divide" – a guide to matrimonial law in Scotland for Family Lawyers in England & Wales*, FAMILY L. WEEK, <https://www.familylaw-week.co.uk/site.aspx?i=ed81249> (last visited Feb. 21, 2019).

91. JANE MAIR, NATIONAL REPORT: SCOTLAND 25 (2008), <http://ceflonline.net/wp-content/uploads/Scotland-Property.pdf>; Scott Cochrane, *Family Law in Scotland*, BRODIES LLP (2007), <https://brodies.com/binformed/legal-updates/family-law-in-scotland>.

92. *Id.* at 27.

93. MAIR, *supra* note 95, at 27–28.

94. *Id.* at 25.

95. *What is privity in contract law?*, IN BRIEF, <https://www.inbrief.co.uk/contract-law/privity-in-contract-law/> (last visited Mar. 18, 2019).

96. MAIR, *supra* note 95, at 21, 25; *Minutes of Agreement*, ORACLE L., <http://www.oraclelaw.com/family-law/minutes-of-agreement> (last visited Feb. 14, 2019).

97. *Guide to Divorce & Separation*, AUSTIN AFFERTY [hereinafter "Guide to Divorce"], <https://www.austinlafferty.co.uk/divorce-separation-scotland-guide.html> (last visited Feb. 6, 2019); Alasdair Loudon, *Putting Children First*, 10 THE CLIENT 17, 17 (2010), available at <https://www.turcanconnell.com/media/2299/putting-children-first-the-client>.

are, of course, not summarily enforceable.⁹⁸

The respect judicially given to such an agreement will be discussed below, but it is worth considering the reason for the lack of pre-nuptial agreements in the Scottish legal landscape. Most pre-nuptial agreements are intended to protect the assets which came from one spouse's family, keeping the assets safe from the possible future claims of the other party.⁹⁹ The purpose is also to ensure that inherited assets of either spouse do not fall into the hands of the other spouse or his own extended family.¹⁰⁰ The terms of section 10 and particularly 10(4) and 10(6)(b) of the 1985 Act already serve that purpose¹⁰¹ and that in itself is no accident. There is in effect a clean break at the start of the marriage as well as the end. The pre-nuptial agreement is not unknown in Scotland but in many situations it is unnecessary except in respect of finer details.

There is a very limited challenge to the enforcement of a registered Minute of Agreement in a family law case. Except in cases of fraud and *vis ac metus*, the challenge is restricted to the terms of section 16 of the 1985 Act.¹⁰² That section permits a court to vary or to set aside any or all of the terms of a written agreement if: (1) the parties have specifically declared in the body of the deed that the court should have that power (and that is the norm); or (2) the court decides that any or all of the terms of the agreement were not "*fair and reasonable at the time*" of the agreement.¹⁰³ The rare but not unknown case in which there is no mention of pension sharing is specifically covered in section 16(2),

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98. Loudon, *supra* note 101, at 17.

99. Norrie, *supra* note 1, at 18. *Prenuptial Agreement*, THORNTON L., <https://www.thorntons-law.co.uk/for-you/thorntons-family-law-divorce-solicitors/prenuptial-agreement> (last visited Mar. 18, 2019) (advising that prenuptial agreements are used to protect the parties existing assets and determine how assets will be divided if there is a divorce in the future).

100. THORNTON L., *supra* note 103.

101. Family Law (Scotland) Act 1985, §§ 10(4), 10(6)(b).

102. JANE MAIR ET AL., ALL SETTLED? A STUDY OF LEGALLY BINDING SEPARATION AGREEMENTS AND PRIVATE ORDERING IN SCOTLAND: FINAL REPORT, 107 (2013), *available at* <http://eprints.gla.ac.uk/85810/1/85810.pdf>.

103. Family Law (Scotland) Act 1985, § 16(1).

which provides that in these circumstances, the court has the power to vary or set aside an agreement.¹⁰⁴

V. CHALLENGES TO PRE- OR POST- MARITAL AGREEMENTS BETWEEN SPOUSES

As mentioned above the primary rule of financial provision in divorce is in s9(1)(a) whereby the matrimonial property is to be shared fairly.¹⁰⁵ Section 10(1) provides that fair sharing is equal sharing unless special circumstances apply.¹⁰⁶ Section 10(6) sets out a non-comprehensive list of possible circumstances, and the first-mentioned of these is that there is an agreement between the parties on the ownership or division.¹⁰⁷ The court is not completely bound by the terms of such an agreement but in the absence of facts which would satisfy the criteria of section 16, the agreement will be enforced. A would-be challenger of an agreement, whether prenuptial or made in contemplation of an impending divorce, has something of a hill to climb.

The first major case in respect of s16 was *McAfee v McAfee* in 1990 in which both parties were practicing lawyers.¹⁰⁸ The wife was a specialist in family law and went to another family law specialist for advice before entering into the agreement which excluded her right to any capital sum on divorce.¹⁰⁹ Ultimately, the court determined that while her professional qualifications and experience were important factors in considering whether the agreement was unfair or unconscionable, the circumstances called for further evidence to determine the outcome.¹¹⁰

The wife in *Worth v Worth* in 1994 was successful because the agreement excluded her right to claim against her husband's pension, which neither of the parties had realised, at the time of

104. *Id.* at §§ 16(1), 16(2).

105. *Id.* at § 9(1)(a).

106. *Id.* at § 10(1).

107. *Id.* at § 10(6).

108. *McAfee v. McAfee* [1990] SCLR 805 [806] (Scot.).

