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# All Settled?

A study of legally binding  
separation agreements and  
private ordering in Scotland

## Final Report

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## Chapter 1

### Background to the study: research, social and policy context

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#### **Background to the study: changing law and legal practice**

In Scotland, as in other jurisdictions, the great majority of families organise the aftermath of separation, without recourse to the courts, through a process of private ordering typically supported by legal and other professionals. This report presents the findings of a research study of private ordering in one family justice system, and its outcomes in the form of minutes of agreement (MoA). Scots family law seeks to encourage parties to negotiate and reach agreement on ancillary matters, in the context of the breakdown of adult intimate relationships, without recourse to the courts. The objective of reaching private agreement has been promoted as a means of lessening conflict, encouraging settlements, which accommodate and reflect the diversity of families and the needs of individuals, and contributing to the reduction of pressure on the civil court system and associated public funding. Changes in both family law and practice are likely to have influenced the extent to which individuals choose to conclude private ordering with a MoA rather than to pursue judicial action. However, there has been only limited research evidence to date upon which to assess and analyse the extent to which such individual agreements and the actions of the parties are influenced or informed by the legal provisions and practice, that is, how much these agreements are made “in the shadow of the law”.<sup>1</sup>

In Scotland, if consensus results from the private negotiations of the parties, it is likely to be recorded in a formal written agreement, known as a minute of agreement, which will usually be registered for preservation and execution in the Books of Council and Session. Such agreements are documents of public record and are stored centrally in the National Records of Scotland, and they are legally enforceable. Earlier research into the substance and outcomes of such minutes of agreement was conducted by Wasoff, McGuckin and Edwards in the mid-1990s<sup>2</sup> but since then there have been a number of significant changes which are likely to have had an impact on the nature, scale and outcomes of private ordering on separation.

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<sup>1</sup> Mnookin and Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88(5) *Yale Law Journal* 950.

<sup>2</sup> Wasoff, McGuckin and Edwards, *Mutual Consent: Written Agreements in Family Law*, 1997.

The use of MoA in Scotland, in the context of the breakdown of family relationships, is set against the background of the Family Law (Scotland) Act 1985. Section 9 of that Act sets out a clear and detailed framework of principles by which financial provision on divorce can be justified, and in terms of which the courts can make orders for the division of property and financial provision. It is thought that making “the rules of the game” clear in this way, and reducing judicial discretion, will encourage parties to reach agreement without recourse to the courts, as this case note comments:

“The 1985 Act has been successful mainly because awards are fairly predictable so that couples can settle their claims without litigation.”<sup>3</sup>

While the courts retain power under section 16 of the 1985 Act to vary or set aside terms of a MoA, they may only do so in certain limited circumstances and this also encourages the use of private agreements. The agreements studied in the earlier research<sup>4</sup> were made in 1992 and although the section 9 principles for financial provision on divorce were in force at that time they were relatively new. Since then there have been many judicial decisions concerning the principles and family lawyers are now very experienced in their operation. It was anticipated that this would lead to an increase in the use of MoA and may also have influenced their content.

In recent years there have been other statutory reforms, which are likely to have increased the use of and influenced the nature of MoA. The Child Support Act 1991 (and its many reincarnations) and the Children (Scotland) Act 1995, especially its principle of minimum intervention in section 11, encourage consensual arrangements and have become well established since the previous research. Although the 1985 Act makes provision for the reallocation of pension assets, further clarification on their redistribution and valuation is provided in legislation and regulations, e.g. (Divorce etc. (Pensions) (Scotland) Regulations 1996, Pensions on Divorce etc. (Pension Sharing) (Scotland) Regulations 2000, Pensions Act 1995, Welfare Reform and Pensions Act 1999). It was expected that this further clarification might result in greater evidence of pension sharing in MoA.

More recently, the introduction of civil partnership in the Civil Partnership Act 2004 and

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<sup>3</sup> ‘Financial provision on divorce, *B v B*, Lord Woolman, Outer House, October 19, 2010, *Family Law 108*, p. 3.

<sup>4</sup> Wasoff *et al.*

limited rights for unmarried cohabitants in the Family Law (Scotland) Act 2006 have extended the application of family law to couples other than those who are married. To date, the Scottish courts have had relatively few opportunities to consider such relationships (largely due to the ubiquity of private ordering!), although there is some evidence of parties to such relationships consulting lawyers about the drafting of agreements to regulate their relationships.<sup>5</sup>

The developing Scots family law statutory framework has been accompanied by significant changes in legal practice. The formally adversarial nature of the courts has increasingly been replaced by a focus on negotiation, mediation and collaborative law.<sup>6</sup> These changes in practice are also set against a background of limited access to legal aid, though civil legal aid for family actions continues to be available in Scotland to those who qualify.<sup>7</sup> It seems likely that the practice of family lawyers and the increasing availability of access to trained mediators, solicitor/mediators and collaborative law practitioners may have further influenced the use and nature of MoA and the experience of individuals who use them but in the absence of contemporary data this remained relatively unexplored. Thus, while private ordering on relationship breakdown characterises the family justice system in Scotland, as elsewhere, its processes and outcomes are largely private and unknown. Despite its ubiquity, it was not known the extent to which the principles and provisions of the various relevant statutory measures, or indeed the wider objectives for civil justice in Scotland,<sup>8</sup> were satisfied in private negotiations and agreements.

