

Can use simplified procedure if there are no children and no financial awards are sought.

Two years without consent

S1 (2) (e) of the 1976 act states that "There has been no cohabitation between the parties at any time during a continuous period of two years after the date of the marriage and immediately preceding the bringing of this action"

Consent of the other party not necessary.

6 month reconciliation period allowed s2(4)

Can use simplified procedure if there are no children and no financial awards are sought.

Can divorce spouse without consent if they won't consent after one year.

Interim gender recognition certificate issued

Obtaining the above is grounds for divorce.

S1(1)(b)

Either party can ask court for divorce.

Defences

Adultery-

1.**Lenocinium**- common law defence maintained by act.

S1(3) of the 1976 act.

Spouse is art and part of the adultery.- if the husband forces wife to be a prostitute, or couple engage in husband and wife swapping parties. Must prove innocent spouse encouraged other spouse to commit adultery. Must take encouragement seriously and it must have caused the adultery.

Gallagher v Gallagher 1928 SC 286- Husband sent his wife a letter asking her to do something so he could divorce her. Three months later the wife went into a relationship with someone else. The husband tried to divorce her on adultery. He was unsuccessful because of the letter he had sent her. She raised defence of lenocinium. His encouragement caused her to go off with another man. 6 years later he did get a divorce and she was still living with the other man.

Thomson v Thomson 1908 SC 179- Wife asked husband for some money. He suspected she was meeting her boyfriend. He said certainly, go. Gave her two pounds. Had her followed by detectives to Gateshead where she was committing adultery. Raised action of divorce. She raised defence of lenocinium. Defence was unsuccessful- he only suspected adultery- did not actively encourage it.

2.**Condonation**- if parties start living together again. If the innocent party knows about adultery, then they can be said to have accepted or condoned it. Must live together for minimum for three months.

S1(3) of the 1976 act.

Spouse can condone the adultery. 3 month cohabitation period allowed.

All other defences now abolished.

Postponement of divorce decree

A decree of divorce can be postponed under S3A of the 1976 act. This is relevant if a person wants to get a divorce in their own religion.

Standard of proof

On the balance of probabilities, with burden of proof on pursuer.

S1(6) Standard of proof is on the balance of probabilities. Burden of proof is on the party raising the action.

If action undefended the divorce action proceeds by way of affidavit evidence (sworn statements in court- two- one from yourself and another from someone close to the family).

Simplified divorce

Only available if

1. the action is undefended.
2. Action is on grounds of 1 or 2 years non-cohabitation.
3. No other action is pending.
4. No children under 16.
5. No financial claims.
6. No mental disorders.

Financial provision on divorce

Governed by the Family Law (Scotland) Act 1985

This act sets up the guiding principles to be applied in divorce actions. E.g. The court can order one spouse to pay a capital sum to the other spouse; it can order one spouse to transfer property to the other; or it can make one spouse to pay a periodical allowance to the other. Orders can also be made regarding pensions. The court can also make incidental orders. **The court can only make an order if it is justified by one of the principles in s9 of the 1985 act and it is reasonable having regard to the resources of the parties. s8(2)**

This does not include financial provision for children which is a separate issue altogether.

S8 orders;

S8(1)(a) capital sum-lump sum payment

S8(1)(aa) Transfer of property

S8(1)(b) periodical allowance- aliment

S8(1)(ba) pension lump sum order

S8(1)(baa) pension sharing order

S8(1)(c) incidental order

S8(2)

Every order must be justified by s9 principles and reasonable with regard to the resources of the parties. (income and a capital nature)

Every financial order must be justified by 1 of the s9 principles and reasonable having regard to the resources of the parties.

Resources includes present and foreseeable resources s27(1)

Resources are both income and capital.

If resources fall between divorce and court action then s8(2) acts as protection- prevents spouse from paying out too much.

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 [or as the case may be the net value of the partnership property should be so shared between the partners in the civil partnership] ¹ ;

(b) fair account should be taken of any economic advantage derived by either [person] ² from contributions by the other, and of any economic disadvantage suffered by either [person] ² in the interests of the other [person] ² or of the family;

[

(c) any economic burden of caring, should be shared fairly between the persons—

(i) after divorce, for a child of the marriage under the age of 16 years;

(ii) after dissolution of the civil partnership, for a child under that age who has been accepted by both partners as a child of the family [or in respect of whom they are, by virtue of sections 33 and 42 of the Human Fertilisation and Embryology Act 2008, the parents] ⁴ .

