

MARITAL AGREEMENTS IN SCOTLAND

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(I) Historical Introduction

Property During Marriage

The common law of Scotland originally imposed what looked like a community of property regime on married couples, analogous to the systems well-known throughout the *ius commune* of western Europe,¹ though in a form that in the modern period has been described as 'extremely crude'.² It was not based on any partnership between the spouses, nor on a relationship involving equal shares and equal responsibilities - or even a division of shares and a division of responsibilities. Rather it was a much more primitive system based on the husband's absolute rights that he acquired on marriage, and a woman's economic subservience, both elements of which were perceived as being part of the natural law (i.e. divinely ordained)³. Together with the primogeniture rules of succession, the form of community of property pertaining in Scotland was an effective means of ensuring that control of property remained, as far as possible, within the male domain.

The husband had two major rights. First and most important was the *ius mariti*, by which all the moveable property held by a woman at the date of her marriage passed to her husband at its constitution; likewise all moveable property acquired by the woman during the subsistence of her marriage fell to

¹ Stair, *Institutions of the Law of Scotland* (1681) I, iv, 9 expressed it as 'a community of goods betwixt the married persons'. See also Erskine's *Institute of the Law of Scotland* (1773) I, vi, 12 and Bell's *Principles of the Law of Scotland* (1829) para 1549.

² A. Anton, 'The Effects of Marriage Upon Property in Scots Law' (1956) 19 *Modern Law Review* 653.

³ See Stair, I, iv, 9. As early as 1683 it was being argued before the Court of Session that it was error to compare the Scottish husband's rights with a *societas* or *communio bonorum* in the European sense: *Earl of Leven v Montgomery* (1683) Mor 5803. Bell's *Lectures on Conveyancing* (3rd edn, 1882) vol II at 855 gets to the heart of the matter when he writes: 'A communion of goods arises by marriage, in which the husband and wife, and their children, if any, are jointly interested ...[but] during the marriage [the husband] is, to all intents and purposes, proprietor of the whole goods in communion, as regards transactions *inter vivos*.'

the husband.⁴ In return, the husband took on liability for his wife's ante-nuptial debts, as well as an on-going obligation of maintenance (called aliment in Scotland). Secondly, the husband had a *ius administrationis*, which was his right to administer all the property owned by his spouse that did not fall to him by dint of the *ius mariti*, most importantly of course her heritable property.⁵ So even if the married woman was technically owner, she lacked legal control over her own property. A woman's autonomy was very severely compromised on marriage; her husband's was unaffected.

By the middle of the nineteenth century the unquestioned acceptance of this state of affairs was being increasingly challenged, though it took fully sixty years of legislative development for the effects of the *ius mariti* and the *ius administrationis* to be removed in their entirety. The first amelioration of the wife's position came with the Conjugal Rights (Scotland) Amendment Act 1861, which allowed a woman who had obtained a decree of judicial separation to retain such property as she acquired subsequent to the decree, and also entitled a deserted wife to seek an order from the court which would protect her property from the claims of her deserting husband.⁶ The Married Women's Property (Scotland) Act 1877 allowed married women to retain their own earned income (though judicial interpretation of the Act tended to limit its application⁷). The most important legislation was, however, the Married Women's Property (Scotland) Acts of 1881 and 1920, the former abolishing the husband's *ius mariti* and the latter abolishing his *ius administrationis*⁸. The 1920 Act also removed the existing common law rule that donations between husband and wife were always revocable by the donor.⁹ From that

⁴ A limited exception to this was the wife's 'paraphernalia', being her clothes, jewellery and their receptacles. She remained absolute owner of these: see F Walton, *Husband and Wife* (3rd edn 1951) at pp 219-221.

⁵ Any income generated, by means of rent and the like, from a married woman's heritable property, being moveable, fell automatically to the husband.

⁶ See *Turnbull, Petitioner* (1864) 2M 402, where the word 'desertion' in this context was held to bear its natural meaning, wider than that required to give a ground for divorce.

⁷ See E Clive *The Law of Husband and Wife in Scotland* (4th edn, 1997) at para 14.010.

⁸ An exception to this abolition of the *ius administrationis* was that the husband remained entitled to administer his wife's property for so long as she was in minority. This last vestige of the rule was abolished by s 3 of the Law Reform (Husband and Wife) (Scotland) Act 1984.

⁹ Married Women's Property (Scotland) Act 1920, s 5. This allowed property to be transferred from one spouse to the other and so (subject to the normal bankruptcy rules) protect the property from the creditors of the former.

point a separate property regime probably applied in Scotland to married couples.¹⁰ For the avoidance of all doubt in the matter, s 24 of the Family Law (Scotland) Act 1985 now provides that, subject to the provisions of that or any other enactment, marriage or civil partnership¹¹ shall not of itself affect the respective rights of the parties in relation to their property. So during a marriage/civil partnership the ownership of property is (generally speaking) unaffected by any domestic relationship the property owner or claimant happens to be a party to. Each party remains separately owner of his or her existing property and, subject to minor qualifications,¹² it is general property law rather than family law that determines ownership of property acquired subsequent to entering into a marriage/civil partnership. Each spouse/civil partner is an autonomous individual, owner of their own property and liable for their own debts.

Financial Claims on Divorce

Judicial divorce has been available in Scotland since the Reformation in 1560,¹³ originally limited to the matrimonial offences of adultery and desertion.¹⁴ From then until 1964 divorce was treated as akin to death: the innocent spouse received from the estate of the guilty spouse (divorce being fault-based throughout that period¹⁵) such property as she or he would have inherited had the guilty spouse died.¹⁶ As such the court had no power to

¹⁰ The Married Women's Property (Scotland) Act 1881 simply removed the husband's *ius mariti* without explicitly putting in place a separate property regime, though in the absence of the husband's right this was almost certainly a necessary implication. But there remained room for doubt and the likelihood of unfairness in certain areas such as savings from housekeeping allowances: see Anton, (n 2).

¹¹ Of course, civil partnership, a purely statutory creation, never was subject to common law rules. The addition of civil partnership to the rule in s 24 is designed to ensure that there is no possibility of an argument being made that civil partnership and marriage are to be treated differently in respect of property ownership.

¹² Family Law (Scotland) Act 1985, ss 25 and 26: presumption of equal shares in, respectively, household goods and savings from housekeeping allowances.

¹³ The authority of the Pope in Scotland was abolished by Act of Parliament on 24 August 1560: APS II, 534, c 2.

¹⁴ Divorce for adultery, seemingly mandated in *Matthew* 19.9, was accepted immediately, while divorce for desertion was introduced by statute in 1573: APS III, 81, c 1 (12mo c 55).

¹⁵ Except that in 1938 incurable insanity was added as a ground, in which case divorce had no effect on the parties' property: Divorce (Scotland) Act 1938, s 2(1).

¹⁶ Terce and courtesy from heritable property and *ius relictæ/relictī* from moveable property. A wife's terce was a liferent of one third of the husband's heritable property; a husband's courtesy was a liferent of the whole of the wife's heritable property but was claimable only if there was a living child of the marriage who had been heard to cry: Stair II, vi, 19. *Ius relictæ*

award aliment or a periodical allowance, with the result that the wife of a property owner was likely to leave her marriage very significantly better provided for than the wife of a wage-earner, however high the wage. The Succession (Scotland) Act 1964 separated the rules on death from the rules on divorce, and gave the divorce court the power to make such order as it thought fit to grant to the pursuer a capital sum or (for the first time) a periodical allowance, or both. The Divorce (Scotland) Act 1976, which introduced no-fault divorce into Scots law,¹⁷ extended the 1964 reforms to allow either pursuer or defender to apply for financial provision on divorce, irrespective of fault. This highly discretionary system, usually exercised in favour of granting an indefinite periodical allowance, and usually in practice requiring an ex-husband to pay that periodical allowance to an ex-wife, was swept away by the Family Law (Scotland) Act 1985, and this Act remains the basis of the law today.