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<sup>5</sup> Wasoff, Miles and Mordaunt, "Legal Practitioners' perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006: Research Report", 2010.

<sup>6</sup> See, eg, Myers and Wasoff, *Meeting in the Middle: A Study of Solicitors and Mediation Practice – Research Findings*, 2004, Scottish Executive Central Research Unit. For recent discussion of these different approaches as they are used in Scotland, see Nicholson, "A better way to talk" 2012 JLSS 14 and Quail, "Keep CALM and carry on" 2013 JLSS 24.

<sup>7</sup> Cf the position in England. For discussion, see Maclean and Eekelaar, "Legal Representation in Family Matters and the Reform of Legal Aid: A Research Note on Current Practice" 2012 *Child and Family Law Quarterly* 223.

<sup>8</sup> The Scottish Government (2013) *Making Justice Work* is a four year programme whose broad aim is to ensure Scottish civil justice is 'fair, efficient and effective'. One of its projects is to enable access to justice, "to develop mechanisms which will support and empower citizens to avoid or resolve informally disputes and problems wherever possible, and to ensure they have access to appropriate and proportionate advice, and to a full range of methods of dispute resolution, including courts and tribunals where necessary, and appropriate alternatives." (<http://www.scotland.gov.uk/Topics/Justice/legal/mjw>)

## **The social context**

Since the 1992 research was carried out, there have been important changes in both social attitudes and practices. We have seen a growing acceptance of same sex relationships and recognition of the importance of step parents in the lives of children.<sup>9</sup> Also significant has been the marked growth in heterosexual cohabitation, and a decline of 17% in the number of marriages (from 35,057 in 1992 to 29,135 in 2011<sup>10</sup>). In 2007-2008, 48% of adults aged 16 and over were married, and 10% were cohabiting.<sup>11</sup> A larger proportion of children are now born outside of marriage. In 2011, 51% of births in Scotland were to parents not married to each other, compared to 29% in 1991. The great majority of those births in 2011 were to parents in stable relationships.<sup>12</sup>

Home ownership has become more prevalent, particularly for married couples, over that 20 year period, now accounting for 64% of all households in Scotland. The rate of owner occupation is even higher for households with children; e.g. 71% of households with two adults and one or two children.<sup>13</sup>

## **Earlier research on private ordering and minutes of agreement**

The earlier research on private ordering and minutes of agreement<sup>14</sup> described the contents of a nationally representative sample of over 600 MoA made in 1992, and the subsequent experience about two years later of 30 of the parties. That study estimated that there were about 3000 MoA that year, one for every four divorces. The great majority (83%) were made by married couples who were separating; 7% were made by unmarried or cohabiting couples. Just over three quarters (77%) of those who made a MoA were home owners, a higher rate of owner occupation than in the general population, showing that such agreements were property driven in a large number of cases. Capital or lump sums were discussed in 40% of MoA. Although pensions were discussed in 9% of agreements, payments relating to pensions were agreed in only 3% of cases. In interviews, women commented that, with hindsight, they thought they were ill-informed about the value of their husbands' pensions and their right to claim a share.

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<sup>9</sup> Wasoff and Martin, *Scottish Social Attitudes Survey 2004: Family Module Report*, Scottish Executive, Edinburgh 2005.

<sup>10</sup> General Register Office for Scotland (2012) *Scotland's Population 2011: The Registrar General's Annual Review of Demographic Trends*, Edinburgh: GRO(S), p. 55.

<sup>11</sup> The Scottish Government (2009) *Scottish Household Survey 2007-08*, Edinburgh: The Scottish Government.

<sup>12</sup> General Register Office for Scotland (2012) *Scotland's Population 2011: The Registrar General's Annual Review of Demographic Trends*, Edinburgh: GRO(S), p. 23.

<sup>13</sup> The Scottish Government (2012) *Scotland's People Annual Report: Results from the 2011 Scottish Household Survey*, Edinburgh: The Scottish Government, p. 17

<sup>14</sup> Wasoff, et al, 1997.

Children were mentioned in 59% of agreements, and of these, it was agreed that mothers would have sole custody of the children in 91% of cases (fathers in 6% and joint custody in 3%). These agreements preceded the current child support legislation, and aliment for children was discussed in two thirds of cases involving children.

The terms of the great majority of agreements had been observed for the two year period after they were made, despite reports of dissatisfaction and changes in circumstances.

### **Aims and objectives of the study**

The broad aim of this research was to add to our understanding of private ordering and its outcomes in the family justice system, taking Scotland as its case study example. It explores the impact of these changes in law and legal practice on the use of agreements, the detailed nature of their content, and the experiences of the parties involved, and considers if and how the broader objectives of the statutory framework of family law are observed in private ordering, and how much private ordering *is* carried out “in the shadow of the law”.