] ³

[

(d) a person who has been dependent to a substantial degree on the financial support of the other person should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from—

(i) the date of the decree of divorce, to the loss of that support on divorce;

(ii) the date of the decree of dissolution of the civil partnership, to the loss of that support on dissolution.

] ⁵

(e) a [person] ⁶ who at the time of the divorce [or of the dissolution of the civil partnership,] ⁷ seems likely to suffer serious financial hardship as a result of the divorce [or dissolution] ⁷ should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

Crockett v Crockett 1992 SCLR 591- business was matrimonial property, value of business fell between date of separation and date of court hearing. Wife was going to be entitled to a capital sum of £53,000 but because the valuation of the business had fallen, she only got £17,500. Husband could only pay out what was reasonable to the resources of the parties.

S8(1)(a) Capital sum

Either party can ask for payment of a capital sum. Can be claimed in addition to any other order.

Must be justified by 1 of s9 principles and reasonable having regard to the parties resources.

S12(1)(b) deferred decision- allows court to defer decision until a later date depending on circumstances of the case. The danger here is that if one party dies then you may end up with no order at all.

S12(2) postponed payment of capital sum at a set future date. Some courts will set a specified date that the capital sum has to be paid by. Or there can be a sum payable on a specified event, such as the death of the other party.

Security can be granted- ask the court to grant this to make sure the other party pays out.

S12(3) instalment payments

s14(2) (g) transfer of property to trustee/curator bonis

S14(2)(h) can vary antenuptial or postnuptial agreement:
Can set aside/vary , ante/post nuptial contact

S14(2)(j) order to regulate interest payable:

Normally interest runs from the date of the court order itself, but this order allows the court to decide when interest starts.

Geddes v Geddes - dispute over what date the interest should run from. Sheriff allowed interest from the date of citation (whole action started off) Husband appealed to COS- gives the court a power beyond what exists at common law. Sheriff's decision was upheld- can start earlier.

Livie v Livie 1999 Greens Family law 34-1639- not successful, did not get interest running from earlier date.

S14(2)(ja) sheriff clerk can execute deed:

Sheriff clerk can sign deeds relating to moveables
Heritage- Sheriff Courts (Scot) Act 1907 s5A

S14(2) (k) ancillary order necessary to give effect to s9

Anti- avoidance order:

S18 allows the court to set aside or vary a transaction. This would be used if a party tried to conceal their assets and was then discovered. The other party could ask the court to set aside the original award and make a new financial provision. Court has discretion how to act here. It can make any order it thinks fit and can make an ancillary order. S18(2) and (4).

Used of one spouse is hiding assets. Court can be asked to reassess the situation.

Court can be asked to set aside transaction or interdict the party acting inappropriately. Any transaction made in the last 5 years can be set aside.

Private agreements

S16 allows the court to set aside or vary any agreement the parties have made.

It can set the agreement aside if it was not fair and reasonable.s16(1)(b).

It can set an award of periodical allowance aside if the agreement states it can be changed. s16(1)(a).

Gillon v Gillon 1995 SLT 678- gives list of criteria to help decide whether to set aside a private agreement. Entered into private agreement in 1988 and woman divorced the husband because of his adultery. The woman worked in an estate agents and he was a policeman. They had a house worth £33,000 with a loan worth £30,500 over house. Bought his half for £6750 and gave up capital sum. Later she wanted joint minute set aside and wanted to claim capital

and his brother as individuals and not as trustees for the firm matrimonial property? No- under Partnership act 1890, property is held in trust for the partnership because they were bought with partnership money and they were a partnership asset.

Parker v Parker 2015 SCLR 259

2 ways to value a business- assets basis and future maintainable earnings basis.

Redundancy payments -can be matrimonial property:

Tyrell v Tyrell 1990 SLT 406- Mr Tyrell got a redundancy payment after the date of separation but before divorce- not to be matrimonial property. Had he got it before the date of separation, it would have been matrimonial property.