There have been other developments. Civil partnership (an institution for same-sex couples functionally identical to the institution of marriage for opposite-sex couples) was introduced into Scots law by Part III of the Civil Partnership Act 2004 (UK), and the 1985 Act was amended so that the financial provision on divorce sections apply equally to dissolution of a civil partnership¹⁸. The Family Law (Scotland) Act 2006 introduced a regime of financial provision for separating cohabitants (same-sex and opposite-sex), but it is much more limited, and deliberately less valuable, than the regime (discussed in the next section) for spouses/civil partners.¹⁹ So the choice to marry or enter a civil partnership is regarded by the law as a voluntarily made choice to subject one's patrimony to a higher level of control than it would be

and *ius relict*i are claims (which may still be made today on the death of a spouse or civil partner) for one third or one half (depending upon whether there are surviving issue) of the moveable property.

¹⁷ Retaining as alternative grounds for divorce, the fault-based grounds of adultery, unreasonable behaviour and desertion. Desertion was abolished as a ground for divorce by the Family Law (Scotland) Act 2006, but divorce today retains both fault grounds (adultery and unreasonable behaviour) and non-fault grounds (non-cohabitation, for one year with consent or two years without consent).

¹⁸ See Civil Partnership Act 2004, sched 28, part II.

¹⁹ The details of cohabitants' claims are outwith the scope of this chapter. For a discussion, see K Norrie, *Family Law (Scotland) Act 2006: Text and Commentary* (Dundee University Press, Dundee 2006) at pp 68-72.

subjected to through a choice to cohabit with another person in an unregistered (though conjugal) relationship. As we will see, however the parties' personal autonomy is not significantly restricted by either of the choices and parties in either form of relationship are free, if they wish, to contract with each other in order to avoid the application of the 'default rules'.

(II) The Financial Consequences of Divorce/Dissolution: The Default Rules for Spouses/Civil Partners

The Section 9 Principles

Structurally, as we have seen, Scotland does not have a community property regime for married/civilly empartnered couples, though functionally it has something very close to what might be described as deferred community property (for acquests). For on divorce/dissolution²⁰ the effect of the financial orders that the Scottish court can make is, by and large, the same as the effect achieved by a community property regime²¹. The available orders are listed in s 8 of the 1985 Act, and include orders for the payment of a capital sum, for the transfer of property, for the payment of a periodical allowance²² and for the sharing of interests in a pension scheme. It is competent to make any of these orders only when the order is both (i) justified by one or more of five principles laid down in section 9 of the 1985 Act and (ii) reasonable having regard to the resources of the parties. Section 9 is the very heart of the 1985 Act: an order cannot be made unless justified, and it cannot be justified except by one or more of the principles listed there. There is no direct structural link between the types of order listed in s 8 and the justifications for making an order in s 9 though, as we will see, only some of the s 9 principles can be used to justify a periodical allowance.

²⁰ 'Divorce' being the legal process by which a valid marriage is brought to an end; 'dissolution' being the process by which either a voidable marriage or a civil partnership is brought to an end.

²¹ This similarly is explored rather more fully by K Norrie 'The Legal Regulation of Adult Domestic Relationships' in *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland*, (EUP, 2009) eds V Palmer and E Reid, pp 146-172, esp at pp 155-156.

²² It is important to note immediately that 'periodical allowance' is not to be regarded as precisely analogous to aliment or maintenance. Maintenance is an award of living expenses, but a periodical allowance under the 1985 Act will often have a quite different purpose.

The first principle that justifies the court making an order for financial provision on divorce/dissolution is that the net value of the 'matrimonial/partnership property' should be shared fairly between the parties to the marriage/civil partnership.²³ This is by far the most important, and most widely used, of the s 9 principles.

The central concept in this principle is the artificial and statutorily delineated 'matrimonial/partnership property'. This is given a precise definition in s 10(4) of the 1985 Act and is not subject to judicial discretion.²⁴ Property in Scotland either is or it is not 'matrimonial/partnership property' ('acquests' in the terminology of some other legal systems) and if it is not, then it is not available for sharing under this first and most powerful of the section 9 principles. 'Matrimonial/partnership property' means all the property belonging to the parties or either of them at the relevant date which was acquired by them or him or her (otherwise than by gift or succession from a third party) (i) before the marriage/civil partnership for use by them as a family home or as furnishings and plenishings for such home or (ii) during the marriage/civil partnership but before the 'relevant date'. In other words, those assets²⁵ that accrue to the parties or either of them between the date of the marriage/civil partnership and (basically) the date of separation fall within the concept of 'matrimonial/partnership property' - unless gifted by or inherited from a third party - and their value (but not necessarily themselves) is likely to be shared 50-50. Conversely, property that either party owned before the marriage/civil partnership is not available for such sharing, unless it was acquired before the marriage/civil partnership for use by the parties as a family home or furnishings and plenishings thereof.²⁶ 'Property' for this

²³ 1985 Act, s 9(1)(a).

²⁴ Attempts by judges in the early years of the Act's operation to claim a discretion to include or exclude particular types of asset from the definition have not thrived.

²⁵ An increase in the value of an asset during the marriage/civil partnership is not itself matrimonial/partnership property: the concept refers to the asset itself and not its value.

²⁶ Compare *Ranaldi v Ranaldi* 1994 SLT (Sh Ct) 25 where a house was not matrimonial property, having been purchased as a family home in contemplation of a previous marriage, with *Mitchell v Mitchell* 1995 SLT 426 where a house was matrimonial property, having been purchased in contemplation of a previous marriage between the same parties now divorcing (again).

purpose might include any right or interest in benefits under a pension arrangement. A periodical allowance is never justified by this principle, which justifies only the making of an order for the payment of a capital sum, or for the transfer of property, or pension splitting.

Fair sharing under this principle is presumed to be equal sharing.²⁷ So if party A owns £100,000 worth of 'matrimonial/partnership property' and party B owns £20,000 thereof, this principle will justify an order the effect of which is to require the transfer from A to B of cash or assets worth £40,000: that way each takes £60,000, which is one half of the total 'matrimonial/partnership property'. However, the presumption of equal sharing may be departed from if the court is persuaded that special circumstances exist that justify sharing in different proportions than 50-50: examples are given in s 10(6) of the sorts of circumstances that might justify a departure from equal sharing and include the terms of any agreement between the parties, the sources of the funds used to acquire the property, the nature of the property and the use to which it is put.²⁸

Valuation of the property has proved a contentious issue in practice though it is now settled that 'net value' refers to the price paid and not the value received.²⁹ The date of valuation is, generally speaking, the date of separation (the so-called 'relevant date'³⁰) but this was amended³¹ in relation to property transfer orders to be, generally speaking, the date of the order. That amendment resolved one of the most controversial aspects of the operation of the 1985 Act, arising from the case of *Wallis v Wallis*:³² when valuation is made at the relevant date, an order for the transfer of property which had increased in value between the relevant date and the date of the court decree would result in the party in whose favour the order was made receiving the full increase without having to share that increase with the other.

²⁷ 1985 Act, s 10(1).

²⁸ For a full discussion of s 10(6), see K Norrie *Stair Memorial Encyclopaedia of the Laws of Scotland: Child and Family Law* (Reissue, 2004) at para 662.