The specific objectives of the research were to:

1. Identify the extent to which written separation agreements that are legally binding contracts made without recourse to the courts, in the form of minutes of agreement (MoA), are used in family law within Scotland, with particular focus on their use within the context of the breakdown of adult relationships.
2. Describe the content of such agreements.
3. Compare the current use of such agreements with earlier agreements, the subject of previous research into written agreements in family law which was concluded in the mid 1990s.
4. Compare agreements made within the context of different types of adult relationships: marriage, civil partnership and cohabitation.
5. Highlight the extent to which the content of agreements reflects existing statutory provisions for judicial resolution of family disputes.
6. Assess the extent to which the nature of the agreements and the process of reaching agreement are influenced by the availability and nature of legal advice.
7. Examine the views and experience of a sample of parties to the agreements under review, with a view towards their enforcement and parties' satisfaction with them.

8. Document the experience of family lawyers in negotiation towards and drawing up of MoA.

9. Consider the extent to which MoA, seen as a key outcome of private ordering in family law, meet the wider policy objectives of the family justice system.

### **Research questions**

The research questions followed from the specific research objectives above, and included:

1. How many written separation agreements (minutes of agreement (MoA)) are made in a typical year relating respectively to marriages, cohabitations and civil partnerships, and how do these numbers compare to the number of divorces and dissolutions concluded in that year?

2. What provisions are made in these agreements, e.g. in relation to property (family home, other domestic assets, pensions, other capital), ongoing support of an economically weaker partner, arrangements for residence and contact with any children of the relationship?

3. How do a current set of agreements compare in their frequency and content with earlier agreements, the subject of previous research into written agreements in family law which was concluded in the mid 1990s?

4. How do agreements made within the context of different types of adult relationships, marriage, civil partnership and cohabitation, compare?

5. How much do agreements reflect existing statutory provision for judicial resolution of family disputes? To what extent can it be inferred that they are made in the “shadow of the law”?

6. What do agreements tell us about parties’ access to legal advice?

7. How do parties to the agreements under review understand the process of negotiating agreements, and their enforcement? How do they see their purposes and consequences and how satisfied are they with them?

8. How do family lawyers describe and understand the process of negotiation and drawing up of MoA? What are the key barriers to reaching agreement they identify? How do these compare with cases that conclude by litigation?

9. How much do MoA meet wider policy objectives of the family justice system? As far as the parties and their lawyers are concerned, are there other objectives sought in making an agreement?

## **Research methods**

The research was in two stages. The first stage collected information from a nationally representative sample of 600 minutes of agreement registered in 2010 using a standard form devised for the research (Appendix 2). All such agreements are lodged centrally at one location, with the Keeper of the Registers of Scotland, in Edinburgh. The information collected related to property including the matrimonial home, pensions, debts and other assets and how they were redistributed; other financial information, the presence of children and any information recorded about residence, contact and child support. The second stage followed up 30 of these agreements with in-depth telephone interviews with one of the parties involved to explore their experience of reaching agreement and meeting its terms. Telephone interviews were also conducted with 13 solicitors who drew up agreements. A full discussion of the methodology can be found in Appendix 1.

The following chapters explore in more depth the extent, nature and use of these MoA, within the context of relevant statutory provisions.

## Chapter 2

### The law relating to minutes of agreement

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Scotland provides a legal framework, which is open to the possibility of private ordering in the regulation of family relationships, and in which negotiated settlements have been able to flourish. A number of factors contribute towards this settlement-friendly environment: first, long established legality and use of marriage-related contracts; secondly, a statutory, family law framework with clear guidelines and a preference for consensus; thirdly, an effective system of registration and, fourthly, limited scope for challenge. While there have been some specific measures aimed at encouraging individuals to reach agreement, rather than seeking resolution of disputes through the courts, to a considerable extent the increasing prevalence of private settlement has developed naturally within a friendly legal environment.

Where parties have reached agreement in respect of some aspect of their relationship or its breakdown, it is common for them to reduce that agreement to writing; this is often referred to as a minute of agreement. Such deeds are by no means specific to family law but their use has become particularly well established within that context. These minutes of agreement are commonly registered and as a consequence they gain legal force equivalent to a court decree. As a form of legal agreement, they are subject to the general rules of contract but there are also some specific provisions, which apply in the context of family law. This chapter shall concentrate on the latter, which are of particular relevance to our study.<sup>15</sup>

It should be noted that the rules applying to civil partnership are in similar terms to those which apply to marriage and discussion of marriage and divorce throughout this chapter should be read as applying equally to civil partnership and dissolution.

#### **Marriage contracts**

Marriage contracts of various kinds; ante-nuptial, post-nuptial, marriage settlements, separation agreements, have a long and well-established history in Scotland. While their purpose, form and relative popularity have changed over time, their legal enforceability has been constant. As a general rule, Scots law respects the private

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<sup>15</sup> For further discussion see Edwards and Griffiths, *Family Law* (2<sup>nd</sup> ed), 2006, Thomson/W.Green, chapter 15.

agreements of couples as enforceable and does not distinguish between different types of marriage contracts.<sup>16</sup> Subject to standard legal principles regarding capacity and consent,<sup>17</sup> “parties to a marriage contract ... are entitled to make such terms as they think fit”.<sup>18</sup> While it is possible that an agreement might be reduced on the basis of, for example, undue influence, duress or misrepresentation, this is relatively rare and claims can be difficult to substantiate.<sup>19</sup>

