

Principles in Practice: financial provision on divorce in Scotland

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Abstract:

Scots law of financial provision on divorce is now 30 years old. The Family Law (Scotland) Act 1985 is one of the best known and most respected elements of the Scottish family law system and yet, for something so significant and familiar, it has attracted comparatively little attention from researchers and commentators.

The 1985 Act was designed to address the mischiefs of the previous legal system and to achieve explicit objectives. Particular problems, which had been identified in respect of the pre-1985 law, included a lack of clear guidance, too much judicial discretion, restrictions on the orders which courts could make and an over-reliance on continuing periodical allowance. The Scottish Law Commission considered that “[w]hat financial provision on divorce should seek to achieve is fundamental to the type of legal provision governing it” and, although they concluded that no single objective was appropriate, they did identify a range of objectives which included the desirability of achieving a clean break between the parties. The resulting detailed statutory framework of the 1985 Act - “a highly sophisticated system” (Sutherland) - was designed to achieve these objectives by means of a carefully constructed jigsaw of orders, principles and guidance. The legislation was carefully planned and well drafted but how well has it worked in practice?

One of the aims of the SLC, in designing the 1985 Act, was to increase the willingness of couples to reach agreement and to reduce the need for judicial resolution. To that extent, the Act has worked in that there are relatively few reported cases but while there are undoubtedly many benefits in settlement, the lack of published judgments makes it more difficult to see how the legislation is used.

While the 1985 Act has been generally well-received over the past three decades, it has also attracted some criticism and raised some questions. Compared with the English law on ancillary relief, its principled framework appears to leave little space for judicial discretion. While its preference for a clean break settlement fits well with modern, simple no-fault divorce, Scots law has been criticised for being unduly harsh on the ‘homemaker spouse’. While certainty and clarity about the law has undoubtedly been achieved, has it been at the expense of fairness?

In a recent study, funded by the Nuffield Foundation – Mair, Mordaunt and Wasoff, *Built to Last* <http://eprints.gla.ac.uk/117617/1/117617.pdf> - we analysed a sample of 200 reported cases on financial provision, spanning the 30 years during which the 1985 Act has been in force, together with in-depth interviews with solicitors, advocates and judges. Using findings from that research, this paper will explore how the statutory principles of financial provision work in practice.

Keywords:

Property – divorce – financial provision

1. Introduction: 30 years of the Family Law (Scotland) Act 1985

Financial provision on divorce in Scotland was radically reformed by the Family Law (Scotland) Act 1985 which introduced a detailed and principled statutory framework. The legislation was designed to address the mischiefs of the previous legal system and to achieve explicit objectives. Particular problems, which had been identified in respect of the pre-1985 law, included a lack of clear guidance as to the nature and purpose of financial provision on divorce, too much judicial discretion, restrictions on the types of orders which courts could make and an over-reliance on continuing periodical allowance. The Scottish Law Commission considered that “[w]hat financial provision on divorce should seek to achieve is fundamental to the type of legal provision governing it” and, although they concluded that no single objective was appropriate, they did identify a range of objectives which included the desirability of achieving a clean break between the parties.

The legislation was carefully planned and well drafted but how well has it worked in practice? After 30 years in force, there have been relatively few published cases and little detailed academic analysis. Among the cases which have been reported, the majority have been at first instance and, even among those which have been appealed, there has been little indication of serious legal issues or problems with the legislation. Anecdotally, Scottish family lawyers have tended to speak positively about the 1985 Act and stories of financial provision on divorce rarely, if ever, make the headlines in the Scottish media. All of this might tend to suggest that the 1985 Act works well.

Within Scotland, there have been occasional expressions of disappointment at the apparent under use of some of the principles but little evidence of real concern and certainly no calls for reform. There has, however, been criticism of the Scottish system from England, most famously in the comments of Lord Hope in *Miller v Miller; McFarlane v McFarlane*¹ and more recently in discussion surrounding the Divorce (Financial Provision) Bill (HL) introduced by Baroness Deech as a Private Members Bill in the House of Lords. These criticisms have focused on a lack of flexibility in the statutory framework, its perceived unfairness and, in particular, its harsh treatment of ‘homemaker’ wives.

This paper presents evidence from a recent research project funded by the Nuffield Foundation: Mair, Mordaunt and Wasoff, *Built to Last* (2016).² From the perspective of Scots legal practitioners, it explores how well the legislation works, whether it is perceived as being unduly inflexible and whether it is capable of producing outcomes which are fair.