²⁹ *Sweeney v Sweeney (No 2)* 2005 SLT 1141.

³⁰ Defined in s 10(3) and (3A).

³¹ Family Law (Scotland) Act 2006, s 16.

³² 1993 SC(HL) 49. See also *Jacques v Jacques* 1997 SC(HL) 20.

This was perceived to be particularly pernicious when the property was originally jointly owned.

The underlying assumption in s 9(1)(a) is that it is in the very nature of marriage/civil partnership that the benefit of acquests must fall to both parties. During the effective life of the marriage/civil partnership ownership is not really relevant to the enjoyment of the property, but on divorce/dissolution a division is needed to guarantee that the benefit continues to accrue to both. The claim for a fair share of 'matrimonial/partnership property' is a claim almost as of right, and it will be applicable in virtually every case. As Lord McClusky put it:

'Junior counsel ... suggested that the principles listed in s 9(1) as (a), (b), (c), (d) and (e) are "cumulative". I should prefer to say that it is the duty of the court to apply (a) and also to apply whichever of the other specified principles are relevant in the light of the facts of the case'.³³

The second principle that can justify the making of an award of financial provision on divorce/dissolution is that fair account should be taken of any economic advantage derived by either party from contributions, whether financial or otherwise, of the other, and of any economic disadvantages suffered by either party in the interests of the other party or of the family.³⁴ This is designed to compensate, for example, for the loss of job opportunities, which had been given up for the sake of the family, and to share the economic benefits that one spouse/civil partner received, such as enhanced career opportunities, because the other spouse/civil partner relieved him or her of a share of the family burdens. The aims of this principle are (i) to even out the advantages and disadvantages gained or suffered by one in the interests of, or for the benefit of, the other or the family, and (ii) to recognise the palpable value to families of the non-financial contributions made in the form, typically, of housekeeping and childminding. The underlying assumptions of this principle have much in common with, but are wider than, those that underpin the law of unjustified enrichment. A periodical

³³ *Cunniff v Cunniff* 1999 SC 537 at 539F-G.

³⁴ Family Law (Scotland) Act 1985, s 9(1)(b).

allowance is never justified by this principle, which justifies only the making of an order for the payment of a capital sum, or for the transfer of property, or pension splitting.

The third principle is that any economic burden of caring for a child of the family under 16 should be shared fairly between the parties.³⁵ This allows the court to make an order that will share the actual costs of bringing up the child: it is frequently used to justify the transfer to the parent who has residence of the child the half share of the family home that belonged, before divorce/dissolution, to the non-residence parent. A periodical allowance might be justified by this principle, but it would terminate on the youngest child's 16th birthday. The underlying assumption is obvious - that both parents have an obligation to share the financial responsibilities of bringing up their children even when, because of parental separation, the emotional and practical responsibilities are very unevenly distributed.

The fourth principle is that a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him or her to adjust, over a period of no more than three years, from the date of the decree, to the loss of that support by the divorce/dissolution.³⁶ This is primarily designed to provide a short-term cushion to persons who have been long out of the job market and would therefore require a period of readjustment before being able to become fully independent. This principle will frequently be used to justify the awarding of a periodical allowance. However, it is fundamental error to see this principle as one that is designed to provide ongoing maintenance or one that focuses on needs. It has the short-term aim of providing time for readjustment, not the long-term provision of a source of income. It misses the whole point of the self-contained 'justifications' in s 9 to criticise as ungenerous the three year limitation to the periodical allowance that can be made under this principle.

³⁵ *Ibid*, s 9(1)(c).

³⁶ *Ibid*, s 9(1)(d).

The fifth principle is a safety net provision for a party who at the time of the divorce/dissolution seems likely to suffer serious financial hardship as a result of the divorce/dissolution: it allows the court to make such financial provision as is reasonable to relieve the party of that hardship over a reasonable period of time.³⁷ Originally this principle was designed for parties who might lose out on shares of pensions and the like referable to marriage but, though pensions are now more readily accessible through the application of s 9(1)(a), this principle remains relevant in cases where there is little in the way of 'matrimonial/partnership property' but one is a high earner and the other is not and the differences in lifestyle before and after the divorce/dissolution is stark.³⁸

These principles need to be looked at together, and an award under one may satisfy the requirements of another: for example a generous award under s 9(1)(a) may obviate the need for an award under s 9(1)(b) or (e). The court is looking to make an overall award that is 'coherent' (rather than, as the English courts tend to put it, one that is 'holistic'). It will be noticed that fault (in the sense of responsibility for the breakdown of the marriage/civil partnership) plays no part in these principles. It is explicitly provided³⁹ that in applying the s 9 principles the court shall not take account of the conduct of the parties, unless the conduct has adversely affected the financial resources available for distribution or, in relation only to the fourth and fifth principles, it would be manifestly inequitable to leave the conduct out of account.

The Family Home

The family home is often the single most valuable item of 'matrimonial/partnership property' available for sharing under s 9(1)(a) and is usually the most emotionally significant. However, other than the extension of the definition of 'matrimonial/partnership property' to include property acquired before the marriage/civil partnership if acquired for the purpose of being a family home for the parties, there are no special rules governing the

³⁷ Ibid, s 9(1)(e).

³⁸ See for example *Haughan v Haughan* 1996 SLT 321 (OH); 2002 SLT 1349 (IH).

³⁹ 1985 Act, s 11(7).

distribution of the family home on divorce/dissolution. It follows that, if part of the 'matrimonial/partnership property', the net value of the home will be shared (presumptively equally) between the parties. However, it is very common (particularly if there are still children living in the home) for the court to order the transfer of one party's half share to the other, either in satisfaction of an entitlement to receive something or, if no net transfer between the parties is justified by the section 9 principles, with a compensating transfer of an equivalent amount of cash or other property.

Pensions

It very frequently happens that after the family home, and often even before that, the largest single asset of a party whose marriage/civil partnership is being brought to an end is the interest he or she has in an occupational pension scheme. Such interests always were within the contemplation of the Family Law (Scotland) Act 1985,⁴⁰ and from the start pension funds were resources from which a party could be ordered to pay a capital sum. Problems in accessing these funds before the pension-holder's retirement, however, meant that such payment of capital sums as were ordered were frequently required to be postponed until the date of retirement, or paid in installments. And even after retirement the contributor's entitlement will often be a monthly income rather than a lump sum, making an order to pay a capital sum to an ex-spouse unfeasible other than by instalments.

The Pensions Act 1995 introduced into the 1985 Act a new provision,⁴¹ relevant only to orders for financial provision justified by the principle in section 9(1)(a), that the matrimonial property should be shared fairly between the parties. If the interest in a pension scheme includes a lump sum, payable either on retirement or death of the contributor, the court may make a variety of orders requiring the trustees or managers of the scheme to pay over the whole or part of this lump sum, when it becomes due, to the non-contributor spouse. These are known as 'earmarking orders', for they earmark a portion

⁴⁰ See 1985 Act, s 10(5), as originally enacted.

⁴¹ 1985 Act, s 8(1)(ba) and s 12A.

of the lump sum which will go to the non-contributor ex-spouse at the time the lump sum becomes due in the normal course of events.