In the 19<sup>th</sup> century, ante-nuptial contracts were used widely to modify or exclude the operation of matrimonial property law which, by virtue of the *jus mariti* and right of administration, gave rights of ownership and control to husbands over their wives’ property. Beyond that, these contracts were employed as a means of making specific provision for families both during marriage and in the event of its possible dissolution. With the reforms which resulted from the Married Women’s Property (Scotland) Acts of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, the need for ante-nuptial contracts to avoid the *jus mariti* and right of administration was removed and for most families, except the wealthiest, the practice of entering into an ante-nuptial agreement died out, leading Clive to comment in the 4<sup>th</sup> edition of *The Law of Husband and Wife in Scotland*, that “[m]arriage contracts are now rare”.<sup>20</sup>

By the end of the 20<sup>th</sup> century, ante-nuptial contracts were assumed to have largely disappeared and where they were used it was most likely to be in order to clarify and provide for what should happen in the event of divorce. Unlike in England, Scots law dealing with financial provision on divorce makes a clear statutory distinction between matrimonial property,<sup>21</sup> which is open to sharing on divorce,<sup>22</sup> and non-matrimonial property which will remain the separate property of the individual spouses, although it may be taken into account as part of their resources.<sup>23</sup> While ante-nuptial agreements might be used to clarify and confirm which assets are non-matrimonial, and to protect

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<sup>16</sup> For discussion of marriage contracts, see Clive, *The Law of Husband and Wife in Scotland* (4<sup>th</sup> ed), 1997, W.Green, chapter 17. For recent discussion of some issues in practice, see MacBride and Kendall, “Wedded to the pact?” 2010 JLS 10.

<sup>17</sup> For example, duress, undue influence, facility and circumvention. For discussion, see McBryde, *The Law of Contract in Scotland* (3<sup>rd</sup> ed), 2007, Thomson/W.Green.

<sup>18</sup> *Thomson v Thomson* 1982 SLT 521 per Lord Cameron at 526

<sup>19</sup> For a recent example of a challenge concerning coercion, see *MacDonald v MacDonald* 2009 Fam LR 131.

<sup>20</sup> At para. 17.005. Chapter 17 of this book provides a more detailed consideration of marriage contracts.

<sup>21</sup> Family Law (Scotland) Act 1985, s10(4).

<sup>22</sup> *Ibid*, s9(1)(a).

<sup>23</sup> *Ibid*, s8(2)

them against possible transformation into matrimonial property during the relationship, the need for such private agreement is, therefore, less obvious than it has been in England.<sup>24</sup> While ante-nuptial contracts may be thought to have all but disappeared, pre-relationship contracts have been receiving increased attention in Scotland in recent years in the context of cohabitation. The introduction of some rights for cohabitants to claim financial provision on the breakdown of their relationship,<sup>25</sup> and the uncertainty surrounding the nature and extent of these awards, has certainly been highlighted by the legal profession as a good reason for cohabitants to consider entering into a pre-cohabitation agreement. A small number of ante-nuptial and pre-cohabitation agreements were looked at in the context of this research but they have not been included in the following analysis.<sup>26</sup>

Historically, separation agreements were also common as a non-judicial way of formalising the end of a couple's relationship "at bed and board" and could be used to make provision for aliment and property settlement between spouses and in respect of children. These agreements were an important method of regulating the financial and property consequences for the couple, their children, their wider families and the rights and interests of third parties. The original purpose of separation agreements was to signal the end of married life in practice without the final step of divorce. As divorce became easier, gained in social acceptability and became increasingly common, the use of "separation" agreements continued but their purpose gradually changed. For many couples, separation, instead of a long-term status, would be a relatively short-lived stage on the way to divorce and, therefore, increasingly "separation agreements" were entered into as preparation for divorce and with the intention of regulating its long-term consequences. Instead of applying to the court for orders of financial provision on divorce, a couple may decide to make their own arrangements in the form of a private agreement and it is these "separation agreements" which make up the sample of minutes of agreement<sup>27</sup> analysed in this report. In addition to Scots law's general openness to marriage contracts, the specific use of private ordering in the context of separation and divorce is clearly accepted: "parties may by agreement oust the

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<sup>24</sup> See eg *Radmacher v Granatino* [2011] AC 534. For discussion in a Scottish context, see Mair, "The Marriage Contract: *Radmacher v Granatino* (2011) Edin LR 265. For discussion of marital agreements in England generally, see Law Commission, *Marital Property Agreements: A Consultation Paper* (2010).

<sup>25</sup> Family Law (Scotland) Act 2006, s.28.

<sup>26</sup> There were five ante-nuptial and five pre-cohabitation agreements within the sample of 600 MoA.

<sup>27</sup> 590 separation agreements.

jurisdiction of the court ... 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.”<sup>28</sup>

### **Clear statutory framework**

Private agreements are most often made in the context of separation and divorce and they should be considered primarily against the background of the statutory framework for financial provision on divorce as governed by the Family Law (Scotland) Act 1985. On application, the court may make a range of orders,<sup>29</sup> which must be justified by one or more of the principles set out in section 9. One of the key aims of the legislation was to provide clear guidance to the courts in terms of making financial provision orders and it was hoped that, with clear guidance as to what a court might do, couples would be encouraged to make their own agreement without resorting to court action.