Damages from delict claims- can also be matrimonial property:

Skarpaas v Skarpaas 1993 343- Mr S was injured offshore on an oil rig and he didn't work again during the marriage (4 years before separation) £100,000 damages. Held that money was matrimonial property. The portion paid over to wife was calculated by deducting future loss of earnings and solution from the wife. Wife got £25,000. He appealed unsuccessfully.

McGuire v McGuire 1991 SLT (Sh Ct) 76- Mr McG was seriously assaulted and sustained head injuries- got lump sum compensation. He had been in a vegetative state. £45,000. Wife decided to divorce him she was unemployed. All he had was the £45,000. Court decided it was matrimonial property- wife got £20,000.

Tax rebate –

MacRitchie v MacRitchie 1994 SLT (Sh Ct) 72- separated in 1990 and he got a tax rebate for the years 86-91 and on appeal it was held that it was matrimonial property because the claim for the tax rebate came into existence whilst the parties were married.

Trust property- Not usually matrimonial property but will be if you try to conceal assets from your spouse by placing them in a trust.

AB v CD 2007 Fam LR 53- all the assets were placed into a discretionary trust- the husband told his wife he put it away from creditors reach. Over 9 year period the trust distributed £1.4 million to the husband. Was the property held in the trust matrimonial property- held that the trust's assets were matrimonial property and had to be split because he tried to deny the wife access to the assets.

Net Value

Net value of matrimonial property that has to be shared- deduct debts occurred before the marriage and during. If there are no assets after the debts have been deducted, the court will still make orders allocating the debts to each spouse.

s10(2) need to deduct debts incurred by 1 or both parties before the marriage if they relate to matrimonial property and those incurred during the marriage.

Excluded from matrimonial property:

- Gifts from 3rd parties
- Inheritance
- Property acquired before marriage
- Property acquired after marriage

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

Short v Short 1994 GWD 21-1300- Mrs S without her Husband's knowledge took out a number of loans secured over the matrimonial home and she forged her husband's signature and dissipated the funds. Sheriff took this into account.

Russell v Russell 1996 Fam 21-5- wife gave up her job and lost money- held not to be dissipation of resources.

Park v Park 1988 SCLR 584- Husband did not pay the mortgage arrears built up and the house was repossessed and taken by the mortgage company. Held not to be dissipation.

(d) The nature of the family property, the use made of it (including use for business purposes or as a family home) and the extent to which it is reasonable to expect it to be realised or divided or used as security- does one spouse need the house for a business or to bring up the children? Sometimes the court will transfer the house to the carer of the children.

Budge v Budge (No1) 1990 SLT 319- Husband's only source of income was his croft and argued he should not have to sell and divide it- court allowed unequal sharing.

(e) The actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce. Considers who is funding the costs of the divorce and make provision for it.

Section 9 principles

The court can make an award if it is justified by the principles in s9 and it is reasonable having regard to the resources of the parties. Both criteria have to be met.

There are 5 principles:

Principle 1. s9(1) (a)

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

Net value.

Relevant date.

Matrimonial property defined in s10 (4) and s10 (4A).

S11(7) conduct of parties disregarded unless the conduct has adversely affected the financial resources.

Fair sharing is equal sharing

Cannot get a periodical allowance under this principle.

Principle 2 S9(1)(b)

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.

Cannot have a periodical allowance under s9(1)(b)

E.g. if one spouse gives the other spouse money to set up business

Advantages and disadvantages can be taken from before the marriage as well.

- Other persons may get PRR
- E.g. parents, grandparents
- Can extinguish PRR of parents s82(1)(c)- remove PRR if the parent's do not care for the child appropriately.
- COURT MUST ARRANGE CONTACT BETWEEN PARENT AND CHILD EVEN IF PRR IS REVOKED.
- S82(1)(e) court can make arrangements for contact if court considers it appropriate and in best interests of the child
- S82(1)(f) court can decide any question on PRR

Permanence order regarding adoption (S83):