That provision does not apply to the part of the pension from which the contributor takes income. That is clearly a valuable 'resource'. Part III of the Welfare Reform and Pensions Act 1999 introduced into the 1985 Act the power to make a 'pension sharing order'⁴² under which the whole or part of the value of a pension (including that portion which generates income) can be transferred to the non-contributor partner, effectively creating two pensions out of the single scheme. The order must be made at or before the date of the decree of divorce/dissolution or declarator of nullity.⁴³ The order may be justified by any of the principles in section 9(1) and not just that in section 9(1)(a) of the 1985 Act.⁴⁴ Pension sharing may also feature as an element in a separation agreement, though to be enforceable any such agreement must be registered in the Books of Council and Session.⁴⁵

Maintenance

It is not and never has been in Scotland one of the underlying assumptions of marriage (and now civil partnership) that the parties thereto undertake a life-long obligation to maintain the other and maintenance, in the sense of providing for ongoing alimentary needs, has never been one of the goals of the financial provision that the Scottish courts make on the termination of a marriage.⁴⁶ In a system that has had judicial divorce for 450 years, it has long been accepted that consent to marriage is the undertaking of an obligation to maintain for so long as the marriage lasts, but no longer. Scots law reflects this understanding, and the obligation of aliment, now governed by the first seven sections of the Family Law (Scotland) Act 1985, lasts only as long as the marriage/civil partnership lasts. But even then the obligation is not absolute and the parties can agree between themselves as to the terms under which that obligation is to be met. However, s 7(1) provides that any provision

⁴² 1985 Act, s 8(1)(baa).

⁴³ 1999 Act, s 28(7), (8).

⁴⁴ *Galloway v Galloway* 2003 Fam LB 10.

⁴⁵ Welfare Reform and Pensions Act 1999, s 28(3)(b).

⁴⁶ Except, in practical terms, for the short historical period between 1964 and 1985.

in an agreement that purports to exclude future liability for aliment or to restrict the right to bring an action for aliment shall have no effect unless the provision was fair and reasonable in all the circumstances of the agreement at the time it was entered into. So the agreement can be challenged on the basis that it was not fair and reasonable. These terms are discussed further below. Additionally, under s 7(2), an application may be made to the court for variation of the amount payable under an agreement, or for the termination of the agreement whenever there has been a material change in the circumstances.⁴⁷

This statutory obligation of aliment, and the rules for variation of agreements concerning the payment of aliment, do not survive the marriage/civil partnership that gives rise to the obligation, and there is no ongoing obligation of maintenance after divorce/dissolution. A periodical allowance ordered by the court as part of the financial provision it makes is based on the justifications listed in section 9, as discussed above, and not on any obligation to maintain or right to be maintained, for none exists except between spouses/civil partners and from parents to children. However, there is nothing to prevent the parties undertaking an obligation to pay and receive a periodical sum for the purposes of maintaining the payee, either by contract or by unilateral promise (fully enforceable in Scots law). Such an agreement may be set aside or varied by the court at any time after granting a decree of divorce/dissolution if the agreement expressly provides for the court doing so,⁴⁸ or on the payer's sequestration,⁴⁹ or on the making of a maintenance calculation by virtue of which child support maintenance becomes payable by either party with respect to a child to whom or for whose benefit periodical allowance is paid under the agreement.⁵⁰ A mere change of circumstances, such as justifies the court varying an agreement relating to spousal aliment, is not sufficient to allow the court to vary a contract, freely undertaken, to pay

⁴⁷ The making of a maintenance calculation in respect of a child to whom or for whose benefit aliment is payable under such an agreement is a material change of circumstances for these purposes: *ibid*, s 7(2A).

⁴⁸ Family Law (Scotland) Act 1985, s 16(1)(a) and (2)(a).

⁴⁹ *Ibid*, s 16(3)(a)-(c).

⁵⁰ *Ibid*, s 16(3)(d), as inserted by the Child Support (Amendments to Primary Legislation) (Scotland) Order 1993, SI 1993/660.

non-spousal (or post-spousal) maintenance.⁵¹ But if the agreement is contained in a separation agreement between the parties to the marriage/civil partnership to take effect on divorce/dissolution, it may be set aside or varied if not fair and reasonable under s 16 of the 1985 Act, as discussed below.

Purpose of the Rules

The Family Law (Scotland) Act 1985 aims to provide a detailed structure within which the courts must operate in determining what financial provision to make when spouses or civil partners dissolve their legal relationship and have been unable to agree themselves as to the division of their property. Though designed to be far less discretionary than the pre-1985 law, a certain level of discretion clearly still rests with the court - for example in determining a 'fair' sharing of 'matrimonial/partnership property' under s 9(1)(a), in assessing contributions and disadvantages under s 9(1)(b) and taking 'fair account' of them, and making a 'reasonable' provision either for adjusting to loss of support under s 9(1)(d) or for ameliorating serious financial hardship under s 9(1)(e). But the Act does provide a structure within which all courts can operate to produce a result that is (to some extent at least) predictable. Predictability of judicial outcome is believed to encourage extra-judicial settlement, an important social aim of the law. Another major aim of the Scottish legislation on financial provision on divorce/dissolution is to encourage the court to design a settlement that ensures a 'clean break' between the parties. The primary order that the court can make is one for the payment of a lump sum or for the transfer of property from one ex-spouse to the other: in other words, a once and for all financial settlement, after which the parties are to be free of obligation towards - and free of dependency on - each other. The two most valuable assets (the family home and the pensions) are normally dealt with through a one-off payment, for the principles contained in s 9(1)(a) and (b), which are the primary means of dealing with these assets, allow for the making only of an order for the payment of a capital sum or for the transfer of property or for a pension sharing order. Principles 9(1)(c) and (d), which tend to be supplementary to the primary

⁵¹ *Drummond v Drummond* 1995 SC 321.

claim under principle 9(1)(a), envisage the making of an order for a periodical allowance, but in both cases only for limited periods of time. Only principle 9(1)(e) ever justifies an open ended periodical allowance, and that principle, as a safety net, has limited application and indeed is seen less and less in the law reports as the years have gone by. The 1985 Act itself steers the court in the direction of satisfying all the principles by means of a clean break payment: section 13(2) provides that an order for a periodical allowance, even where competent, may not be made unless the court is satisfied that an order for the payment of a capital sum or for the transfer of property or a pension sharing order would be inappropriate or insufficient to satisfy the requirements of being reasonable and being justified.

III. Pre-Nuptial and Post-Nuptial Agreements

General Enforceability of Marriage Contracts

Marital agreements, usually referred to in Scotland as ‘marriage contracts’, are enforceable under Scots law in the way that other contracts are.⁵² It is nothing to the point that they have been entered into by spouses (or prospective spouses⁵³), or that they tend to regulate matters that, absent the agreement, the court would be empowered to regulate. They have never been regarded as being contrary to public policy for they far more commonly regulated property arrangements during marriage than on its termination and were not, therefore, seen as deeds that encouraged divorce, or that undermined the essential nature of marriage. Nor did their often one-sided nature pose any difficulties, for Scots law, in sharp distinction to the English common law and following a European tradition whereby unilateral promises are legally enforceable⁵⁴, has never worried about the validity of contracts

⁵² Marriage settlements may also take the form of trusts and, if so, are subject to the general Scots law of trusts and in particular the rules in the Trusts (Scotland) Act 1921 and the Trusts (Scotland) Act 1961.

⁵³ In *Kibble v. Kibble* 2010 Fam. LB 103/3 the Sheriff Principal rejected an argument that an agreement between prospective spouses was not an agreement between “parties to a marriage” as required by s. 16 of the Family Law (Scotland) Act 1985, discussed below.