As much of the later content of this report will refer back to the 1985 Act, the basic framework of sections 8 and 9 is set out here. Section 8 provides the court with a range of orders, which may be used in the sharing and redistribution of property and finance on divorce. These include orders for the payment of a capital sum, the transfer of property, a periodical allowance and a range of specific orders related to the sharing of pensions.<sup>30</sup> According to section 8(2), the court may only make an order where it is justified by one or more of the section 9 principles and where it is reasonable with regard to the resources of the parties. Key to the 1985 Act’s framework is the availability of a range of orders in order to accommodate diverse situations and to suit the needs of different families. Section 13(2), however, reflects the underlying preference for orders which facilitate a “clean break” solution by limiting the use of orders for periodical allowance. They can only be used where justified by the principles in section 9(1)(c), (d) or (e) and where the other orders would not be appropriate or sufficient.

Section 9 sets out five principles, which should guide the court in the making of orders for financial provision. They are as follows:

*The first principle* – section 9(1)(a) provides for the fair sharing of the net value of the matrimonial property. Section 10 sets out detailed further guidance on the

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<sup>28</sup> *Milne v Milne* 1987 SLT 45 at 47, *per* Lord Kincaig.

<sup>29</sup> s8(1)

<sup>30</sup> *Ibid.*

application of section 9(1)(a) and particular attention should be drawn to section 10(1) which provides that fair sharing shall be presumed to be equal sharing except where special circumstances, including those set out in section 10(6), would result in some other proportion being fair. Section 10(4) defines clearly which assets should be treated as matrimonial property.

*The second principle* – section 9(1)(b) provides that 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 or of the family. Contributions are specifically stated to include indirect and non-financial contributions, in particular looking after the home or caring for the family.

*The third principle* – section 9(1)(c) provides that any economic burden of caring, after divorce, for any child of the family under the age of 16, should be shared fairly between the parties.

*The fourth principle* – section 9(1)(d) provides that where one party has been dependent to a substantial degree on the support of the other, she should be awarded reasonable financial provision to adjust to the loss of that support. Such provision should not exceed a period of three years from the date of the divorce.

*The fifth principle* – section 9(1)(e) provides for reasonable financial provision over a reasonable period to be given to a party who seems likely to suffer serious financial hardship as a result of the divorce.

While the 1985 Act continues to give considerable discretion to the courts in various ways, it does nonetheless provide very clear and structured guidance and it was thought this would encourage couples to negotiate their own settlements, guided by a relatively clear idea of what they might obtain if they went to court. In addition to this general encouragement, agreements are also specifically mentioned. The first principle in section 9(1)(a) is that the net value of the matrimonial property should be shared fairly between the parties and, according to section 10(1), fair sharing is taken to be equal sharing except where special circumstances make it fair to share the property in some other proportions. Section 10(6) sets out a non-exhaustive list of special circumstances, which includes reference to “the terms of any agreement between the persons on the

ownership or division of any of the matrimonial property”.<sup>31</sup> In this way, it is clearly anticipated that individual couples might influence the fair sharing of their property through the use of agreement.

The Children (Scotland) Act 1995 also sets out clear and detailed principles in the form of parental responsibilities and rights.<sup>32</sup> While all decisions concerning a child are subject to the guiding principle of the welfare of the child,<sup>33</sup> the clear statement of what is expected of parents in respect of their children is likely to help them to reach private agreements about the care of children following the breakdown of an adult relationship. This is specifically encouraged by section 11(7)(a) which includes what is often referred to as the principle of minimal or non-intervention: the court shall not make an order in respect of a child unless it would be better to do so than to make no order. In other words, the preference is for the parties to make their own arrangements. The effectiveness and enforceability of agreements between couples concerning their children are obviously subject to different considerations from those concerning property and finance, and regardless of the existence of an agreement, it is always open to any party who shows an interest to apply to the court for an order regulating parental responsibilities and rights in terms of section 11 of the 1995 Act. Nonetheless the clear, detailed and agreement focused provisions of the Act are likely to encourage parties to seek agreement rather than resorting to court action.

In respect of cohabitation, legislation is also likely to be a significant influence in the increased use of agreements but for rather different reasons. In terms of property consequences on divorce, couples can feel secure in making their own arrangements in light of relative certainty concerning the type and nature of orders which a court might make. It is, however, the lack of certainty about the provisions in the Family Law (Scotland) Act 2006, applying to cohabitants, which is likely to motivate cohabiting couples to enter into agreements, so that they may exclude the statutory scheme and possibly put in place an alternative framework for regulating the potential breakdown of their relationship. In this respect, pre-cohabitation contracts are closer in purpose to 19<sup>th</sup> century ante-nuptial contracts.

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<sup>31</sup> section 10(6)(a).

<sup>32</sup> ss.1 and 2.

<sup>33</sup> S.11(7)(a).

## **Registration**

There are no specific rules regulating the form or procedure for reaching agreement with regards to separation or divorce and parties are free to make their own informal arrangements. In practice, many couples who wish to regulate the consequences of the breakdown of their relationship will seek to conclude a formal written agreement, usually with the assistance or advice of legal advisers. Such an agreement or contract is commonly referred to as a minute of agreement.

