



The *Family Law (Scotland) Act 1985*: A principled system in context

Jane Mair*

The Family Law (Scotland) Act 1985 introduced a detailed and tightly structured framework of statutory principles and guidance to be applied by the Scottish courts in making orders for financial provision on divorce. Within Scotland, the legislation is highly regarded and viewed as achieving a good balance between certainty and flexibility. Beyond this domestic context, there is sometimes a different perception of the Act as being overly rigid and lacking in discretion. Drawing on findings from a recent empirical study of 30 years of the 1985 Act in practice, this article will explore the gap between internal and external perceptions, stressing in conclusion the importance of context.

I Introduction

The *Family Law (Scotland) Act 1985*, and in particular the statutory framework for financial provision on divorce which forms a substantial part of that Act, is regarded within Scotland as something of a success. The 1985 Act introduced a detailed statutory framework for financial provision on divorce which, at the time, represented a radical reform of the existing law in Scotland, replacing an almost entirely discretionary approach¹ with one which was highly principled and tightly structured. Despite the extent of that reform, both in philosophy and practice, it was an Act which rooted quickly. More than 30 years later, a recent empirical study of reported cases and practitioner experience found overwhelming support for the Act.² The Scottish statutory framework, however, while praised by practitioners within Scotland, sometimes attracts criticism from other jurisdictions and in particular from its nearest neighbour, England and Wales. From the outside, the legislation may appear rigid and lacking in discretion whereas, from the inside, it is viewed as offering an effective balance between certainty and flexibility.

This article will explore the gap between these internal and external views, focusing in particular on the importance of context. By identifying how, on occasion, elements of the Scottish system have been ‘taken out of context’, it will consider how that process can shape debate in a particular way. Then, by drawing on the original vision of the Scottish Law Commission for the legislation and the recent experienced voices of practitioners, it will seek to re-establish the importance of the wider context in reading and understanding the *Family Law (Scotland) Act 1985*.

* Professor of Private Law, School of Law, University of Glasgow.

1 *Divorce (Scotland) Act 1976* s 5(2), which enabled the court to make such order ‘as it thinks fit, having regard to the respective means of the parties to the marriage and to all the circumstances of the case’.

2 Jane Mair, Enid Mordaunt and Fran Wasoff, *Built to Last: the Family Law (Scotland) Act 1985 — 30 years of financial provision on divorce* (2016) Nuffield Foundation <[www.nuffieldfoundation.org/sites/default/files/files/Research%20report\(1\).pdf](http://www.nuffieldfoundation.org/sites/default/files/files/Research%20report(1).pdf)>.

II Different views — At home and abroad

The 1985 Act was the product of extensive research and consultation conducted by the Scottish Law Commission, which was responsible for drafting the Bill. By the time the legislation was enacted, much careful groundwork had already been done by the Commission. There are relatively few reported decisions, tending perhaps to suggest that the law is fairly settled and uncontroversial, and the vast majority of those decisions are at first instance. Over 3 decades of the 1985 Act in practice, only three cases have proceeded to the ultimate Court of Appeal — two to the House of Lords³ and the third, very recently, to the UK Supreme Court,⁴ further indicating the established nature of the law. The legislation has attracted little academic criticism and only occasional published commentary by practitioners, much of it positive. In a recent empirical study, *Built to Last*, which explored the use of the legislation in litigated outcomes,⁵ the 1985 Act was widely praised by legal practitioners in Scotland, with one solicitor describing it as ‘a gem!’⁶

That the legislation works well within its domestic forum is, of course, the principal consideration for Scots family law. While there is no room for complacency — and indeed a key theme to emerge from the recent study was that practitioners could make better use of the legislation⁷ — Scots family lawyers see themselves as being ‘very fortunate’⁸ to have in place what they regard as a well-drafted, clearly constructed statute. The difficulties of reforming family law are widely known and well-documented in several jurisdictions. Even when reformers can agree on the substance, the political difficulties inherent in the legislative process are significant.⁹ One particular debate taking place in several common law jurisdictions, including Scotland’s closest neighbours, England and Wales, and further afield in Australia,¹⁰ is how — and indeed whether — to reform¹¹ an existing approach to ancillary

3 *Wallis v Wallis* 1993 SC (HL) 49; *Jacques v Jacques* 1997 SC (HL) 20.

4 *McDonald v McDonald* 2017 SC (UKSC) 142.

5 Mair, Mordaunt and Wasoff, above n 2. The study analysed 200 reported cases over the 30 years during which the legislation has been in force and interview data from a sample of 30 solicitors, advocates and judges. In earlier research (Jane Mair, Fran Wasoff and Kirsteen Mackay, *All Settled? A study of legally binding separation agreements and private ordering in Scotland* (Economic and Social Research Council, 2013)), we looked at the operation of the 1985 Act as reflected in negotiated separation agreements. In that context we analysed a sample of 600 agreements and interviewed 30 parties to the agreements as well as solicitors. The findings from that research found similar appreciation of the benefits of the statutory principles and guidance.

6 Mair, Wasoff and Mackay, above n 5, 172 (solicitor 05).

7 *Ibid* 173. This article focuses primarily on the statutory framework itself rather than on discussion of outcomes.

8 *Ibid* 155–6 (solicitor 12).

9 Mavis Maclean and John Eckelaar, ‘The Perils of Reforming Family Law and the Increasing Need for Empirical Research, 1980–2008’ in Joanna Miles and Rebecca Probert (eds), *Sharing Lives, Dividing Assets* (Hart Publishing, 2009) 25. A point noted by Kathryn O’Sullivan, ‘Rethinking ancillary relief on divorce in Ireland: the challenges and opportunities’ (2016) 36 *Legal Studies* 111, 133.