⁵⁴ So long, now, as they are in writing: Requirements of Writing (Scotland) Act 1995, s 1(2)(a)(ii).

made in the absence of consideration. Autonomy of the parties, in other words, trumps both the property rules on marriage/civil partnership and the property distribution rules on divorce/dissolution. The general position was set out by Lord Kincaid in *Milne v Milne*⁵⁵:

In my opinion parties may by agreement oust the jurisdiction of the court to pronounce upon the pursuer's entitlement to payment of a capital sum, where such is applied for in an action for divorce, and if they do so, the court must give effect to any such agreement. It has always been the law that notwithstanding statutory provisions regulating the rights of parties, they may agree to certain terms, and if they do so they must receive effect. It is different where the court has a duty in relation to the interests of other parties affected by a decree of divorce, such as children of the marriage.... No agreement between the parties on these matters can relieve the court of its obligation. Further there may be statutes which expressly provide that no parties may contract out of the provisions of the statute.

So marital agreements in Scotland are more than simply one of the circumstances to be taken into account on divorce in terms of s 10(6) of the 1985 Act: they are contracts enforceable in a court of law⁵⁶ and, insofar as they deal with matters that the court would otherwise have jurisdiction over, they can effectively oust the jurisdiction of the court. In Scotland the courts have jurisdiction to determine financial provision on divorce/dissolution only when the parties, in the exercise of their own autonomy, either do not or cannot reach agreement themselves and so one or other of them asks the court to make an order which he or she seeks to show is justified by one or more of the section 9 principles. Unenforceable, however, are terms that

⁵⁵ *Milne v Milne* 1987 SLT 45 at 47. See also *Thomson v Thomson* 1982 SLT 521, *Elder v Elder* 1985 SLT 471, *Horton v Horton* 1992 SLT (Sh Ct) 37.

⁵⁶ Indeed, an agreement may be enforceable even after the death of one of the parties: see *Redfern's Executor v Redfern* 1996 SLT 900; *Lavery v Lavery* 2008 Fam LR 46.

purport to restrict the parties' right to seek a divorce⁵⁷ or a term whereby one party agrees to consent to a divorce based on non-cohabitation for one year.⁵⁸

Decreased Popularity of Marital Contracts in Scotland

Before the enactment of the Married Women's Property (Scotland) Acts, as described above, marriage contracts were 'widely used amongst the propertied classes'⁵⁹ (a relatively small proportion, it should be remembered, of the marrying population) as a means of altering or avoiding completely the rules then existing that governed the property relationship between the spouses - and in particular the rules that a married woman's moveable property fell into the ownership of her husband and that her heritable property fell under his administration. As the right was the husband's, the ante-nuptial contract normally took the form of a deed granted in his name, renouncing his rights. If the husband were unwilling to grant such a deed, the wife could achieve some protection for herself by establishing an ante-nuptial trust in her own favour.⁶⁰ Marriage contracts were also a means by which a more sophisticated distribution of assets on divorce could be achieved than was provided for by the common law.

But the need to avoid these rules simply evaporated when the rules themselves changed and the popularity of marriage contracts has waned. The Married Women's Property (Scotland) Acts, by creating a system of separate property amongst spouses, removed the major incentive to parties contemplating marriage to enter into marital agreements and today such agreements, though generally enforceable, are not commonly met with. Even when spouses/civil partners wish to modify the separation of property provided for by the law, there is simply no culture in contemporary Scotland of

⁵⁷ *Lawson v Macculloch* (1797) Mor 6157.

⁵⁸ That consent is valid only if given at the time the decree is pronounced and any previously given consent may be withdrawn up until that time: *Boyle v Boyle* 1977 SLT (Notes) 69. Without such consent the non-cohabitation must be for at least two years: Divorce (Scotland) Act 1976, s 1(2)(e), as amended by the Family Law (Scotland) Act 2006.

⁵⁹ Clive, (n 7) at 17.001.

⁶⁰ In *Beith's Trustees v Beith* 1950 SC 66 the Court of Session finally abandoned the rule that a wife was incapable of subsequently varying or renouncing her own ante-nuptial trust. This rule was designed for her own protection for renunciation would result in the trust property falling under the control of her husband, but the need for that protection disappeared with the Married Women's Property (Scotland) Acts.

doing so by means of formal agreement. Rather, when individual couples wish a closer combination of their resources than is provided by the law, or who find the law's separation of property inconvenient or inappropriate, they can achieve their aims far more easily by means such as joint bank accounts, taking title to heritage in joint names, and specifying each other as beneficiaries in pension schemes, insurances and wills. On divorce too the default rules for financial provision on divorce/dissolution discussed above provide much of the protection in any case that prenuptial agreements are primarily designed to ensure. The general law to a large extent shields the capital assets that the parties owned before entering a marriage/civil partnership from claims on divorce/dissolution, for the definition of 'matrimonial/partnership property' excludes virtually all of these capital assets. The author of a practitioner textbook⁶¹ positively advises against recommending clients to enter into marital agreements because (i) the Family Law (Scotland) Act 1985 creates 'a fair and sensible system', any departure from which may, in due course, become outdated and inappropriate, (ii) spouses can provide for each other by other straight-forward means (such as those mentioned above), (iii) household goods are presumed to be owned equally in any case, and (iv) 'it is generally inadvisable to discuss the arrangements for the breakdown of a marriage before it has begun or at regular intervals during the marriage: this may damage or destroy the trust between the parties to the contemplated marriage, or become a recurring source of trouble after marriage'.⁶²

But marital agreements are not completely unknown in Scottish practice. They may be entered into where individual couples have particular reasons to do so. It is not uncommon, for example, for parties to a second or subsequent marriage/civil partnership to wish to avoid court involvement in their financial affairs after a previous experience in the divorce/dissolution court that they perceive as unfair. And with reconstituted families - increasingly common in Scotland as elsewhere - a property owner may seek by marriage contract to preference the issue of his first family over any

⁶¹ G Jamieson, *Family Law Agreements* (Tottel Publishing, 2005) at p 35.

⁶² *Ibid.*

potential claims of his new spouse. Jamieson suggests that a marital agreement might be appropriate if one of the spouses/civil partners is very wealthy and giving a generous, but less than 50% share, of his or her property would be more than ample for the needs and comforts of the other.⁶³ Clive points out that where there is doubt as to which legal system will govern, and the parties fear being subjected to 'an uncongenial matrimonial property regime', an agreement as to which legal system is to govern the relationship will resolve that doubt and would be given effect in Scotland.⁶⁴

Setting Aside or Varying Marriage Contracts

The normal rules of contract apply to marital agreements where they are entered into except that on divorce/dissolution a court may make an 'incidental order' in relation to financial provision setting aside or varying any term in an ante-nuptial or post-nuptial marriage settlement or in any corresponding settlement in respect of a civil partnership.⁶⁵ Such an order needs to satisfy the normal requirements set out in sections 8 and 9 of the 1985 Act for the making of any order for financial provision, as discussed above, and it must not prejudice the existing rights of any third party.⁶⁶ Requesting such an incidental order is rare. The court also has the power to set aside or vary any of the terms of an agreement as to the financial provision to be made on divorce/dissolution.⁶⁷ This particular issue arises (and has been judicially discussed) much more commonly in relation to separation agreements (which are also covered by the rule in s 16 of the 1985 Act) and so will be discussed in detail in the next section.

IV. Separation Agreements

⁶³ Ibid.

⁶⁴ Clive (n 7) at para 17.016. [See also j. Kerrigan, 'Separation Agreements, Survivorship Destinations and Succession' 2010 S.L.T. \(News\) 25 who suggests that separation agreements might also be used to evacuate special destinations in title deeds, not otherwise achieved under s. 19 of the Family Law \(Scotland\) Act 1985.](#)

⁶⁵ 1985 Act, s 14(2)(h).