3. A principled system but does it work?

The Report,³ on which the 1985 Act was based, aimed to clarify and offer “*specific guidance to the courts, the legal profession and the public on the purpose or purposes of financial provision on divorce, and on the principles to be applied and the factors to be taken into consideration in connection therewith*”.⁴ Indeed, the Report emphasised throughout the need for financial provision on divorce to be based on a defined set of principles, which are available and accessible to all:

It does not seem satisfactory that questions of social policy, which have very important financial consequences for individuals, should turn on informal understandings and somewhat arbitrary rules of thumb based on no ascertainable principle and known only to a small circle of court practitioners. It seems to us that

¹ 2006 UKHL 24 per Lord Hope at paras 101-12.

² The full report is available at <http://eprints.gla.ac.uk/117617/1/117617.pdf>.

³ SLC (No. 67) *Family Law: Report on Aliment and Financial Provision*, 1981.

⁴ *Ibid*, p82.

*any solicitor in any part of Scotland, even if not a divorce specialist, should be able to turn to a statute on financial provision on divorce and find some clear statement of the underlying principles on the basis of which he could advise his client and seek to negotiate a settlement. That is not possible under the present law.*⁵

The Act sets out five principles⁶ - fair sharing of matrimonial property; balancing of economic advantage and disadvantage; fair sharing of the economic burden of childcare for any child of the family up to the age of 16; a period of readjustment (up to a maximum of three years) where one spouse has been substantially dependent on the other; relief of serious financial hardship resulting from the divorce. The court may make a number of orders⁷ where they are justified by one or more of these principles and where they are reasonable with regard to the resources of the parties.⁸ The Act goes on, in the following sections, to set out further detailed guidance on the application of each of the principles and the appropriate use of each of the orders. The resulting detailed statutory framework of the 1985 Act is “a highly sophisticated system” (Sutherland); a carefully constructed jigsaw of orders, principles and guidance.

The principled nature of the statutory system is clearly consistent with the philosophy of the Report which preceded its coming into force, but does this principled system work? One of the criticisms that is sometimes made of the Scottish system is that it is overly restrictive; that by sticking strictly to its principles it lacks flexibility. Certainty, it is sometimes argued, is achieved at the expense of discretion and fairness. The question of fairness is highlighted in particular in respect of ‘homemaker wives’. Whereas the ‘needs’ of the ex-wife would be highlighted and addressed in England, in Scotland it is argued that she receives no special treatment beyond the possibility of an order under the fourth principle – readjustment – and even there any period of readjustment is subject to a statutory maximum of three years.

These were issues which were explored in the context of our research through interviews with a sample of 30 solicitors, advocates and judges. The following extracts give some flavour of the range of views expressed.

3. 1 A balance between certainty and flexibility

Overall, interviewees considered the principles were sufficiently flexible for their needs, i.e. to achieve fair outcomes for clients. Generally, there was no appetite for changes to the principles because:

Do I wish for more flexibility? No, I don't think so. I think that we gain very much from a reasonably rigid structure limiting judicial discretion. Take the example of the Forth Road Bridge, which is a wonderfully strong structure, thank goodness, because I drive across it every day, but it does sway a bit. And if it didn't sway a bit with changes of temperature and with high winds, it would fall down. It's got to have ... some inbuilt flexibility in it, but I don't want anymore, because that would encourage speculative litigation and go down the English route. [Solicitor 05]

In headlines about the Scottish system of financial provision, the focus is often on the bare principles and indeed often only on the first principle – fair sharing of matrimonial property – and the fourth principle – readjustment. A common theme throughout the interviews was the importance of considering all five of the principles and of recognising that the principles do not sit within the Act in isolation. They are, rather, part of an integrated framework set within

⁵ Ibid, p81.

⁶ 1985 Act, s9.

⁷ 1985 Act, s9.

⁸ 1985 Act, s8(2).

the double-pronged approach of what is fair and what is reasonable.⁹ When the framework is taken as a package it can be very flexible: “*if section 9 was viewed in isolation it wouldn't be enough, but ... when you then take account of the other sections of the Act [especially] ... the over-arching principle ... of fairness ... that probably gives us the flexibility that we need.*” [Solicitor 20] Such fairness values all contributions to the marriage sharing: “*fairly the fruits of the labour of the parties during their marriage ... that labour can be working, or looking after children, or keeping the house, whatever it may be.*” [Solicitor 20]

The principles were seen as a positive means of achieving fairness for clients; there was no sense that practitioners were fighting against the principles to achieve such fairness: “*I don't find them a strait-jacket at all, I find them more like signposts along the way. So no, definitely not a strait-jacket. I don't feel they stop me doing anything.*” [Solicitor 06] This was an approach adopted by agents and judges alike. Despite the fact that the Act had set certainty before judicial discretion, there was sufficient flexibility within the principles to allow for a level of interpretation:

... in this court we don't feel so constrained, in the sense that we can bend principle as we want it. ... I don't find the language in the ... Act inhibits me terribly. ... And there are degrees of flexibility built into it, and I think you can stretch them a fair bit: but I've never felt the need to stretch them in a way, which ... would be doing violence to the language of it. [Judge 30]

The codified, principled approach of the '85 Act, offering a level of certainty, was summed up as resulting in: “*people spend[ing] a lot less in legal expenses in Scotland than in other parts of the world, particularly England, and we can give them a reasonable range of outcomes.*” [Advocate 22] The structured nature of the principles was generally welcomed:

“I like the principles ... the fact that there is a structured way in which we can advise our clients. ... If you look at England ... they are very much reliant on previous orders ... but also it is often worth their having a go in terms of the litigation ... I don't think that is a nice situation for clients.” [Solicitor 17]

In Scotland clients could understand, from the outset, what outcomes would be likely: “*a client will come in and say this is my story. ... Because of the flexibility and ... discretion afforded to the sheriff I always say to clients – ‘Here is the range of possible outcomes ... that's your parameter.’*” [Solicitor 18] The level of certainty meant that practitioners were able to place before a client: “*a set of spread sheets and say – ‘Look, the range of ... outcomes ... is between this and this, and if we can get an outcome somewhere in this range we'll be doing quite well.’*” [Advocate 22] Such certainty means: “*Scotland has traded flexibility for certainty ... that's just the way you've got it.*” [Advocate 22] And on the whole practitioners liked the way they'd got it, because it was seen to serve the majority well – no mean feat: “*for a vast majority of our cases, the certainty it produces is beneficial to clients because it saves ... money on litigation, ... [reducing] fall-outs over money and children. Because you've got certainty, you know what the outcomes are going to be ... there is a huge benefit in that.*” [Solicitor 12]

Flexibility and certainty could be viewed as extremes:

On the one hand, you would have complete flexibility and nobody would know where they were – and in England they just make it up as they go along – and then, on the other hand, you've got a very strict view of the legislation, as if it's kind of, back of an envelope – ‘What's the matrimonial property? Divide it 50/50 and that's an end of it’, which is far too simplistic. And somewhere in the middle ... you've got something that works, which is a matrimonial property regime, but with an ability to mitigate the

⁹ Ibid.

worst effects of that by allowing for unequal sharing and economic disadvantage.
[Judge 29]

Of course, there is a balance to be struck between flexibility and certainty: it is not a straight either/or. While it was generally recognised that the English system gave a high level of flexibility, it was seen to come at too high a price: “*the only way you can create true flexibility is to have an English system, which isn’t based on principle at all, and I wouldn’t favour such an approach*”. [Judge 29] No one looked with complete admiration at such flexibility, which allowed a high level of discretion to the courts: “*I would be very unenthusiastic about us expressly introducing more discretion, because I see day in and day out the damage that does down south*”. [Solicitor 01]

There was no appetite for any such change: “*I wouldn’t want to see more creativity, more flexibility, in the terms of the statute. I don’t think that will be a good idea. We gain so much from the certainty that people can have, and the courts would be much more flooded with speculative cases if we allowed that to happen*”. [Solicitor 05] The structured nature of the framework was considered to be helpful: “*because you then know what types of orders the court is likely to make ... it’s probably a good thing that there is less creativity when placed in the hands of the court*”. [Solicitor 17] However, trading flexibility for certainty did not mean the Scottish system was without any flexibility of its own – that was far from the case: “*there is huge flexibility there*”. [Solicitor 18] Indeed, there was a view that: “*the Act provides as much flexibility as you like ... if you read Little v Little¹⁰ and Jacques v Jacques¹¹ together, there’s effectively an unfettered discretion and so it’s not the Act that doesn’t give flexibility*”. [Judge 29]

Interviewees liked the structure the principles afforded their clients, which enabled them to focus more exactly on aspects of their case, avoiding expensive and possibly acrimonious litigation:

A lot of people come in ... and say – ‘I want ... to fight this all the way’. A lot of the time we have to sit down and say to them – ‘Well, you can only fight within these principles ... because if you are unrealistic ... then ... you are less likely to win ... this battle that you think you are going to have’. ... In England they end up in these horrible, costly litigations because they don’t have such structured principles to rely on. So ... in terms of people, from a psychological perspective, I like the fact that the principles are structured. [Solicitor 17]

3.2 But is it fair?

It is the statutory principles in section 9, rather than a general concept of ‘fairness’, which underpin the Scottish system of financial provision and sometimes that may lead to criticism that the legislation pays insufficient attention to the question of whether or not the outcomes are fair. Fairness is of course built into the legislation: it is most obviously central to the first principle – the ‘fair’ sharing of matrimonial property¹² – but it is a very structured path to fairness rather than a general concept.