109. *Id.*

110. *McAfee v. McAfee* [1990] SCLR 805 [808] (Scot.).

the agreement, that she had been entitled to do.¹¹¹ There was no question of fraud in this case—merely mutual ignorance about the possibility of a claim against the value of the pension interest.¹¹² The wife was successful because the agreement had been unfair *at the date it had been entered into*.¹¹³

The most useful authority on the section 16 challenge is *Gillon v Gillon* from 1995 in which the court took the opportunity to set out five principles which should govern the interpretation of section 16:

The agreement on financial provision must be looked at from the two points of view of fairness and reasonableness,

All the relevant circumstances prevailing at the time the agreement was entered into must be examined, including the nature and quality of any legal advice given. In other words if the legal advice was poor it may assist the challenger, but the court will probably be happier to leave the disappointed challenger to sue her lawyer.

Any unfair advantage taken by one spouse of the circumstances prevailing at the date of the agreement will be relevant. So, if either spouse had been other than candid about his or her resources at the time of the agreement then that fact will be relevant,

The court should not be unduly ready to overturn an agreement validly entered into and

The court will not necessarily infer that an agreement is unfair or unreasonable just because it results in an unequal or even very unequal division. The court is not there to rectify the mistakes of a party who later has a change of mind.¹¹⁴

111. *Worth v. Worth* [1994] SLT (Sh Ct) 54 [54] (Scot.).

112. *Id.* at 56.

113. *Id.* at 56–57.

114. *Gillon v. Gillon* (No 3) [1995] SLT 678 [678] (Scot.).

Agreements as to periodical allowance are made between the parties on a bespoke basis, almost always negotiated and adjusted between the parties' lawyers. There are styles of agreement which are commonly used but the whole point of the agreement is that it is tailored to fit one specific case. The parties may agree to whatever lawful terms they choose, but in most cases the terms of the agreement will, to a greater or lesser extent, follow the shadow of what the court would be likely to do if the matter were litigated. That shadow is generally inimical to periodical allowance and there is a tendency, where the available assets allow it, to affect a clean break by capitalizing the whole financial provision.

VI. STATE FUNDING OF SEPARATED PARTIES.

The Department for Work & Pensions, which administers State benefits, operates without variation across all of the jurisdictions of the UK with very few exceptions. The slight variation is in the sphere of child support which is beyond the scope of this article.

If parties are still living together as a couple, then one party usually makes a claim for means-tested benefits for both parties. This is significant because the rate of payment is generally lower for each member of a couple. Single people can have a rate of payment that is more than double that of a couple. It is important, therefore, to establish whether or not two people are living together as part of a unit. A couple for these purposes means either: (1) two people who are married to each other and are members of the same household; or (2) two people who are not married to each other but are living together as husband and wife (otherwise than in prescribed circumstances).¹¹⁵ It follows that it is possible for either or both members of a married couple to claim means-tested benefits as if they were single. However, under these circumstances the individuals trying to claim single status need to convince benefits

115. *Living together and opposite sex marriage: legal differences*, CITIZENS ADVICE SCOT. (2015), <https://www.citizensadvice.org.uk/scotland/family/living-together-marriage-and-civil-partnership-s/living-together-and-opposite-sex-marriage-legal-differences-s/>.

authorities that they are not living in the same household, even if they are physically living under the same roof. This is particularly important if one of the parties is otherwise ineligible for benefits. For example, in a case where the husband is employed and earning a good salary, his wife may have no earnings at all. If the couple cease living together as a married couple but stay under the same roof for reasons of practicality and /or necessity, she may be able to claim some state benefits even though her basic housing needs are already met.

A mother who is in receipt of means-tested benefits and who thereafter receives payments of child support maintenance does not thereby suffer any diminution in her entitlement to those state benefits.

The question of what is a 'household' for these purposes is "a question of fact and degree, there being no certain indicia the presence or absence of which is by itself conclusive."¹¹⁶ However, it has been established that a person cannot be a member of more than one household at the same time.¹¹⁷

A separated spouse who receives means-tested benefits will suffer a pro rata deduction from those benefits if she also receives periodical allowance on a regular basis.¹¹⁸

The difficult questions in this sphere are about a claimant's resources. If, for example, a benefit claimant could seek periodical allowance from a wealthy ex-husband but chooses not to do so, should her state benefit be reduced accordingly? If not, then there would be a danger that her resource in the form of her potential claim would be discounted. On the other hand, if she were to go to the trouble of making a claim she may end up with no net gain. A strict application of regulation 42 (2) of the Income Support Regulations leads to a deduction from income support of any sum which the benefit claimant has failed to claim.¹¹⁹ The practical problems lie in the evaluation of the potential income resource. In

116. *Regina (on the application of Hossack) v. Kettering Borough Council and another* [2002] EWCA (Civ) 886 [10] (Eng.) (citing *Simmons v. Pizzey* [1979] AC 3 (Scot.)).

117. R(SB) 8/85 [¶ 12]; see also EDWARD JACOBS, *CHILD SUPPORT: THE LEGISLATION* 576 (12 ed. 2015).

118. *Morrell v Secretary of State for Work & Pensions* [2003] EWCA Civ 526.

119. The Income Support (General) Regulations 1987, SS 87/1760, § 42(1) (U.K.).

the Scottish system, the Department for Work & Pensions has wide-ranging power to make allowances for relief of serious hardship.¹²⁰ The difficult cases are those in which an order has been made by a court for spousal maintenance, but there is only intermittent compliance with that order.

VII. CONCLUSION

Not all litigants are happy with judicial decisions on financial provisions, but there is general agreement that the Scottish system itself is fair, well-structured, flexible and practical—just as Eric Clive and the Scots Law Commission in 1981 wanted it to be.

120. DEPT FOR WORK & PENSIONS, <https://www.gov.uk/government/organisations/department-for-work-pensions/about> (last visited Mar. 19, 2019) (stating that the Department for Work and Pensions is responsible for providing welfare, pensions, and child maintenance policy in the UK).