10 See, eg, J Thomas Oldham and Patrick Parkinson, ‘Evaluating Judicial Discretion — Family property law in Australia and the USA compared’ (2016) 30 *Australian Journal of Family Law* 134.

11 For an overview of an alternative approach to full-scale reform, proposed by the Law

relief which is predominantly discretionary. The titles of many academic articles on the subject use words and images which resonate with the Scottish experience: ‘the search for principle’;¹² ‘principle or pragmatism’;¹³ ‘the paradoxes of principle and pragmatism’;¹⁴ ‘rule-based regulation versus discretionary-based decision’.¹⁵ These are words and phrases familiar from the Scottish Law Commission deliberations which preceded the *Family Law (Scotland) Act 1985* and which, some 30 years later, feature again in the Scottish empirical research. The search for a balance between rules and discretion is particularly pertinent for Scotland which, being itself a mixed jurisdiction, is well-used to the interplay between elements of the civil and common law traditions.¹⁶ While legal transplants are notoriously difficult, the Scottish experience of the last 30 years of financial provision on divorce under a ‘mixed system’ may offer some useful insights to others.

There is no strong academic tradition of comparative family law engagement between the different jurisdictions within the United Kingdom. What each system knows of the other often emerges in a relatively ad hoc way. In respect of financial provision on divorce, we tend to be at best wary of the approach adopted in our neighbouring jurisdictions and, at times, openly critical. While Scots lawyers see the 1985 Act in a positive light, across the border it has a less favourable reputation. When compared with the English approach to financial remedies on divorce, the Scottish model is presented as lacking in discretion, being rather formulaic in nature and, having the potential to result in harsh outcomes for homemakers and wives.¹⁷ Even if the benefits of certainty are acknowledged, they are thought to be gained at the high cost of flexibility and fairness. While Scots lawyers think the 1985 Act has achieved a good balance, English lawyers are not convinced. Why should there be such differing perceptions of the 1985 Act at home and abroad? Is the Scottish national identity — juridical and personal — really so distinct? The legal systems certainly come from different families — one common law and one mixed — and inevitably that leads to a difference in perspective. From the Scottish side ‘our traditional “discretion-scepticism”’ is evident and, from the

Commission of England and Wales — ie, ‘building on existing law and practice’ rather than ‘revolution’, see Elizabeth Cooke and Spencer Clarke, ‘The Law Commission’s Report on Matrimonial Property, Needs and Agreements’ (2014) 48 *Family Law Quarterly* 359.

12 Alison Diduck, ‘Ancillary Relief: Complicating the Search for Principle’ (2011) 38 *Journal of Law and Society* 272.

13 Joanna Miles, ‘Principle or Pragmatism in Ancillary Relief: The Virtues of Flirting with Academic Theories and Other Jurisdictions’ (2005) 19 *International Journal of Law, Policy and the Family* 242.

14 Rebecca Bailey-Harris, ‘The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales’ (2005) 19 *International Journal of Law, Policy and the Family* 229.

15 Louise Crowley, ‘Dividing the Spoils on Divorce: Rule-based Regulation Versus Discretionary-based Decision’ [2012] *International Family Law* 388.

16 For discussion of the peculiarly Scottish version, see Elspeth Reid, ‘Mixed but Not Codified: The Case of Scotland’ in Julio Cesar Rivera (ed), *The Scope and Structure of Civil Codes* (Springer, 2013) vol 32, 343.

17 This article will focus principally on the structure and aims of the *Family Law (Scotland) Act 1985*, rather than on outcomes. The latter is, of course, an area for further debate elsewhere and an interesting model which might be usefully employed is that of comparative conversation adopted in Oldham and Parkinson, above n 10.

English side a mirror ‘trend towards rule-scepticism’ pertains.¹⁸ Are the social and economic circumstances so far apart? There are undoubtedly fewer ‘big money’ cases in the Scottish courts, which may skew the overall picture, but for the important bulk of ‘ordinary’ couples and ‘everyday’ cases,¹⁹ the social and economic circumstances are surely very similar. There is to some extent a mutual distrust between the jurisdictions when it comes to financial provision on divorce and partly at least that may be borne out of unfamiliarity and a lack of context.

It has been said that the ‘primary task for the comparatist is to examine the internal logic and philosophical content of another legal system so that there can be understanding of, and effective communication with, that system’.²⁰ On occasions when the Scottish legislation has been discussed in England, the absence of that ‘internal logic’ is striking. There are two key moments when the 1985 Act has achieved some prominence in England and, at each, rather than presenting an integrated statutory system, attention has been drawn to a particular element. That action of ‘taking out of context’ is problematic. The 1985 Act is neither a single principle nor a simple rule but ‘a highly sophisticated system’;²¹ a carefully constructed jigsaw of orders, principles and guidance. To make sense of it — to understand its ‘internal logic’ — it must be looked at as a whole, with each provision set within the statutory framework. A frequent response from legal practitioners, interviewed in recent research, was that if the Act is to work as intended, and to work as well as it can, the legislation must be seen and used as a complete framework and not as a single principle. Similarly, if the Scottish experience of financial provision on divorce is to make any useful contribution to the wider comparative project of family law, it is important for those in other jurisdictions to see the complete structure of the Act and to read its provisions contextually.

III The 1985 Act: An outline of the system

To explore how the Scottish legislation works and why the whole Act matters, it is necessary to begin with a brief explanation of the provisions themselves.²² The 1985 Act adopts a single, integrated system for property sharing and financial adjustment which applies at the point of divorce.²³ There is no

18 Niall R Whitty, ‘From Rules to Discretion: Changes in the Fabric of Scots Private Law’ (2003) 7 *Edinburgh Law Review* 281, 339.