To achieve a fair outcome is: “*the whole point of the Act*”. [Advocate 21] However, fairness, as we have noted, was considered to be: “*a subjective quality. ... What I think is fair and what my opponent thinks is fair and indeed what the sheriff thinks is fair can all be different*”. [Solicitor 18] In order to ameliorate such subjectivity, creativity must be set within the: “*two-*

¹⁰ *Little v Little* 1990 SLT 230; 1990 SLT 785.

¹¹ *Jacques v Jacques* 1995 SLT 963; 1997 SLT 459.

¹² 1985 Act, s9(1)(a).

fold ... test – the orders have to be justified by the principles, but then also have to be reasonable having regards to parties' resources". [Solicitor 18]

Words and concepts other than 'fairness' were used, such as 'acceptable outcome'. But what is an acceptable outcome? It could be: "*Where each party is equally unhappy*" [Solicitor 05] – on the face of it a glib response, but actually a very telling one. It is easy when sitting at a desk removed from clients and their concerns to forget the level of human misery that divorce may bring with it:

"it's a great privilege of a family lawyer to take people who are having such a bad time and try and make it better. ... That's the joy of the job, to take people who, ... if you do your job right, are going to be happier at the end than they were at the beginning". [Solicitor 05]

It could be the obverse: "*Two happy clients. ... But, actually, if I achieve a reasonably satisfied client then that's it. None of them is ever happy, you know, they're not happy, but I want a client to have a fair and reasonable outcome*". [Solicitor 06] So, perhaps: "*An acceptable outcome to the client is one where they are equally happy, or equally miserable to the other party's response*". [Solicitor 13]

Happiness is rarely a factor of a divorce. Far more significant is to achieve a level of fairness for a client: "*if I can get them to accept the reality of the situation, if they go out of here thinking ... that every aspect's been dealt with, that I've had my corner fought, that I've got a fair outcome, that's all I want my clients to think*". [Solicitor 06] In order to achieve such fairness a family lawyer spends: "*a lot of time trying to pour oil on troubled waters and finding solutions rather than just resolutions*". [Solicitor 07] Clients often begin with a list of demands and need to be guided to: "*articulate what they think would be a fair outcome*", which often means challenging them to imagine if: "*the boot were on the other foot ... if you can get them to consider that, then that goes a long way to resolving the problem*". [Solicitor 09] Thus, clients were encouraged to think: "*about what's fair, not only what's fair to them but what's fair overall*". [Solicitor 20] Being pragmatic, an acceptable outcome would, therefore, be one where:

"both parties leave that process with an outcome that they can live with. If ... you meet somebody in a pub sobbing into his beer saying – 'She took the shirt off my back', I take the view that you were badly advised, or ... you ignored advice, because that should not be an outcome". [Solicitor 13]

It was suggested that most clients would say that the Act serves neither party well at an emotional level, because it does not focus on their individual contributions made to the marriage. However, that was actually seen as a very positive aspect of the Act, enabling the agent to say to the client:

... this was a partnership. ... And actually this is not about ... the court vindicating your sense of yourself. ... The point is what we are ... doing is a really quite blunt, rough and ready assessment ... that's a good thing. Rather than ... there [being] an overwhelming focus on trying to give weight to things like contributions and needs, which happens down south ... and is so damaging in the longer term. [Solicitor 01]

For a client to feel that an outcome is fair it needs to fulfil their: "*expectations and that's a question of the judgment of the practitioner, as to how you set those expectations*" and the principles are central as: "*the default position*". [Solicitor 14] Clarifying what a client wishes to achieve within the context of the principles should lead to a reasonable outcome where: "*they were both able to move on without one of them being over burdened one way or the other*", [Solicitor 15] which may well mean: "*without on-going dependence on the former spouse, if at all possible*". [Judge 29] While an agent may take account of their client's expectations, a judge takes no account of either party's hopes and feelings: "*I don't take that*

into account. ... An acceptable outcome for me is one where I feel I've produced the fairest result that I can in the circumstances of the parties' finances". [Judge 31]

Another way of assessing outcomes is to look at the number of appeals, which: *"are very few ... in family cases. ... There must be some thing about the system that's working pretty well. I don't think it's just the cost of appealing that is inhibiting people ... even in big money Court of Session cases the number of appeals is very few". [Solicitor 13]*

3. 3 Is it harsh on wives?