The term “minute of agreement” is often used in Scotland to refer to a written agreement or contract between parties. Such documents are commonly registered in the Books of Council and Session, as a result of which they become directly enforceable in the same way as a court decree. In order to create a binding contract between the parties, no particular form is required but in order to have it accepted by the Keeper of the Registers, the deed must be self-proving according to the Requirements of Writing (Scotland) Act 1995; meaning that it must be signed by both parties and witnessed. Prior to the 1995 Act, the requirement was that it should be probative in form, signed by both parties and witnessed by two witnesses each of full legal capacity. The process of registration ensures the preservation or safe keeping of the agreement and, provided the agreement includes consent to registration for execution, it will also result in the grant of warrant for execution of summary diligence. Herein lies the great benefit of the option of registration of such agreements, allowing the parties to enforce their agreements by means of summary diligence if the need should arise. This process of registration is a familiar, easy and long established aspect of the Scottish legal system, which has enabled separation agreements to develop as a simple and effective way of giving force to the outcomes of private settlement.

## **Limited challenge**

Another significant factor, which contributes to the popularity of negotiated separation agreements in Scotland, is the fact that there is very little scope for these agreements to be challenged or reviewed. Parties who have invested time and effort in reaching a settlement can be fairly confident that their agreed terms will be respected. These agreements or contracts are subject to all of the standard requirements relating to capacity and consent but, provided that the parties are of full age and appropriate mental capacity and provided that there has been no coercion, undue influence or error, they will be regarded as binding and enforceable.

There is specific provision within the Family Law (Scotland) Act 1985 for challenge and review of agreements as to financial provision. Section 16 provides that the court may make an order setting aside or varying such an agreement in two situations. The first applies to any term of the agreement relating to periodical allowance but only where the agreement expressly includes a term providing for such review. This provision reflects the ongoing nature of periodical allowance, the possibility of changing and unforeseen circumstances and the power of the court to vary or recall a court order for periodical allowance.<sup>34</sup> The court may exercise this power to vary or set aside “at any time after granting decree of divorce”.<sup>35</sup> While this provision does offer important scope for reconsideration of an agreement, it must be remembered that its use is dependent on the parties including specific provision for its use within the agreement itself.<sup>36</sup>

The other situation in which the court may set aside or vary an agreement, or any term of it, is “where the agreement was not fair or reasonable at the time it was entered into”.<sup>37</sup> This is of limited application, particularly in view of the requirement that the fairness of the agreement is considered at the time it was made rather than at the time of the application for review. There is also a very limited period during which a challenge can be made in terms of section 16(1)(b). It is specifically linked to the point of divorce and the court can only make an order “on granting divorce or within such time thereafter as the court may specify on granting decree of divorce.”<sup>38</sup> It is important to note that the parties cannot agree to exclude the operation of section 16(1).<sup>39</sup>

Section 16 applies to “an agreement as to financial provision to be made on divorce”.<sup>40</sup> As mentioned above, Scots law does not prescribe the nature or form of such an agreement and the coverage of section 16 is therefore broad and can include formal or informal agreements. Agreement should, however, be distinguished from a gift or other unilateral obligation,<sup>41</sup> which would not be open to review. Section 16 applies “where the parties to a marriage have entered into an agreement as to financial provision to be made on divorce” and this was held in *Kibble v Kibble*<sup>42</sup> to include an ante-nuptial agreement, which purported to provide for possible future divorce. It is not, therefore,

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<sup>34</sup> 1985 Act, s13(4)

<sup>35</sup> *Ibid*, s16(1)(a)

<sup>36</sup> See eg *Ellerby v Ellerby* 1991 SCLR 608

<sup>37</sup> *Ibid*, s16(1)(b)

<sup>38</sup> *Ibid*, s16(2)(b)

<sup>39</sup> *Ibid*, s16(4)

<sup>40</sup> *Ibid*, s16(1)

<sup>41</sup> See, eg, *Anderson v Anderson* 1991 SLT (Sh Ct) 11.

<sup>42</sup> 2010 SLT (Sh Ct) 5.

limited specifically to “separation agreements” or to agreements made in immediate contemplation of divorce. This decision emphasises and confirms Scots law’s openness to private settlement in the context of adult relationships and the lack of distinction between agreements made at different stages. Parties should think carefully, and be fully advised, whenever they enter into an agreement as it may have implications at a much later stage: a point which was highlighted in one of the interviews in this research by a party who was shocked on separation to discover that an agreement made many years before about the proportions each party would take of the value of the home, should they separate, would still have effect:

“because initially, my previous partner had put in a larger sum than me, so we’d agreed that should something happen, that she would get return of her amount and I would get return of mine. Now what I didn’t foresee is that after 12 years that that would still stand, despite the fact that I had earned and put in, you know, that amount three times over into our house and, you know, just general living.” [Party 7]

What the court must consider under section 16(1)(b) is whether the agreement was fair and reasonable at the time it was made, rather than with the benefit of hindsight or at the point of challenge. It is clear that the courts have limited scope for interference and there are relatively few reported cases of successful challenge. As the sheriff commented in *Worth v Worth*<sup>43</sup>:

“In granting what appears to be a discretionary power to the court, Parliament has not provided any guidance as to its exercise; nor has it indicated how the questions of fairness and reasonableness are to be approached.”<sup>44</sup>

Important further guidance as to how to apply this test was provided by Lord Weir in *Gillan v Gillan (No3)* in the form of five principles:<sup>45</sup>

1. It is necessary to examine the agreement from the point of view of both fairness and reasonableness.

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<sup>43</sup> 1994 SLT (Sh Ct) 54.