⁶⁶ 1985 Act, s 15(3).

⁶⁷ 1985 Act, s 16.

The General Enforceability of Separation Agreements

Unlike pre- and post-nuptial agreements, separation agreements entered into by spouses who have decided that their marriage/civil partnership should be brought to an end are commonly met with in Scotland.⁶⁸ The motivation for entering such agreements is likely to have less to do with dissatisfaction with the default rules for financial provision in the Family Law (Scotland) Act 1985, and more to do with the desire to avoid lengthy and expensive court proceedings, which invariably add an unhelpfully adversarial tone to what is already a tense and unpleasant experience. Most family law practitioners will seek to persuade their separating clients to reach agreement with their spouse/civil partner, and it is only when agreement cannot be reached that the divorce/dissolution court will be asked by one or other of the parties to make orders for financial provision as well as an order terminating the legal relationship. Since separation agreements in Scotland, like pre- and post-nuptial agreements, are governed by the general Scots law of contract (or of unilateral promise) there is no special legal definition, nor any particular requirements as to form beyond the normal rules of contract, that such an agreement must satisfy before being validly constituted. Though a verbal agreement is competent, certain matters commonly dealt with in separation agreements require to be writing⁶⁹ and in any case for evidential reasons an agreement in written form is far preferable and, if executed in terms of the Requirements of Writing (Scotland) Act 1995, will be self-evidencing.⁷⁰ Most separation agreements are registered in the Books of Council and

⁶⁸ For the purposes of this discussion, 'separation agreement' means an agreement between parties who have concluded that their relationship should be terminated by divorce/dissolution and who wish to regulate the financial consequences of that conclusion themselves rather than leaving it to the divorce/dissolution court. 'Separation agreement' may also refer to the private regulation of a couple who have decided to separate but not to divorce: it is agreements with this latter meaning that Clive discusses in his chapter on 'Separation' in *Husband and Wife*.

⁶⁹ See Requirements of Writing (Scotland) Act 1995, s 1(2).

⁷⁰ Section 2 of the 1995 Act provides that a deed is formally valid if it has been subscribed by the granter or the parties; section 3 provides that it is self-evidencing if the signature has been attested by a single witness.

Session⁷¹ for preservation and execution, for any deed registered there has the force of a decree of the Court of Session.⁷² This is not a form of judicial scrutiny of agreements and far less one of judicial endorsement. Rather the parties are free to enter whatever agreement they wish, one of the terms of which will normally be consent to registration in the Books of Council and Session - and consent, therefore, to enforceability of the agreement. The parties' autonomy is not qualified, except as described in the next section, by judicial paternalism.

The term 'separation agreement' is a factual one, referring to any agreement concluded by the parties to a marriage/civil partnership (existing or prospective) governing, inter alia, the financial arrangements in the event of their separation - this might involve an agreement for the transfer of assets, the undertaking of an obligation of maintenance, or the sharing of a pension in terms of the Welfare Reform and Pensions Act 1999. Separation agreements of this sort tend in practice to be negotiated after, rather than before, the parties have decided to split up. They are, again like pre- and post-nuptial agreements, enforceable in the normal way,⁷³ at least insofar as they deal with financial matters⁷⁴ and subject only to special rules for their variation or setting aside contained in s 16 of the Family Law (Scotland) Act 1985. Insofar as they deal with maintenance, these rules have already been described.

Setting Aside Agreements on Financial Provision

⁷¹ That is to say the Register of Deeds maintained by the Keeper of the Registers of Scotland on behalf of the Court of Session.

⁷² See *Stair Memorial Encyclopaedia of the Laws of Scotland* 'Public Registers and Records' (Reissue) at para 41.

⁷³ This has been the case at least since Stair's *Institutions*. At I, iv, 9 he wrote: 'By private pactions the interest in, and division of, the goods of married persons after the dissolution of their marriage, may be according to their pleasure, as they agree'.

⁷⁴ Separation agreements are not in practice limited to financial matters and if, for example, there are children involved, they will frequently set out the arrangements for the future care of and contact with the children: such terms are not enforceable in the normal way and it is open to either party to go to court to seek an order under s 11 of the Children (Scotland) Act 1995: the terms of the agreement has no bearing on the court's assessment of the welfare of the child.

There is, of course, an inconvenient truth in all of this which a strict adherence to party autonomy fails to confront - that within domestic relationships, opposite-sex certainly and same-sex probably, the parties are seldom of equivalent economic strengths. Even when they are, there may be disparities in social or psychological strengths that create opportunities for exploitation of the weaker and more vulnerable party. It is this high likelihood of a disparity in bargaining power that justifies a difference of treatment between separation agreements and normal commercial contracts. The law's continuing preference for marriage/civil partnership over cohabitation is revealed by its treating agreements between the latter as if they were commercial rather than domestic contracts, notwithstanding a likelihood of bargaining power disparity that is at least as great as with couples who have formalised their relationship.

Prior to the 1985 Act, an agreement on the financial provision to be made on divorce could not be set aside unless there was evidence of a vitiating factor such as error, fraud, undue influence or misrepresentation - in other words the normal contractual rules were applied without qualification due to the fact that the agreement had been between spouses.⁷⁵ In addition, an agreement might be rescinded by one party due to the material breach of the other.⁷⁶ These remain the only means of setting aside cohabitation contracts. Section 16 of the Family Law (Scotland) Act 1985, however, gives the court a limited additional⁷⁷ power to set aside or vary agreements made between spouses/civil partners on the financial provision to be made on their divorce/dissolution. Section 16 applies to agreements made either before or after the commencement of

⁷⁵ Other than that the agreement could be held to be frustrated by the later reconciliation of the parties: see *Davidson v Davidson* 1989 SLT 466. Resumption of cohabitation is strong, but not necessarily conclusive, evidence of reconciliation and mutual revocation of the agreement: per Sheriff Scott in *Methven v Methven* 1999 SLT (Sh Ct) 117.

⁷⁶ See *Morrison v Morrison* 1999 *Green's Family Law Bulletin* 43/6.

⁷⁷ The normal contractual grounds for reduction or rescission continue to exist and, sometimes, may prove useful: see G Junor, 'Separation Agreements and Common Law Remedies' (1998) *Green's Family Law Bulletin* 36/2.

the 1985 Act,⁷⁸ and it cannot itself, by a term in the agreement, be excluded.⁷⁹

The test by which the court may set aside or vary an agreement or any term of such an agreement (including those relating to transfer of property, capital sums and pension sharing) is that the agreement is shown to be not fair and reasonable at the time it was made.⁸⁰ This is not to be interpreted identically to the test in the Unfair Contract Terms Act 1977.⁸¹ ‘Unfairness’ and ‘unreasonableness’ are two separate bases upon which the agreement can be set aside, and it is not necessary for the party seeking reduction of the agreement to show that it was both unfair and unreasonable.⁸² ‘Reasonableness’, as always, implies a range of acceptable outcomes and so an agreement is not challengeable solely on the ground that the parties might have reached a different, more reasonable, agreement.⁸³ The focus of enquiry in most cases has not been on the fairness of the outcome (in the way that the English courts seek ‘fairness’ in determining an appropriate financial provision on divorce/dissolution, or ‘ancillary relief’ in their recondite terminology) but rather on the fairness of the agreement itself and in particular on the process that led to the agreement being reached. So for example all the circumstances pertaining to the parties at the time the agreement was made are to be taken into account including in particular the nature and quality of any legal advice obtained by either party.⁸⁴ A failure to seek legal advice is unlikely on its own to justify the court in setting aside an agreement.⁸⁵ Putting pressure on a spouse/partner to agree may, if

⁷⁸ 1985 Act, s 16(5).