The 1985 Act marked a very significant change in the Scottish legal approach to financial provision on divorce; quite distinct from the previous more discretionary system. It was a change closely linked to the Divorce (Scotland) Act 1976 and its move towards no-fault divorce; a link which was reflected in the 1985 Act's preference for clean break and private resolution, neutrality towards fault and focus on independence and moving forward. This new system of financial provision was conceived at the beginning of the 1980s; an era of optimism about feminism and gender equality, following close on the introduction in the 1970s of statutory commitments to equal pay and equal treatment for women. The 1985 Act emerged at a time of transition from a more traditional breadwinner/homemaker model of marriage to a modern vision based on equal partnership. After 30 years, there are still debates about no-fault divorce and there is ongoing frustration at the slow progress towards gender equality and particularly towards equal pay. On reflection, although the model of the 1985 Act was well suited to anticipated gender equality and neutrality in work and family, does it produce harsh consequences where gender equality remains an aspiration rather than a reality?

While the fourth principle (s9(1)(d)) provides for a period of readjustment following divorce, and may give rise to an order for periodical allowance, the period is restricted to three years. When the Scottish approach to financial provision is criticised for being harsh on women, attention is usually focused on this provision: *"I'd like to ... remove the maximum of three years" [Advocate 26] "I think five years would be better". [Solicitor 19]* It was felt to be: *"quite harsh" [Solicitor 14]* and there needed to be: *"more flexibility ... for some people, providing longer than three years to get PA. ... It's just for a very small number of cases". [Judge 30]*

The problem was outlined as follows:

You think – 'We've done a deal, we've split the assets down the middle, you've got another couple of years really minor financial support coming in, then you've got your child support and you are on your own.' – And you cast forward to where that person will be in five years' time ... if you actually do that you begin to realise that there are some people who are going to be struggling quite significantly if their support is cut after three years. And this might be in circumstances where their ex is earning very significantly and able to go from strength to strength, whilst they are not. [Solicitor 03]

Compensation and maintenance are not concepts that sit easily within Scots law, but there were interviewees who spoke in these terms in connection with wives from long marriages who had no future prospects of earning, unlike their husbands. These concepts are English in nature, not Scottish and while no one was suggesting: *"going over to that system where joint lives order are much more common, I do sometimes wonder if the substantive fairness has been done to women". [Solicitor 03]*

4. It's good legislation

Overwhelmingly, the message from the practitioners we interviewed was that they welcomed and appreciated the legislation. The 1985 Act was regarded as being *"a very good piece of*

legislation” [Advocate 22]: “*a gem*” [Solicitor 05]. It is clear and well drafted. It is complex and sophisticated but it has been carefully constructed and the provisions are well signposted and well integrated. Through its principles, the legislation offers certainty but the detailed guidance and range of factors within which those principles must be applied ensure flexibility and scope for creative outcomes. There was widespread respect for the legislation and almost no desire for change. In fact there was a positive message from practitioners that they did not want substantial change.

There were many aspects of the legislation, which were thought to contribute to its success but the section 9 principles in particular were praised. They were seen as achieving clarity and certainty while still allowing for flexibility. The first principle was quite clearly the starting point and the most significant but in the interviews, the point was stressed that each of them was needed and there was no enthusiasm for changing them. Central to the success of the legislation was the combination and interconnectedness of the individual principles themselves and of the principles with the other guiding factors. Section 8(2) in particular, which requires the application of the principles against a broader context of what is fair and reasonable with regard to resources, was key to achieving an acceptable balance between certainty and discretion.

While the legislation itself was sound and there was no need, or appetite, for change, there was also a clear message that it could be used to greater effect and this was a consistent message across all groups of interviewees. Reflecting on their experience, many expressed views about the possibilities for more imaginative use of the legislation; the need sometimes for more ambitious construction of argument; the importance of providing the necessary evidence to allow the sheriff or judge to make more creative judgments. If there were problems with the law of financial provision, it was not the fault of the legislation itself but of those who used it. Occasionally interviewees in one group, for example sheriffs, indicated things that those in another group, for example solicitors, might do in order to make the legislation work better. It was notable that these comments were very evenly matched across all groups and there was no sense of fault lying in any one particular area or of one group blaming another. Rather there was a collective acknowledgement that the 1985 Act worked well but had the potential to work even better: a view summed up by this comment from a sheriff: “*It’s about people actually thinking about the principles and pleading them and using them, and sheriffs and judges going through them and applying them.*” [Sheriff 28]