Family Law (Scotland) Act 1985

1985 CHAPTER 37

Financial provision on divorce, etc.

8 Orders for financial provision

(1) In an action for divorce, either party to the marriage may apply to the court for one or more of the following orders—

(a) an order for the payment of a capital sum or the transfer of property to him by the other party to the marriage ;

(b) an order for the making of a periodical allowance to him by the other party to the marriage;

(c) an incidental order within the meaning of section 14(2) of this Act.

(2) Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any, as is—

(a) justified by the principles set out in section 9 of this Act; and

(b) reasonable having regard to the resources of the parties.

(3) An order under subsection (2) above is in this Act referred to as an " order for financial provision ".

9 Principles to be applied

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

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

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

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

(d) 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 to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce;

(e) a party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

(2) In subsection (1)(b) above and section 11(2) of this Act—

" economic advantage" means advantage gained whether before or during the marriage and includes gains in capital, in income and in earning capacity, and " economic disadvantage " shall be construed accordingly;

" contributions " means contributions made whether before or during the marriage; and includes indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family.

10 Sharing of value of matrimonial property

(1) In applying the principle set out in section 9(1)(a) of this Act, the net value of the matrimonial property shall be taken to be shared fairly between the parties to the marriage when it is shared equally or in such other proportions as are justified by special circumstances.

(2) The net value of the matrimonial property shall be the value of the property at the relevant date after deduction of any debts incurred by the parties or either Of them-—

(a) before the marriage so far as they relate to the matrimonial property, and

(b) during the marriage,

which are outstanding at that date.

(3) In this section "the relevant date" means whichever is the earlier of—

(a) subject to subsection (7) below, the date on which the parties ceased to cohabit;

(b) the date of service of the summons in the action for divorce.

(4) Subject to subsection (5) below, in this section and in section 11 of this Act " the matrimonial property " means all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)—

(a) before the marriage for use by them as a family home or as furniture or plenishings for such home; or

(b) during the marriage but before the relevant date.

(5) The proportion of any rights or interests of either party under a life policy or occupational pension scheme or similar arrangement referable to the period to which subsection (4)(b) above refers shall be taken to form part of the matrimonial property.

(6) In subsection (1) above " special circumstances ", without prejudice to the generality of the words, may include—

(a) the terms of any agreement between the parties on the ownership or division of any of the matrimonial property;

(b) 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 parties during the marriage;

(c) any destruction, dissipation or alienation of property by either party;

(d) the nature of the matrimonial property, the use made of it (including use for business purposes or as a matrimonial home) and the extent to which it is reasonable to expect it to be realised or divided or used as security;

(e) the actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce.

(7) For the purposes of subsection (3) above no account shall be taken of any cessation of cohabitation where the parties thereafter resumed cohabitation, except where the parties ceased to cohabit for a continuous period of 90 days or more before resuming cohabitation for a period or periods of less than 90 days in all. 7

11 Factors to be taken into account

(1) In applying the principles set out in section 9 of this Act, the following provisions of this section shall have effect.

(2) For the purposes of section 9(1)(b) of this Act, the court shall have regard to the pxtentto which—

(a) the economic advantages or disadvantages sustained by either party have been balanced by the economic advantages or disadvantages sustained by the other party, and

(b) any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property or otherwise.

(3) For the purposes of section 9(1)(c) of this Act, the court shall have regard to—

(a) any decree or arrangement for aliment for the child;

(b) any expenditure or loss of earning capacity caused by the need to care for the child ;

(c) the need to provide suitable accommodation for the child;

(d) the age and health of the child;

(e) the educational, financial and other circumstances of the child;

(f) the availability and cost of suitable child-care facilities or services;

(g) the needs and resources of the parties; and

(h) all the other circumstances of the case.

(4) For the purposes of section 9(1)(d) of this Act, the court shall have regard to—

(a) the age, health and earning capacity of the party who is claiming the financial provision;

(b) the duration and extent of the dependence of that party prior to divorce;

(c) any intention of that party to undertake a course of education or training;

(d) the needs and resources of the parties; and

(e) all the other circumstances of the case.

(5) For the purposes of section 9(1)(e) of this Act, the court shall have regard to—

(a) the age, health and earning capacity of the party who is claiming the financial provision ;

(b) the duration of the marriage;

(c) the standard of living of the parties during the marriage ;

(d) the needs and resources of the parties ; and

(e) all the other circumstances of the case.