19 The importance of looking at the ‘everyday’ cases is a theme explored in Emma Hitchings, ‘The impact of recent ancillary relief jurisprudence in the “everyday” ancillary relief case’ (2010) 22 *Child and Family Law Quarterly* 93. See also Hilary Woodward, ‘“Everyday” financial remedy orders: do they achieve fair pension provision on divorce?’ (2015) 27 *Child and Family Law Quarterly* 151.

20 David Bradley, ‘Convergence in Family Law: Mirrors, Transplants and Political Economy’ (1999) 6 *Maastricht Journal of European and Comparative Law* 127, 149.

21 Elaine E Sutherland, *Child and Family Law* (W Green, 2nd ed, 2008) 1219 [16-038].

22 More detailed discussion can be found in Mair, Mordaunt and Wasoff, above n 2, 21–36 ch 4.

23 It applies equally in the rare situation of nullity of marriage and, since 2004, has also applied to the dissolution of civil partnership: *Civil Partnership Act 2004* (UK). This article will focus solely on divorce.

separate provision for ex-spousal maintenance,²⁴ although parents are obliged to provide continuing maintenance for children through either the private law obligation of aliment²⁵ or the public law system of child support.²⁶ Central to the framework of the 1985 Act are the ‘principles’ set out in s 9. Further detailed guidance on the interpretation and application of each principle is set out in ss 10–12. Having decided what to share and why, the court is provided in s 8 with a range of different types of order by which to effect the financial settlement. Central to the structure of the system is the link between the orders and the principles and then a further link to the issue of reasonableness. Section 8(2) provides that, where an application for financial provision has been made, the court may make an order which is justified by the s 9 principles and which is reasonable with regard to the resources of the parties. It is essential in understanding the structure of the 1985 Act to appreciate first, the fact that the principles are intended to be cumulative with each one being seen in the context of the others and second that orders, even where justified by the principles, must also be reasonable with regard to the resources of the parties.²⁷

The first principle, in s 9(1)(a), is that the net value of the matrimonial property should be shared fairly. Equal sharing is presumed to be fair sharing²⁸ except in special circumstances,²⁹ including the terms of any agreement between the parties as to ownership or division of the matrimonial property, the source of the funds or assets used to acquire any of the matrimonial property where those funds or assets were not derived from the income or efforts of the persons during the marriage and the nature of the family property, the use made of it and the extent to which it is reasonable to expect it to be realised or divided.³⁰ A key aspect of the first principle is that it applies only to the ‘matrimonial property’ which is clearly defined in s 10(4) as all property belonging to the parties or to either of them at the date of separation or action for divorce which was acquired, other than by gift or succession from a third party, since the date of marriage. It also includes property acquired prior to marriage for use as a family home or furniture and fittings for that home. In other words, the first principle operates a form of deferred community of acquests, whereby the net value of the property of the couple acquired during the marriage is shared on divorce. While the default is equal sharing, there is clear provision for departure from that presumption in the event of special circumstances.

The second principle, set out in s 9(1)(b), is that ‘fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family’. Economic advantage is

24 Spouses in Scots private law owe each other an obligation of aliment (maintenance) but this terminates on divorce; *Family Law (Scotland) Act 1985* ss 1–4. Aliment has always ended on divorce and so there has never been an obligation of continuing maintenance in Scotland.

25 *Family Law (Scotland) Act 1985* s 1.

26 *Child Support Act 1991* (UK).

27 *Family Law (Scotland) Act 1985* s 8(2)(b).

28 *Ibid* s 10(1).

29 *Ibid* s 10(6).

30 A non-exhaustive list of special circumstances is provided in s 10(6).

defined to mean an advantage ‘gained whether before or during the marriage and includes gains in capital, in income and in earning capacity’.³¹ In applying s 9(1)(b), the court is directed to take into account the extent to which ‘the economic advantages or disadvantages sustained by either person have been balanced by the economic advantages or disadvantages sustained by the other person’.³² The court should have further regard to the extent to which any advantage or disadvantage ‘has been or will be corrected by a sharing of the matrimonial property ... or otherwise’.³³ While s 9(1)(b) is in broad and neutral terms, one of its specific aims was to address the situation of disadvantage which might arise in the context of a ‘homemaker/breadwinner’ marriage. It is made explicit that ‘contributions’ include ‘indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family’.³⁴

The third principle, in s 9(1)(c), is that after the divorce any economic burden of caring for a child of the marriage under the age of 16 should be shared fairly. In applying s 9(1)(c), the court is directed to have regard to a range of factors including any loss of earning capacity caused by the need to care for the child and the need to provide suitable accommodation for the child.³⁵

The fourth principle, commonly referred to as the adjustment principle, is set out in s 9(1)(d) in the following terms: 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 to the loss of support, over a period of not more than 3 years from the date of the decree of divorce. This principle, and in particular the 3-year maximum period, has attracted considerable attention outwith Scotland. It is important to note that this is the *fourth* principle in a set of five, which should be applied cumulatively, and there are other ways in the context of the preceding principles by which adjustment needs could already have been addressed.

The fifth principle, set out in s 9(1)(e), provides that: a person who at the time of the divorce or of the dissolution of the civil partnership, seems likely to suffer serious financial hardship as a result of the divorce or dissolution should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period. As with the third and fourth principles, an order under s 9(1)(e) may include periodical allowance but only where the other orders are not sufficient. Unlike the adjustment principle, there is no time limit on an order under s 9(1)(e), with provision being ‘reasonable’ and over ‘a reasonable period’.