⁷⁹ 1985 Act, s 16(4).

⁸⁰ 1985 Act, s 16(1)(b).

⁸¹ *Gillon v Gillon (No 1)* 1994 SLT 978, per Lord Penrose.

⁸² *Gillon v Gillon (No 3)* 1995 SLT 678. This is the leading case on s 16. See also *Clarkson v Clarkson* 2008 SLT (Sh Ct) 2. [In, however, Hanif v. Hanif 2011 Green's Family Law Bulletin 112/5, Sheriff Holligan doubted that the court could realistically distinguish between unfairness and unreasonableness.](#)

⁸³ [In *Turner v. Turner* 2009 Fam LB 102/7, Sheriff McCulloch held that a reasonable agreement would have given the husband less than the actual agreement did, but that was insufficient to make the actual agreement unreasonable.](#)

⁸⁴ *Young v Young (No 2)* 1991 SLT 869; *Anderson v Anderson* 1991 SLT (Sh Ct) 11; *Short v Short* (1994) *Family Law Bulletin* 10/5; *Inglis v Inglis* 1999 SLT (Sh Ct) 59.

⁸⁵ *Inglis v Inglis* 1999 SLT (Sh Ct) 59.

severe, render the agreement unfair,⁸⁶ but giving up a valuable future claim in order to achieve an immediate, short-term, goal such as the departure of an unwanted spouse from the matrimonial home is not a reaction to unwarrantable pressure sufficient to satisfy the test.⁸⁷ Whether advantage has been taken by one party of the other is relevant⁸⁸ but unequal division of assets, even with a great disparity, is not per se evidence of unfairness or unreasonableness.⁸⁹ The omission from the agreement, whether through oversight or otherwise, of a significant asset might be sufficient to justify the court overturning the agreement,⁹⁰ as might the failure of one party to give full and frank disclosure of his or her financial position. Inadvertent misevaluation, if substantial, is likely to render any agreement made on the basis of such valuation unreasonable.⁹¹ But making a bargain that turns out to be bad is not unreasonable: remember the agreement needs to be unfair or unreasonable at the time it was made. So events, for example a drop in the value of property, subsequent to the agreement are irrelevant to an application to vary or set aside the agreement on the ground of unfairness or unreasonableness.⁹²

The onus is on the party seeking to escape the agreement and, generally speaking, the courts in Scotland have been slow to set aside or vary agreements on financial provision. But this reluctance must not be allowed to inhibit the effectiveness of s 16. In *Clarkson v Clarkson*⁹³ Sheriff MacNair said this:

Whilst I accept that the courts should not be unduly ready to overturn agreements reached between parties, equally they should

⁸⁶ In *MacDonald v MacDonald* (2009) *Family Law Bulletin* 99/5 (Sheriff Principal Lockhart) the agreement was set aside after the wife signed it against the advice of her solicitor, because there was ample evidence to show that she had been so bullied by her husband that she was afraid not to sign it.

⁸⁷ *Inglis v Inglis* 1999 SLT (Sh Ct) 59 at 62E, per Sheriff Farrell.

⁸⁸ See *McAfee v McAfee* 1990 SCLR 805; *Gillon v Gillon (No 3)* 1995 SLT 678.

⁸⁹ *Gillon v Gillon (No 3)* 1995 SLT 678. Here Lord Weir (at 682) concluded that 'the intangible value in terms of peace of mind and a sense of security' had to be balanced with the disparity in the division agreed.

⁹⁰ See *Worth v Worth* 1994 SLT (Sh Ct) 54; *McKay v McKay* 2006 SLT (Sh Ct) 149; *Clarkson v Clarkson* 2008 SLT (Sh Ct) 2.

⁹¹ *Clarkson v Clarkson* 2008 SLT (Sh Ct) 2.

⁹² *Anderson v Anderson* 1989 SCLR 475.

⁹³ *Clarkson v Clarkson* 2008 SLT (Sh Ct) 2 at para 13.

not construe s 16 so narrowly so as to deny a party the right given to him or her by Parliament to have an unfair or unreasonable agreement set aside.

The Time for Setting Aside

An order setting aside or varying an agreement relating to pension sharing may be made only on granting the decree of divorce/dissolution and not thereafter.⁹⁴ If the agreement does not contain a term relating to pension sharing, it may be set aside or varied on the granting of the decree of divorce/dissolution or within such time thereafter as the court granting such decree may specify.⁹⁵ If the matter is not raised at that point the agreement becomes unchallengeable thereafter on the statutory basis though it will remain challengeable on the more difficult common law grounds of error, fraud, undue influence and misrepresentation. The court is entitled to make a finding that the agreement is unfair or unreasonable at an earlier point in the process, but it may not act upon that finding by actually setting aside or varying the agreement until the decree of divorce/dissolution is pronounced.⁹⁶

V Conflict of Laws

In a provision that is not in its terms applicable to civil partnership, Scottish legislation sets out rules for the determination of which legal system is to apply to questions in relation to the rights of spouses to each other's property, moveable and immoveable,⁹⁷ but these rules are explicitly disapplied 'to the extent that the spouses agree otherwise'.⁹⁸ It follows that spouses (and there is no reason not to suppose civil partners also) can agree between

⁹⁴ 1985 Act, s 16(2)(c)(i).

⁹⁵ 1985 Act, s 16(2)(b).

⁹⁶ *Gillon v Gillon (No 2)* 1994 SC 162; *MacDonald v MacDonald* (2009) *Family Law Bulletin* 99/5 (Sheriff Principal Lockhart).

⁹⁷ Family Law (Scotland) Act 2006, s 39(1) – (3).

⁹⁸ *Ibid*, s 39(6)(b).

themselves which legal system is to govern their property relationship. At present 'rights in property arising out of a matrimonial relationship' are excluded from the terms of the Rome Convention on the law applicable to contractual obligations.⁹⁹ So the validity of marital agreements contracted abroad (which presumably for this purpose include such agreements entered into by civil partners) is governed by the common law. That provides that foreign agreements will be enforceable in Scotland if (i) formally valid either by the law of the place of execution or by the proper law of the contract¹⁰⁰, that is to say the legal system chosen by the parties to govern the agreement¹⁰¹ or, failing such choice, the system with the closest connection to the agreement¹⁰² and (ii) the parties had capacity to enter the contract (though there is some doubt as to how that capacity is determined).¹⁰³ It follows that 'the important question of the effect which a marriage contract has in the event of divorce is governed by its proper law and not by the law of the country in which the divorce is obtained'.¹⁰⁴ It is thought that, even where a marital agreement is governed by foreign law, the Scottish court retains the power to vary or revoke the agreement under s 16 of the Family Law (Scotland) Act 1985.¹⁰⁵

VI Conclusion

Autonomy of the parties in regulating their own financial affairs is the starting point in Scots law and is not significantly affected by the fact that the parties to

⁹⁹ Brought into UK law by the Contracts (Applicable Law) Act 1990.

¹⁰⁰ See A Anton with P Beaumont *Private International Law* (2nd edn, 1990) at 576- 577.

¹⁰¹ Though no such choice will affect the court in making orders for financial provision under s 8 of the Family Law (Scotland) Act 1985.

¹⁰² See for example *Goold Stuart's Trs v McPhail* 1947 SLT 221.

¹⁰³ See Anton with Beaumont, (n 98) at 577-580. Clive (n 7) at para 17.033 expresses the unqualified opinion that capacity to enter into a marriage contract depends on the law of the party's domicile at the time it is made.