- LA can ask that child be adopted. Conditions in s83(1) must be met;
- (a) LA has requested that child is adopted;
- (b) court satisfied child has been or is likely to be placed for adoption;
- ©p/g understands the effect of the adoption order;
- (d) p/g consents to adoption or their consent should be dispensed with;
- (e) making order is better than no order at all

PO – adoption:

- Grounds for dispensing with consent in s83(2)- same grounds as dispensing with consent under adoption.
- Parent defined in s83(5) as a parent who has PRR or a parent who by a PO has no PRR.
- S83(2)p/g dead; cannot be found or incapable of giving consent; cannot discharge their PRR; lost PRR by a PO and unlikely to be returned; if previous two do not apply the, welfare of child requires it.
- Conditions relating to an PO
- S84
- A child over 12 must consent to a PO unless incapable.
- Either no one has residence of the child or residence is seriously detrimental to welfare of child s84(5)(c).
- Welfare principle –welfare of child throughout childhood must be considered (Note difference in wording in s14.)
- Consider views if child over age if 12. Look at religious persuasion, racial origin and cultural and linguistic background.
- s85- Can have a PO for an adopted child.
- Cannot have a PO if child is married or in civil partnership.
- S86 court can hear representations from
- The LA; Child or child's representative; anyone with PRR; anyone who claims an interest.
- S88 the most up to date PO is the relevant one, if more than one granted.
- S89 If child is under supervision the PO can bring that to an end.
- S92 court can vary ancillary provisions on application.
- S93 court can amend a PO to include that a child would be adopted at a later date.
- S98 PO can be revoked
- S102 once child adopted PO no longer has effect

- Child Under Supervision
- S95-96 possible conflict-

R(mother of C) v Angus Council at Forfar Sheriff Court ;10th Nov 2010, 2010 GW D 40-806- Mother asking to revoke PO. Mother had three daughters and all were at different foster families. Mother lived at various addresses in forfar with different people at different times. never gave local authorities her address or phone number. In 2010 Angus council got a permanence order for the two younger girls asking for them to be adopted. This was granted. Mother realised what had happened and raised action to revoke permanence order which had been granted in favour of the council. Held the PO stood and mother was not successful

East Lothian Council Petr at Haddington Sh Ct Jan 2011, 2011 GWD 5-148- Child born in 2009 and parents both had PRR- not married and in early 30s. father had been very abused as a child and had been in and out of residential care. He misused alcohol, health problems, 9 criminal convictions all drink related and been on probation orders and currently on community service- high risk of reoffending. Mother had 5 children- learning disability and low IQ. All of her children had been taken into care and adopted. She was expecting her 6th child and did not know who her father was. They were assessed as potential parents and allowed to take the baby home. Things deteriorated because the father was violent and threatened to kill the social workers. Child accommodated at 18 weeks old with the Mother's consent. They did not get the child back. Potential adoptive family identified and waiting to adopt. Local authority asked for a PO with authority to adopt the wee girl. Sheriff granted everything they requested on the permanence order parents lose PRR and adoptive parents get them. Child was allowed to be adopted. Parents given indirect contact annually by letter and photograph.

East Lothian Council Petr at Haddington Sh Ct July 2010, 2010 GWD 27-542- parents 20, and 21. Father has 14 criminal convictions of a sexual nature, low IQ and health issues. Mother was 21 and lived with her family in a filthy house unsuitable for a child to live in. Child placed on at risk register and taken into care at birth. Local authority get everything they asked for- LA now have PRR. Annual indirect contact granted.

Aberdeenshire Council v W 2011 SLT (Sh Ct); on appeal to Sheriff Principal at 2011SLT (Sh Ct) 186 and to Inner House 2012 CSIH 37- Both parents were adopted and this was their third child 92008) older two children had also both been adopted. Child had never been looked after by her parents- she was always in care. Foster family wanted to adopt her when she was 13 months old and very settled with them. When LA ask for PO with full range of orders refused because sheriff thought that parents could not discharge their parental rights, but as the child gets older the needs will change and the parents might be able to discharge their parental rights. - might become easier to look after. Aberdeenshire council appealed and the decision was overturned as the parents could not look after the child and it meant a delay in deciding the girl's future. Granted PO and adoption. Parents appealed to court of session. Appeal refused.

City of Edinburgh Council Petr (No 2)