Section 8 deals with the orders for financial provision — that is, the tools which the court may use to implement the scheme of financial provision on divorce. Either party ‘in an action for divorce ... may apply to the court for one or more’³⁶ of the following orders: payment of a capital sum,³⁷ transfer of

31 Ibid s 9(2).

32 Ibid s 11(2)(a).

33 Ibid s 11(2)(b).

34 Ibid s 9(2).

35 Ibid s 11(3).

36 Ibid s 8(1).

37 Ibid s 8(1)(a).

property,³⁸ periodical allowance,³⁹ various pension sharing orders⁴⁰ or an incidental order.⁴¹ While capital sum and property transfer orders are fixed in nature and not subject to subsequent review, there is scope for them to be used flexibly by, for example, payment in instalments or payment at a specified future date.⁴² Although the sum may not be changed, application for variation of the method or time of payment may be made where there is a change in circumstances.⁴³ An order for periodical allowance is by nature more flexible in various ways. It may be sought not only at the time of divorce⁴⁴ but at a later date where no previous order has been made and where, since the date of decree, there has been a change of circumstances.⁴⁵ Variation or recall of an order for periodical allowance may also be sought in the event of a material change of circumstances.⁴⁶ Any order of financial provision must be justified by one of the five statutory principles outlined above, but in the case of periodical allowance it is important to note that only three of the principles may justify its use.⁴⁷ Even then, periodical allowance is the last resort as the court must be satisfied, in terms of s 13(2)(b) that the other orders would be inappropriate or insufficient.

IV Taken out of context

One of the main aims of the Scottish Law Commission in designing the *Family Law (Scotland) Act 1985* was that:

any solicitor in any part of Scotland, even if not a divorce specialist, should be able to turn to a statute on financial provision on divorce and find some clear statement of the underlying principles on the basis of which he could advise his client and seek to negotiate a settlement.⁴⁸

Research into use of the legislation⁴⁹ suggests that this aim has been achieved and that in Scottish legal practice the statutory provisions are widely known, broadly understood and well-respected. While the legislation is of course much less familiar beyond Scotland, it has had some attention and achieved some notoriety in England, mainly as a result of two separate 'moments' of exposure. The first was in 2006, when Lord Hope in the House of Lords in the

38 Ibid s 8(1)(aa).

39 Ibid s 8(1)(b).

40 Ibid ss 8(1)(baa)–(bb).

41 Ibid s 8(1)(c).

42 Ibid s 12. A good example of this can be seen in *B v B* 2012 Fam LR 65, [2012] CSOH 21, where a capital sum was to be paid in six instalments at 6-month intervals. Thus while the overall sum was fixed, the method of payment could address difficulties of realising sufficient capital at the date of decree.

43 *Family Law (Scotland) Act 1985* s 12(4).

44 Ibid s 13(2)(b).

45 Ibid s 13(2)(c).

46 Ibid s 13(3).

47 Ibid s 13. Periodical allowance may only be justified by the principles in s 9(1)(c), s 9(1)(d) or s 9(1)(e).

48 Scottish Law Commission, *Family Law: Report on Aliment and Financial Provision* (Law Com No 67, 1981) 81.

49 Mair, Mordaunt and Wasoff, above n 2; Mair, Wasoff and Mackay, above n 5.

English cases of *Miller v Miller; McFarlane v McFarlane*⁵⁰ commented on it at some length. The second is more recent and concerns the attempts by Baroness Deech to initiate reform of English law on ancillary relief by the introduction into the House of Lords of a Private Members' Bill, which models itself to some extent on the Scottish system.⁵¹ While these two instances are quite distinct, with Lord Hope's comments being highly critical while those of Baroness Deech have been strongly complimentary, each shares a similarity in that it has contributed to a very particular construction of the Scottish system. Each construction misrepresents the full breadth of the legislation and, by taking certain elements of the 1985 Act out of context, frames debate about the legislation in ways which are at odds with the background to the statute and the Scottish experience of using it.

A Lord Hope's criticisms

Criticism of the Scottish legislation came from an unexpected source in the appeal to the House of Lords in the combined cases of *Miller; McFarlane*.⁵² The 1985 Act and in particular s 9(1)(d), the adjustment principle, were raised in submissions by counsel for Mr McFarlane in order to support his defence of his wife's claim for ongoing maintenance. Although Scots law was of no direct relevance to this purely English case, Lord Hope, previously Lord President of the Scottish Court of Session but by this time sitting in the United Kingdom's House of Lords, took the opportunity to give his opinion of the Scottish legislation. He criticised the Act for being too tightly structured; for attaching greater importance to certainty than flexibility or fairness.⁵³ Describing the 1985 Act, quite accurately, as having rejected: 'the unfettered discretion model that up to then had been part of Scots Law',⁵⁴ he went on to make a substantial leap to the conclusion that it had been 'designed to reduce the scope of the court's discretion to the minimum that was consistent with enabling the court to deal with each case on its own facts'.⁵⁵

In many ways it was a surprising comment for Lord Hope to make as, years earlier, in his role as Lord President in the Inner House of the Court of Session, in the first appeal under the Act to the Inner House, *Little v Little*,⁵⁶ he had described the role of the court under the 1985 Act as 'essentially one of discretion'.⁵⁷ In *Miller; McFarlane*, Lord Hope sought to explain this

50 [2006] UKHL 24, 2 AC 618 (*Miller; McFarlane*).