(6) In having regard under subsections (3) to (5) above to all the other circumstances of the case, the court may, if it thinks fit, take account of any support, financial or otherwise, given by the party who is to make the financial provision to any person whom he maintains as a dependant in his household whether or not he owes an obligation of aliment to that person.

(7) In applying the principles set out in section 9 of this Act, the court shall not take account of the conduct of either party unless—

(a) the conduct has adversely affected the financial resources which are relevant to the decision of the court on a claim for financial provison ; or

(b) in relation to section 9(1)(d) or (e), it would be manifestly inequitable to leave the conduct out of account.

12 Orders for payment of capital sum or transfer of property

(1) An order under section 8(2) of this Act for payment of a capital sum or transfer of property may be made—

(a) on granting decree of divorce; or

(b) within such period as the court on granting decree of divorce may specify.

(2) The court, on making an order referred to in subsection (1) above, may stipulate that it shall come into effect at a specified future date.

(3) The court, on making an order under section 8(2) of this Act for payment of a capital sum, may order that the capital sum shall be payable by instalments.

(4) Where an order referred to in subsection (1) above has been made, the court may, on an application by either party to the marriage on a material change of circumstances, vary the date or method of payment of the capital sum or the date of transfer of property.

13 Orders for periodical allowance

(1) An order under section 8(2) of this Act for a periodical allowance may be made—

(a) an granting decree of divorce;

(b) within such period as the court on granting decree of divorce may specify; or

(c) after decree of divorce where—

(i) no such order has been made previously;

(ii) application for the order has been made after the date of decree; and

(iii) since the date of decree there has been a change of circumstances.

(2) The court shall not make an order for a periodical allowance under section 8(2) of this Act unless—

(a) the order is justified by a principle set out in paragraph (c), (d) or (e) of section 9(1) of tins Act; and

(b) it is satisfied that an order for payment of a capital sum or for transfer of property under that section would be inappropriate or insufficient to satisfy the requirements of the said section 8(2).

(3) An order under section 8(2) of this Act for a periodical allowance may be for a definite or an indefinite period or until the happening of a specified event.

(4) Where an order for a periodical allowance has been made under section 8(2) of this Act, and since the date of the order there has been a material change of circumstances, the court shall, on an application by or on behalf of either party to the marriage or his executor, have power by subsequent order—
   (a) to vary or recall the order for a periodical allowance;
   (b) to backdate such variation or recall to the date of the application therefor or, on cause shown, to an earlier date;
   (c) to convert the order into an order for payment of a capital sum or for a transfer of property.

(5) The provisions of this Act shall apply to applications and orders under subsection (4) above as they apply to applications for periodical allowance and orders on such applications.

(6) Where the court backdates an order under subsection (4)(b) above, the court may order any sums paid by way of periodical allowance to be repaid.

(7) An order for a periodical allowance made under section 8(2) of this Act—
   (a) shall, if subsisting at the death of the party making the payment, continue to operate against that party's estate, but without prejudice to the making of an order under subsection (4) above;
   (b) shall cease to have effect on the remarriage or death of the party receiving payment, except in relation to any arrears due under it.

14 Incidental orders

(1) Subject to subsection (3) below, an incidental order may be made under section 8(2) of this Act before, on or after the granting or refusal of decree of divorce.

(2) In this Act, " an incidental order " means one or more of the following orders—
   (a) an order for the sale of property;
   (b) an order for the valuation of property;
   (c) an order determining any dispute between the parties to the marriage as to their respective property rights by means of a declarator thereof or otherwise;
   (d) an order regulating the occupation of the matrimonial home or the use of furniture and plenishings therein or excluding either party to the marriage from such occupation ;
   (e) an order regulating liability, as between the parties, for outgoings in respect of the matrimonial home or furniture or plenishings therein;
   (f) an order that security shall be given for any financial provision;
   (g) an order that payments shall be made or property transferred to any curator bonis or trustee or other person for the benefit of the party to the marriage by whom or on whose behalf application has been made under section 8(1) of this Act for an incidental order;
   (h) an order setting aside or varying any term in an ante nuptial or postnuptial marriage settlement;
   (j) an order as to the date from which any interest on any amount awarded shall run ;
   (k) any ancillary order which is expedient to give effect to the principles set out in section 9 of this Act or to any order made under section 8(2) of this Act.

(3) An incidental order referred to in subsection (2)(d) or (e) above may be made only on or after the granting of decree of divorce.