¹⁰⁴ Clive (n 7) at para 17.032, citing *Montgomery v Zarifi* 1918 SC(HL) 128.

¹⁰⁵ Section 16(4) of the 1985 Act does not permit the s 16 power to be contracted out of. This must include not only explicit but implicit contracting out, such as by choosing a system of law to govern that has no analogous power, and it would be anomalous to adopt any different rule for agreements governed by a legal system not chosen but imposed as having the closest connection to the agreement.

an agreement marry or enter a civil partnership with each other.¹⁰⁶ During the relationship they remain autonomous individuals, with the power of course to limit their own freedom of action by contract or unilateral promise. On divorce/dissolution the rules governing financial provision are truly default rules because they apply only when the parties themselves do not or cannot agree as to the financial settlement that is to be made. The primary aims of the default rules for financial provision on divorce/dissolution are interconnected: clean break, predictability and the encouragement of extra-judicial settlement. It is assumed that a predictable system with limited room for judicial discretion will enable parties to negotiate what is mutually considered a more suitable result with full knowledge of what the courts are likely to do if agreement cannot be reached. Predictability is for this reason regarded as more important than the uncertainties of 'fairness in the individual case', being more likely to avoid fraught and contentious disputes. Inevitably this means that the law is rather less flexible than, say, English law when faced with an unusual scenario: this is most noticeable in 'big money' cases. Nevertheless the law is widely regarded by the legal profession in Scotland as being satisfactory and eminently workable. After a quarter of a century of operation, and substantial judicial discussion, the Family Law (Scotland) Act 1985 is familiar and its principles well-embedded into legal practice. There has been little scope for judicial development such as has been seen in the higher courts in England, though there is an extensive interpretative jurisprudence.¹⁰⁷ There have of course been statutory amendments, in particular in 1999 bringing in pension sharing,¹⁰⁸ and in 2006 qualifying the 'relevant date' in order to resolve the '*Wallis* conundrum'.¹⁰⁹ But the basic principles themselves are generally regarded as robust and sensible.

¹⁰⁶ It is as well to note here that this is true only during life. On death Scots law eschews autonomy of the testator in favour of protected inheritance rights for spouses/civil partners and for issue. As we have already seen, before 1964 the distribution of a person's estate was more or less the same whether a conjugal relationship ended by death or by divorce, and though there are sometimes calls to restore the link (see D Reid, 'From the Cradle to the Grave: Politics, Family and Inheritance Law' (2008) *Edinburgh Law Review* 391) the approach of the Scottish Law Commission in their 2009 *Report on Succession* (Scot Law Com No 215, May 2009) is to keep the two systems well apart.

¹⁰⁷ See K. Norrie, *Stair Memorial Encyclopaedia: Child and Family Law* (Reissue, 2004) at paras 646-675.

¹⁰⁸ Welfare Reform and Pensions Act 1999.

¹⁰⁹ Family Law (Scotland) Act 2006, s 16.

Sometimes there are calls to make Scots law more discretionary or to change the balance between flexibility and predictability,¹¹⁰ but the most recent substantial reform of Scottish family law¹¹¹ dealt only with the 'relevant date' issue and the various consultations that preceded that reform did not identify either serious practical problems or professional discontent with the operation of the 1985 Act.

All the more surprise, then, that when the House of Lords handed down its judgment in the English case of *Miller v Miller, McFarlane v McFarlane*¹¹², the Scottish judge sitting on the Judicial Committee in that case, Lord Hope of Craighead, used his speech to call for a review of the Scottish law, believing that the fair result achieved by the application of English law in these cases could not have been reached in Scotland. This caused no little consternation in Scotland, where there has been no equivalent expression of judicial disquiet.¹¹³ He based this conclusion, however, on a surprisingly narrow reading of the 1985 Act. His worry focused on the fact that in a case where a wealthy spouse has little capital assets Scots law, with its emphasis on capital payment, would be unable to make an award of sufficient worth to achieve what the circumstances of the case required. Commentators responded that the payment of a capital sum can be postponed, and made in instalments.¹¹⁴ The Scottish Government have indicated that it is not minded to act upon Lord Hope's call for reform.¹¹⁵ This is sensible. Amending the law to deal with those rare cases (like both *Miller* and *McFarlane*) where there is a substantial surplus of assets over needs and the only unfairness lies in the economic disparity between the two does nothing for - and risks disrupting - the generality of cases where the underlying problem is that assets and income

¹¹⁰ See for example C Barton and A Bissett-Johnson 'Financial Provision on Divorce in Scots Law: Does it Need Reform?' 2000 *Juridical Review* 265; A Bissett-Johnson and B Dempsey, '*McFarlane v McFarlane*; *Miller v Miller*. Time for a Review?' 2007 *Juridical Review* 65.

¹¹¹ Family Law (Scotland) Act 2006.

¹¹² [2006] UKHL 24, [2006] 2 AC 618.

¹¹³ See E Clive, 'Financial Provision on Divorce' (2006) 10 *Edinburgh Law Review* 413; K Norrie, 'Clean Break Under Attack' (2006) *Journal of the Law Society of Scotland* July, p 16.

¹¹⁴ *Ibid.*

¹¹⁵ Parliamentary Question S2W-28599, answered by the Deputy Minister of Justice 25 September 2006, reported in September 2006 *Journal of the Law Society of Scotland Online*.

are insufficient to keep both ex-spouses/partners at the standard of living they enjoyed when together. The concentration in Scotland on assets acquired during the marriage/civil partnership obviates the need to make necessarily arbitrary distinctions between 'long' and 'short' marriages/civil partnerships and avoids the trap that, for example, English law seems to have fallen into in assuming that marriage/civil partnership involves an undertaking to share assets and income accruing even after divorce/dissolution. While it may well be true that Mrs McFarlane and Mrs Parlour¹¹⁶ would have received less from a Scottish court than they received from the English court, this does not in itself make the Scottish system less 'fair' - because fairness is not an absolute concept and can be judged only in the light of underlying conceptions. The underlying understanding in Scotland is that marriage/civil partnership necessarily involves a sharing of wealth generated during the marriage/civil partnership, but not during life. The English courts seem to see marriage/civil partnership as involving an undertaking of life-long obligations.¹¹⁷ Though socially the differences between Scotland and England may be slight in the structures of family life, the underlying understanding of what marriage/civil partnership means in the two countries must have been affected by the fact that Scotland has had judicial divorce for 300 years longer than England.

Nor is there discontent at the enforceability of marital agreements, or at the parties' power to exercise autonomy by ousting the jurisdiction of the court to make orders for financial provision on divorce/dissolution. The court's limited power to set aside or vary such agreements is seen as striking an appropriate balance between party protection and contractual freedom. The only substantial amendment to the law on marital agreements in Scotland that is at all likely in the future is the extension of the protection granted to

¹¹⁶ *Parlour v Parlour* [2005] Fam 171, conjoined in the Court of Appeal with *McFarlane v McFarlane*.

¹¹⁷ Just as the (Episcopalian) Church of England continues, at least at a formal level, to see marriage as a life-long sacrament and is unwilling, unlike the (Presbyterian) Church of Scotland, to remarry divorced individuals. The Princess Royal was able to marry in a Scottish church notwithstanding that her ex-husband was still alive; her brother could obtain only a blessing from the English church when he (civilly) married a divorced woman with a living ex-husband.

domestic contracts by s 16 of the 1985 Act to cohabiting couples. But even yet, such an extension is not within any existing governmental plans. Marriage/civil partnership remains the politically favoured form of family life.