51 Divorce (Financial Provision) Bill, HL Bill (2013–14) <<https://services.parliament.uk/bills/2013-14/divorcefinancialprovision.html>>; Divorce (Financial Provision) Bill, HL Bill (2016–17) 21 <<https://services.parliament.uk/bills/2016-17/divorcefinancialprovision.html>>. The latter secured a second reading and debate in the House of Lords in January 2017: United Kingdom, *Parliamentary Debates*, 27 January 2017, vol 778, cols 946–66 <[https://hansard.parliament.uk/Lords/2017-01-27/debates/D2A8E873-A6D0-42FB-8138-3C6114A1EDD4/Divorce\(FinancialProvision\)Bill\(HL\)\)](https://hansard.parliament.uk/Lords/2017-01-27/debates/D2A8E873-A6D0-42FB-8138-3C6114A1EDD4/Divorce(FinancialProvision)Bill(HL)))> but with the prorogation of the parliamentary session it made no further progress.

52 *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, 2 AC 618.

53 *Ibid* [111].

54 *Ibid*.

55 *Ibid*.

56 1990 SLT 785 (*Little*).

57 *Ibid* 787.

apparent contradiction by pointing out that his earlier comments in *Little* had been ‘directed at the risk that treating each step in the process as raising an issue of law and not of discretion would open up discussion by the court of first instance for reconsideration on appeal’.⁵⁸ While the desirability of avoiding excessive appeals was clearly a concern in the judgment in *Little*, and the particular focus for Lord Hope in the quoted passage, his overall comment on the 1985 Act, which was at that time still very recent, was illuminating and worth setting out in some detail:

The Act sets out in considerable and almost clinical detail the nature of the property with respect to which orders may be made, the principles which are to be applied and the factors which are to be taken into account. No stone seems to have been left unturned in this analysis. The court is taken step by step through a complicated check list of provisions to which it must have regard, so that no point which might conceivably be relevant is at risk of being forgotten as it proceeds through the exercise to the result ... But despite all the detail much is still left to the discretion of the court.⁵⁹

This description of the construction of the 1985 Act is important to bear in mind when considering his later comments in *Miller; McFarlane* about reducing ‘the court’s discretion to the minimum’.⁶⁰ In *Miller; McFarlane*, Lord Hope seemed to situate the 1985 Act quite firmly on one side of the rules/discretion dichotomy which has become associated with much discussion around financial provision reform. Lord Hope’s description in the earlier case of *Little* is, however, more accurate. It is much closer to the model of the 1985 Act as ‘guided’ discretion or structured flexibility, which: chimes with the Scottish Law Commission’s original vision; is to be found in close reading of the language and structure of the statute; and is reflected in the experiences voiced by legal professionals in the recent empirical research.

Having raised a general concern as to the level of discretion within the Act, and having presented it as favouring ‘certainty in place of flexibility’,⁶¹ Lord Hope went on to focus specifically on the ‘rigid application of the clean break principle, as enacted in section 9(1)(d)’.⁶² Here again his comments risked judging the 1985 Act out of context. Lord Hope focused on the fact that any award under s 9(1)(d) is subject to a maximum period of 3 years — an understandable focus to some extent in that he was following the lead of Mr Miller who sought to argue for a similar restriction on the award payable under English law to his wife. By focusing on this principle, and in particular on the 3-year limit, they were both, however, as Eric Clive has commented, drawn to the 3-year limit ‘like moths to a candle’ and in the process were blinded ‘to the overall approach of the Act’.⁶³ Section 9(1)(d) is only one principle out of five and the 3-year limit is only one — as Clive says,

58 *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, 2 AC 618 [111].

59 *Little v Little* 1990 SLT 785, 787.

60 *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, 2 AC 618 [111].

61 *Ibid* [105].

62 *Ibid* [115].

63 Eric Clive, ‘Financial Provision on Divorce’ (2006) 10 *Edinburgh Law Review* 413, 421.

somewhat ‘arbitrary’ — aspect of that single principle.⁶⁴ It is unrealistic to consider this one aspect in isolation as it is not how the legislation would apply had the case been governed by Scots law and any conclusions drawn from that single principle lack essential context.

B Baroness Deech’s praise

More recently, the nature of the Scottish system and the extent to which it favours certainty over discretion have been raised again in England, this time in the context of Baroness Deech’s introduction into the House of Lords of a Private Members’ Bill.⁶⁵ As Lord Hope was drawn to the adjustment principle,⁶⁶ so Baroness Deech is drawn to the certainty and finality of the fair sharing principle.⁶⁷ Her Bill has received a mixed reaction and once again the debate tends to divide along similar lines. Those in favour of the Deech approach praise the certainty of the Scottish system, while others resist its inflexibility and potential unfairness. As happened with Lord Hope’s comments, there is a tendency to polarisation and, as with Lord Hope, Baroness Deech’s presentation of one particular aspect of the Scottish legislation has the effect of crediting the whole Scottish system with more certainty and less flexibility than it actually has.

Baroness Deech, introducing her Bill at the second reading in the House of Lords, commented that ‘the law I am putting forward is by no means experimental. It has been acted on with great success in Scotland for 30 years.’⁶⁸ While her support for the Scottish system is welcome, it must be stressed that her Bill is not ‘the Scottish system’: while it includes some elements of it, those elements are placed within a fundamentally different construction. While the English Bill proposes one principle — equal sharing of matrimonial property — in Scotland that principle is only one of five. In the Divorce (Financial Provision) Bill (2016–17), there is a single principle of matrimonial property sharing, with the possibility that the default presumption of equal sharing can be varied in special circumstances. These special circumstances include the balancing of economic advantage and disadvantage, the need for a period of readjustment and the need to share the ongoing burden of child care. In other words, what in Scotland are distinct, freestanding principles, in the English version are demoted simply to being special circumstances capable of affecting the proportionate sharing of matrimonial property. The English Bill is, consequently, stricter, narrower and less flexible than the Scottish statute.