<sup>44</sup> *Ibid* at 55.

<sup>45</sup> 1995 SLT 678.

2. Such circumstances relate to all the relevant circumstances leading up to and prevailing at the time of the execution of the agreement, including amongst other things the nature and quality of any legal advice given to either party.
3. Evidence that some unfair advantage was taken by one party or the other by reason of circumstances prevailing at the time of negotiations may have a cogent bearing on the determination of the issue.
4. The court should not be unduly ready to overturn agreements validly entered into.
5. The fact that it transpires that an agreement has led to an unequal or possibly a very unequal division of assets does not by itself necessarily give rise to any inference of unfairness or unreasonableness.

As these principles make clear, the court should not choose lightly to interfere with an agreement, although as the sheriff observed in *Clarkson v Mitchell*:

“[w]hilst ... the courts should not be unduly ready to overturn agreements reached between parties, equally they should not construe s16 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.”<sup>46</sup>

The agreement is judged from the perspective of the parties rather than from any objective assessment of what was fair and that might include taking account of motivations other than simply economic ones. For example, parties may be prepared to accept terms which, while relatively unfavourable in purely financial terms, have perceived benefits in other ways: such as early settlement. In *Inglis v Inglis*,<sup>47</sup> the sheriff rejected a woman’s challenge to an earlier agreement stating that it:

“was entered into by the pursuer in the full knowledge that she had a potential claim on the defender’s pension rights and she renounced that claim in order to achieve what appeared to her to be the immediate and significant advantage of the defender’s departure from the matrimonial home.”

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<sup>46</sup> *Clarkson v Mitchell* 2008 SLT (Sh Ct) 2 at 6. For further discussion of this case see Norrie, “Money and your life” 2009 JLSS 24.

<sup>47</sup> 1999 SLT (Sh Ct) 59

Section 16 has been interpreted as meaning that “the agreement must be both fair and reasonable” and thus that the party challenging it only needs to show that it fails to meet one of those requirements: “[i]t is not necessary ... to establish both unfairness and unreasonableness.”<sup>48</sup>

Beyond the minimal requirements in terms of formal validity for the purposes of registration, there is no prescription as to the form of an agreement. Not surprisingly, however, there was considerable standardisation across the sample of agreements studied in this research. The vast majority of agreements had clearly been drafted by legal professionals although, as noted in chapter 10, there were three documents which appeared to be DIY agreements. In particular, certain standard clauses were included in many agreements, which signalled the awareness of those who drafted the documents of the potential areas for challenge.<sup>49</sup>

The durability of agreements is likely to be a key consideration for parties and their advisers and, in that context, an issue of recent concern, particularly for some family lawyers in Scotland, has been the interaction between private, separation agreements and the system of statutory child support. In terms of section 4 of the Child Support (Scotland) Act 1991, either the parent with care or the non-resident parent may apply for a maintenance calculation in terms of the Act to be made in respect of any relevant children. No such application may be made during the first 12 months following the registration of a maintenance agreement, which would include separation agreements, which make provision for child maintenance.<sup>50</sup> Any provision in an agreement which seeks to restrict an application for a maintenance calculation, in terms of the 1991 Act, is void.<sup>51</sup> The implications of the 1991 Act for separation agreements is explored further in chapter 7.

### **Concluding comments**

Scots law offers a legal environment which encourages and facilitates private ordering within the context of separation. An appropriate vehicle, in the form of a minute of agreement, an effective enforcement mechanism by means of registration and a clear and principled framework for judicial decision making in terms of financial provision on divorce have all contributed to the increasing use of separation agreements. The very

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<sup>48</sup> *Clarkson v Mitchell* 2008 SLT (Sh Ct) 2 at 6.

<sup>49</sup> For further discussion of this, see in particular chapters 3 and 9.

<sup>50</sup> 1991 Act, s9.

<sup>51</sup> *Ibid*, s9(4).

limited scope for challenge of such agreement, which section 16 affords, may be regarded as both the Scottish system's greatest strength and also potential weakness. While parties can be fairly confident that what they agree will be upheld,<sup>52</sup> they should also be fully aware that, having reached agreement, they will have little legal scope for reconsideration or regret.<sup>53</sup>

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<sup>52</sup> In this context, note the concerns of some solicitors about the detrimental impact of the 12 month rule which allows for application for a maintenance assessment in terms of child support: see discussion in chapter 9.

<sup>53</sup> For further discussion of these issues, see Junor, "Challenging Separation Agreements" 1998 SLT 185 and MacBride and Kendall, "Wedded to the Pact?" 2010 JLSS 55(12).