(4) An incidental order may be varied or recalled by subsequent order on cause shown.

(5) So long as an incidental order granting a party to a marriage the right to occupy a matrimonial home or the right to use furniture and plenishings therein remains in force then—

(a) section 2(1), (2), (5)(a) and (9) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (which confer certain general powers of management on a spouse in relation to a matrimonial home), and

(b) subject to section 15 (3) of this Act, section 12 of the said Act of 1981 and sections 30 (as modified for the purposes of section 31 A), 31A and 76A of the Bankruptcy (Scotland) Act 1913 (which protect the occupancy rights of a spouse against arrangements intended to defeat them),

shall, except to the extent that the order otherwise provides, apply in relation to the order—

(i) as if that party were a non-entitled spouse and the other party were an entitled spouse within the meaning of section 1(1) or 6(2) of the said Act of 1981 as the case may require;

(ii) as if the right to occupy a matrimonial home under that order were " occupancy rights " with the meaning of the said Act of 1981; and

(iii) with any other necessary modifications ; and

subject to section 15(3) of this Act, section 11 of the said Act of 1981 (protection of spouse in relation to furniture and plenishings) shall apply in relation to the order as if that party were a spouse within the meaning of the said section 11 and the order were an order under section 3(3) or (4) of the said Act of 1981.

(6) In subsection (2)(h) above, "settlement" includes a settlement by way of a policy of assurance to which section 2 of the Married Women's Policies of Assurance (Scotland) Act 1880 relates.

(7) Notwithstanding subsection (1) above, the Court of Session may by Act of Sederunt make rules restricting the categories of incidental order which may be made under section 8(2) of this Act before the granting of decree of divorce.

15 Rights of third parties

(1) The court shall not make an order under section 8(2) of this Act for the transfer of property if the consent of a third party which is necessary under any obligation, enactment or rule of law has not been obtained.

(2) The court shall not make an order under section 8(2) of this Act for the transfer of property subject to security without the consent of the creditor unless he has been given an opportunity of being heard by the court.

(3) Neither an incidental order, nor any rights conferred by such an order, shall prejudice any rights of any third party insofar as those rights existed immediately before the making of the order.

16 Agreements on financial provision

(1) Where the parties to a marriage have entered into an agreement as to financial provision to be made on divorce, the court may make an order setting aside or varying—

(a) any term of the agreement relating to a periodical allowance where the agreement expressly provides for the subsequent setting aside or variation by the court of that term ; or

(b) the agreement or any term of it where the agreement was not fair and reasonable at the time it was entered into.

(2) The court may make an order

(a) under subsection (1)(a) above at any time after granting decree of divorce; and

(b) under subsection (1)(b) above on granting decree of divorce or within such time thereafter as the court may specify on granting decree of divorce.

(3) Without prejudice to subsections (1) and (2) above, where the parties to a marriage have entered into an agreement as to financial provision to be made on divorce and—

(a) the estate of the party by whom any periodical allowance is payable under the agreement has, since the date when the agreement was entered into, been sequestrated, the award of sequestration has not been recalled and the party has not been discharged ;

(b) an analogous remedy within the meaning of section 10(5) of the Bankruptcy (Scotland) Act 1985 has, since that date, come into force and remains in force in respect of that party's estate ; or

(c) that party's estate is being administered by a trustee acting under a voluntary trust deed granted since that date by the party for the benefit of his creditors generally or is subject to an analogous arrangement,

the court may, on or at any time after granting decree of divorce, make an order setting aside or varying any term of the agreement relating to the periodical allowance.

(4) Any term of an agreement purporting to exclude the right to apply for an order under subsection (Y)(b) or (3) above shall be void.

(5) In this section, " agreement" means an agreement entered into before or after the commencement of this Act.

17 Financial provision on declarator of nullity of marriage

(1) Subject to the following provisions of this section, the provisions of this Act shall apply to actions for declarator of nullity of marriage as they apply to actions for divorce; and in this Act, unless the context otherwise requires, " action for divorce " includes an action for declarator of nullity of marriage and, in relation to such an action, " decree" and " divorce" shall be construed accordingly.

(2) In an action for declarator of nullity of marriage, it shall be competent for either party to claim interim aliment under section 6(1) of this Act notwithstanding that he denies the existence of the marriage.

(3) Any rule of law by virtue of which either party to an action for declarator of nullity of marriage may require restitution of property upon the granting of such declarator shall cease to have effect.