While the English Bill adopts a definition of matrimonial property which is clearly a version of the Scottish definition, it takes no account of the fact that, in the Scottish system, it is only the first principle of fair sharing, in s 9(1)(a), that is specifically tied to matrimonial property. The other principles in the

⁶⁴ Much more detailed exploration of Lord Hope’s comments and rebuttal of them in terms of the *Family Law (Scotland) Act 1985* is provided by Clive: *ibid*.

⁶⁵ The Divorce (Financial Provision) Bill, HL Bill (2016–17) 21.

⁶⁶ *Family Law (Scotland) Act 1985* s 9(1)(d).

⁶⁷ *Ibid* s 9(1)(a).

⁶⁸ United Kingdom, *Parliamentary Debates*, 27 January 2017, vol 778, col 964 <

1985 Act make no direct reference to matrimonial property and so can be satisfied from other non-matrimonial assets or income sources. As explained in the Scottish Law Commission report prior to the 1985 Act, ‘there would be no reason why a wife (or a husband) should not receive half of the matrimonial property *and* in certain cases a share of the joint income after divorce’.⁶⁹ While Baroness Deech’s Bill clearly draws inspiration from the Scottish legislation, it is by no means a full transplant of it. It adopts the most certain elements and omits others: those ‘others’ where flexibility is most likely to be found.

V Placing it back in context

The Scottish Act, as it has been presented for external consumption in these particular instances, is more restricted and constrained than was envisioned by those who devised it or is experienced by those who use it. While one external voice — Lord Hope — was critical and the other — Baroness Deech — is in favour, their representations of the 1985 Act have had a similar effect on debate, leading to a narrow framing around value-laden concepts of ‘discretion’ and ‘fairness’. Dichotomies and dualisms are well-known for their effect of limiting options to a choice between one side or the other.⁷⁰ By re-situating the 1985 Act in its domestic context, the possibilities of bridging, balancing or indeed transcending become more apparent.

A The original vision

It is easy to discover the original vision behind the *Family Law (Scotland) Act 1985* because it was set out explicitly in the work of the Scottish Law Commission which preceded the legislation. Through a series of papers and reports,⁷¹ beginning in 1976 with a consultative memorandum, *Family Law: Aliment and Financial Provision*,⁷² the context was established. The report of 1981,⁷³ in particular, sets out the background, the options and the final proposals in considerable detail and makes explicit what the legislation sought to achieve and how it was intended to work. The 1985 Act was designed to address the mischiefs of the previous approach, including a lack of clear guidance as to the nature and purpose of financial provision on divorce, too much judicial discretion and an insufficient range of orders which in turn led to an over-reliance on the use of ongoing maintenance. There was a lack of clarity as to the purpose of financial provision and, for the Scottish Law

⁶⁹ Scottish Law Commission, above n 48, 93–4 para 3.67 (emphasis in original).

⁷⁰ Frances E Olsen, ‘The Family and the Market: A Study of Ideology and Legal Reform’ (1983) 96 *Harvard Law Review* 1497.

⁷¹ Including A J Manners and Irene Rauta, *Family property in Scotland: an enquiry carried out on behalf of the Scottish Law Commission by the Social Survey Division of the Office of Population Censuses and Surveys in 1979* (Her Majesty’s Stationery Office, 1982); B Doig, *The Nature and Scale of Aliment and Financial Provision on Divorce* (Scottish Office Central Research Unit, 1982); Scottish Law Commission, *Family Law: Report on Aliment and Financial Provision*, above n 48; Scottish Law Commission, *Matrimonial Property* (Law Com CM No 57, 1983).

⁷² Scottish Law Commission, *Aliment and Financial Provision* (Law Com CM No 22, 1976).

⁷³ Scottish Law Commission, *Family Law: Report on Aliment and Financial Provision*, above n 48.

Commission, before a new system could be devised it was essential to address this absence: '[w]hat financial provision on divorce should seek to achieve is fundamental to the type of legal provision governing it'.⁷⁴

The Commission was focused on the need for purpose and, in retrospect, the dominance of one singular purpose — a clean break — has perhaps been overstated. Various possible objectives were explored⁷⁵ and, at an early stage, the Scottish Law Commission was indeed 'strongly attracted' by the single objective of 'enabling the parties to effect the economic transition from marriage to divorce'.⁷⁶ While, however, the Scottish system has come to be associated with the aim of a clean financial break — and the legislation certainly has an in-built preference for one-off settlement — it is important to stress that in the end it was neither its sole aim nor its only possible outcome. The Scottish Law Commission ultimately rejected the view that there should be a 'sole objective of financial provision on divorce',⁷⁷ a conclusion which underpinned their final selection of five principles, capable of responding to a variety of relationship models and a range of circumstances.

The 1985 Act is sometimes presented as favouring certainty at the expense of flexibility, rules in place of discretion. The relationship between these different extremes was certainly a key focus for the reformers, with the Scottish Law Commission stressing the concern 'to try to strike the right balance between principle and discretion'.⁷⁸ The unfettered discretion of the previous system had been a problem but, in tackling that problem, there was no intention to remove judicial discretion entirely, with clear acknowledgement that 'a large measure of discretion' was required by the courts 'to enable them to deal with the great variety of cases'.⁷⁹ The exercise of discretion was, however, to be firmly situated within the framework of clear principles and detailed guidance on how the principles should be applied. Ultimately it was not discretion per se which was the main problem to be tackled, but rather uncertainty and unpredictability. As the Scottish Law Commission explained:

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.⁸⁰

An understanding of this context is important in reading the 1985 Act as it begins to shift the options from 'all or nothing' choices to a statutory structure which was designed to provide clarity and certainty while still accommodating various needs, models and objectives.

⁷⁴ Sutherland, above n 21, 1208 [16-019].

⁷⁵ Scottish Law Commission, *Family Law: Report on Aliment and Financial Provision*, above n 48, 82–90 [3.41]–[3.58].

⁷⁶ *Ibid* 84 [3.44].

⁷⁷ *Ibid*.

⁷⁸ *Ibid* 91 [3.62].

⁷⁹ *Ibid* 82 [3.39].

⁸⁰ *Ibid* 81.

1 Speaking from experience

In empirical research, drawing on interviews with family law professionals — solicitors, advocates and judges — there is clear evidence that the original vision has been realised through the legislation and is understood by those in practice. How those who work within the Scottish system see what they do, and what they can do, in terms of the 1985 Act, tends to echo the language used by the Scottish Law Commission rather than the terms of stark choice more familiar in the debates outwith the Scottish context. Although the word ‘discretion’ was used in the interviews, the language more often was that of ‘flexibility’ and ‘creativity’. Rather than seeing the Act as hampering ‘fairness’, its structure was appreciated as providing precisely the kind of structured framework within which it was possible to achieve ‘acceptable’ outcomes.

(a) *From discretion to flexibility*

Lord Hope criticised the 1985 Act for giving judges a bare minimum of discretion. In the House of Lords debate on Baroness Deech’s Bill, ‘the crux of the issue’ was identified as ‘the value of judicial discretion in every case versus plain rules’.⁸¹ Scots family lawyers are well-aware that the statutory framework of the 1985 Act placed a limit on judicial discretion but, as one solicitor commented, ‘I think that we gain very much from a reasonably rigid structure limiting judicial discretion’,⁸² and the reaction to the possibility of ‘expressly introducing more discretion’ was distinctly ‘unenthusiastic’.⁸³ Not only was there little, if any, enthusiasm for more discretion, but the term ‘discretion’ itself was rarely used and instead what was highlighted was the space for ‘flexibility’.

Of course, just as discretion and rules can be presented as opposites, flexibility and certainty can be — and sometimes are — viewed as extremes:

On the one hand, you would have complete flexibility and nobody would know where they were ... 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.⁸⁴

Most of the practitioners, however, thought that the Scottish legislation sat at neither of those extremes but instead was ‘somewhere in the middle’. What it offered was ‘something that works, which is a matrimonial property regime, but with an ability to mitigate the worst effects of that by allowing for unequal sharing and economic disadvantage’.⁸⁵ Trading discretion for certainty did not

81 United Kingdom, *Parliamentary Debates*, 27 January 2017, vol 778, col 946 <[https://hansard.parliament.uk/Lords/2017-01-27/debates/D2A8E873-A6D0-42FB-8138-3C6114A1EDD4/Divorce\(FinancialProvision\)Bill\(HL\)\)](https://hansard.parliament.uk/Lords/2017-01-27/debates/D2A8E873-A6D0-42FB-8138-3C6114A1EDD4/Divorce(FinancialProvision)Bill(HL)))>.

82 Mair, Mordaunt and Wasoff, above n 2, 92 (solicitor 05).

83 Ibid 99 (solicitor 01).

84 Ibid 99 (judge 29).

85 Ibid. It should be noted that the term ‘matrimonial property regime’ is used here in the specific context of the Scottish system for financial provision on divorce. This is quite distinct from the way in which the term is used in civilian jurisdictions: see, eg, Katharina Boele-Woelki et al, *Principles of European Family Law Regarding Property Relations Between Spouses* (Intersentia, 2013) 141.

mean the Scottish system was without any flexibility of its own — that was far from the case: ‘there is huge flexibility there’.⁸⁶

Discussing the Act not in terms of the limits it placed on judicial discretion but rather as a structure within which each group of professionals had space for flexibility or creativity, contributed to a sense of shared enterprise. The Act was seen to give solicitors, advocates and judges the tools that each group needed and shifted attention from one single issue — judicial discretion — to the effectiveness of an integrated system which offered sufficient flexibility for all. Solicitors liked the clear structure of the statute ‘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’.⁸⁷ The principles were seen as a positive means of achieving fairness for clients; there was no sense that practitioners were fighting against them: ‘I don’t find them a strait-jacket at all, I find them more like signposts along the way... I don’t feel they stop me doing anything.’⁸⁸ There was no sense that judges missed wider discretion:

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.⁸⁹

There were thought to be clear benefits for parties in terms of reduced need for litigation and the ‘certainty that people can have’ under the 1985 Act was explicitly linked to the avoidance of ‘speculative cases’.⁹⁰ The benefits of certainty were not to be overlooked: ‘people spend 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’.⁹¹ 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.⁹²

Even with space for flexibility, there was a strong sense that clients could understand, from the outset, what outcomes would likely be: ‘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.”’⁹³ 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

86 Mair, Mordaunt and Wasoff, above n 2, 99 (solicitor 18).

87 Ibid 99 (solicitor 17).

88 Ibid 93 (solicitor 06).

89 Ibid 93 (judge 30).

90 Ibid 99 (solicitor 05).

91 Ibid 98 (advocate 22). It should of course be noted that Scottish perceptions of the English system may not be accurate.

92 Ibid 98 (solicitor 17).

93 Ibid 98 (solicitor 18).

get an outcome somewhere in this range we'll be doing quite well.”⁹⁴ Interviewees liked the structure which the principles afforded their clients:

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’ ... So ... in terms of people, from a psychological perspective, I like the fact that the principles are structured.⁹⁵

The 1985 Act undoubtedly marked a significant shift from the previous purely discretionary system. A clear choice was made and to some extent that choice means that ‘Scotland has traded flexibility for certainty ... that’s just the way you’ve got it.’⁹⁶ But on the whole, practitioners — at all levels of the profession — seem to like the way they’ve ‘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.⁹⁷

(b) Less about fairness and more about acceptable outcomes

It is the statutory principles in s 9, rather than a general concept of ‘fairness’, which underpin the Scottish system of financial provision and sometimes that leads 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; to achieve a fair outcome is ‘the whole point of the Act’,⁹⁸ but, in Scotland, fairness is approached, not as the starting point but as the endpoint reached via a very structured path.

Fairness is of course ‘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.’⁹⁹ Fairness ‘is an elusive concept’,¹⁰⁰ but, as Alison Diduck has commented, it also ‘has great rhetorical force’¹⁰¹ and any suggestion of lack of fairness becomes difficult to defend. In many of the interviews it was interesting to note that words and concepts other than ‘fairness’ were frequently used, such as ‘acceptable outcome’. As with ‘flexibility’ rather than ‘discretion’, so too with acceptable rather than ‘fair’: the debate can shift and the terms become perhaps less divisive and value-laden. But what is an acceptable outcome? It could be: ‘Where each party is equally unhappy.’¹⁰² 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

94 Ibid 98 (advocate 22).

95 Ibid 100 (solicitor 17).

96 Ibid 98 (advocate 22).

97 Ibid 98 (solicitor 12).

98 Mair, Mordaunt and Wasoff, above n 2, 92 (advocate 21).

99 Ibid 92 (solicitor 18).

100 *Miller; McFarlane* [2006] UKHL 24, 2 AC 618 [4] (Lord Nicholls).

101 Diduck, above n 12, 273.

102 Mair, Mordaunt and Wasoff, above n 2, 122 (solicitor 05).

outcome.’¹⁰³ So, perhaps ‘[a]n acceptable outcome to the client is one where they are equally happy, or equally miserable to the other party’s response’.¹⁰⁴

Happiness is rarely a factor of a divorce. Far more significant is to achieve a level of acceptability and acceptance 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’.¹⁰⁵ 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’.¹⁰⁶ Thus, clients were encouraged to think ‘about what’s fair, not only what’s fair to them but what’s fair overall’,¹⁰⁷ and here too, the structured and detailed nature of the statutory principles and guidance were found to be useful tools.

It could be said that the 1985 Act does not focus sufficiently on the individuals and that clients might say it serves neither party well at an emotional level but that can perhaps also be seen as positive. The relationship models presented in each of the principles are a way of saying that ‘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’.¹⁰⁸

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’.¹⁰⁹ 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’,¹¹⁰ which may well mean: ‘without on-going dependence on the former spouse, if at all possible’.¹¹¹ 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’.¹¹²

VI It is a good mix — In the right context

Overwhelmingly, the message from within Scotland is that the 1985 Act is ‘a very good piece of legislation’,¹¹³ which is capable of producing widely acceptable outcomes and ‘bespoke’ solutions, within the boundaries of a

103 Ibid 122 (solicitor 06).

104 Ibid 122 (solicitor 13).

105 Ibid 122 (solicitor 06).

106 Ibid 122 (solicitor 09).

107 Ibid 122 (solicitor 20).

108 Ibid 123 (solicitor 01).

109 Ibid 123 (solicitor 14).

110 Ibid 123 (solicitor 15).

111 Ibid 123 (judge 29).

112 Ibid 123 (judge 31).

113 Ibid 155 (advocate 22).

statutory framework which remains reasonably rigid and certain. In its domestic context, there is support both for the substance of the principles and for the general structure of the Act but focus on the former should not detract attention from the latter. While in Scotland at present there appears to be no significant demand for amendment of the substantive principles, it is important to stress that the detail of those principles can always be adjusted without necessarily dismantling the whole construction.¹¹⁴ Their substance reflects particular choices, which were made by the Scottish 'lawmakers' at the time and, while their 'willingness ... to adopt a definite position'¹¹⁵ is central to the structure of the statute, it is ultimately that structure rather than the detail of the choices, which is important.

In reform discussions in many jurisdictions, a structural choice is presented between rules and discretion, between certainty and fairness. As Mary Ann Glendon has commented, however, 'in most cases what is required is not actually a choice, but rather a search for the proper mix',¹¹⁶ and, for Scots lawyers at least, the 1985 Act provides precisely that 'proper mix'. Part of the explanation of the success at home of the 1985 Act may be the familiarity of Scottish jurists with the practice of 'mixing'. It is difficult to ignore the comfortable fit of the *Family Law (Scotland) Act 1985*, as a micro-mix, within the broader Scottish mixed legal system. What works in one 'particular context may be difficult to transplant' and the particular Scottish mix may not be appealing or appropriate to others.¹¹⁷ The aim of this article is certainly not to 'sell' the Scottish system to other jurisdictions, but to present it within its context in order to promote understanding. What the Scottish experience can perhaps offer to comparative legal debate is a slightly different perspective on the structural binary choice, by showing what can happen when you move beyond a simple choice between rules and discretion to a new hybrid creation in the form of 'principled' system.

114 A point stressed by Eric Clive, the architect of the 1985 Act, specifically in respect of the 3-year limit on the readjustment principle. The choice of 3 years is 'arbitrary' and could be changed: Clive, above n 63, 421.

115 Crowley, above n 15, 400.

116 Mary Ann Glendon, 'Fixed Rules and Discretion in Contemporary Family Law and Succession Law' (1985–86) 60 *Tulane Law Review* 1165, 1166.

117 Mavis Maclean et al, 'Family justice in hard times: can we learn from other jurisdictions?' (2011) 33 *Journal of Social Welfare and Family Law* 319.