## Chapter 3

### A profile of minutes of agreement: their content, extent and the parties who make them

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This chapter presents an overview of minutes of agreement, based on information collected from a random sample of about 600 agreements registered in 2010. More detailed information about property, including the family home, pensions, capital sums, other assets and debts, ongoing financial support and arrangements about children is discussed in the following chapters, which will examine the content of the agreements and draw on interviews with parties and solicitors.

#### **The number of agreements**

All minutes of agreement are stored in the National Records of Scotland, Edinburgh, together with other deeds, wills, contracts and similar documents, in sequentially numbered boxes. The research team examined all the documents in a random sample of boxes, and chose for close analysis all of those records that related to agreements between familial couples. We were therefore able to estimate the total number of agreements for that year, and describe the types of agreements. A total of 87 randomly selected boxes were chosen from a total of 737 boxes numbered in 2010, – the equivalent of 12% of all relevant MoA for the year. A total of 600 relevant MoA were selected from these 12% of boxes. Extrapolating from this figure we estimate that there were just over 5,000 such MoA registered in 2010.

Comparing this number to the number of divorces and dissolutions granted in 2010 (10,173 and 27, respectively),<sup>54</sup> we estimate that there is one minute of agreement made for every two divorces granted. That rate compares to an estimated rate in 1992 of one agreement for every four divorces granted, based on the figures of an estimated 3000 MoA and 12,447 divorces in 1992.

From these estimates, we conclude that the making of a minute of agreement has become a more commonplace means of agreeing about financial and other issues that arise on separation, and indeed, over the last 18 years, they have become about twice as common.

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<sup>54</sup> The Scottish Government (2011) *Divorces and Dissolutions in Scotland 2009-10: Statistical Bulletin Crime and Justice Series*, Edinburgh: The Scottish Government, p. 8.

### **What type of agreements?**

Of all the agreements between familial couples examined closely (600), the great majority (590; 97%) were separation agreements. Of these, 12% of the parties were living at the same address; the remainder recording different addresses. Other types of agreement were uncommon: 9 agreements (1.5%) were made during a subsisting relationship, 5 were ante-nuptial agreements (<1%) and 5 were pre-cohabitation agreements (<1%). The following analysis was carried out on the 590 separation agreements.

### **Who makes agreements?**

The great majority (84%) of separation agreements were between spouses, a similar proportion as found in 1992 (82%). Agreements between heterosexual cohabitants comprised 15% of the total, just over double the proportion found in 1992. Only a small number of agreements were made by same sex couples (<1%), and by divorced couples (<1%). The latter compares with 8% of agreements made by divorced couples in 1992.

Using the earlier estimate of about 5000 agreements made in 2010, where 84% of these were between spouses, then the number of spouses making a MoA, (about 4200), is 42% of the number of spouses who divorced in that year. That compares with about 2460 agreements between spouses in 1992, or a ratio of 20% of spouses making a MoA to the number divorcing in that year.

Though making up just 15% of all agreements, we can see a marked increase since 1992 in the number and proportion of separating cohabitants who make use of this remedy. In contrast, the number and proportion of agreements between already divorced couples has sharply declined, perhaps because of a clean financial break between them at the time of their divorce.

Minutes of agreement are not required to state whether the couple making them have had children or whether there are or were children of the family, particularly if children of the family are aged 16 or more, or if the agreement does not contain child related provisions, such as residence, contact or child support. Nevertheless, almost half (270; 46%) of agreements mentioned children, and were therefore between parents, and 96% of these (258) contained further details about arrangements concerning children.

### **In-depth interviews**

We conducted 30 in-depth telephone interviews, with 17 women and 13 men. Twenty one were spouses or former spouses, two were civil partners, six were cohabitants, and one was a party to an ante-nuptial agreement. Half of interviewees had dependent children under the age of 16. Sixteen (11 women and 5 men) were living in the former matrimonial home; in four cases both parties to the relationship were living in the matrimonial home (including the couple with an ante-nuptial agreement) and in 10 cases the family home had been sold.

### **Property**

The great majority of agreements dealt with property matters, to the extent that we conclude that such agreements overall are property driven. Only a small number of agreements do not have any provisions about property, such as agreements in which only arrangements about children are made. Thus, whilst minutes of agreement can tell us about how separating couples with property to divide organise that division (and the other practical matters that arise on separation) without involving the courts, they do not shed great light on how separating couples without property to divide on separation deal with the other practical consequences of separation. What is clear is that such couples do not make use of these out of court but legally binding contracts to regulate their post-separation arrangements. In particular, these data do not tell us how the majority of couples who are social rented or private rented tenants resolve any disputes or organise the aftermath of their separation.

We collected information using a standardised pro forma (see Appendix 2) about a wide range of assets a couple might have, including not only the family home and pensions but also furniture and plenishings, cars, joint and sole bank accounts, insurance or endowment policies, investments, debts and any other assets such as businesses and second homes.

The nature of the property addressed in agreements varies, presumably reflecting the property the couple have, with flexibility possible in the non-standardised format of agreements that allow them to cater for a range of circumstances. The family home is mentioned in 83% of agreements, compared to 74% in the 1992 study. Pensions are mentioned in 57% of agreements; a capital sum or consideration is mentioned in 51%; and spousal aliment or periodical allowance in 28% of agreements. Furniture and

plenishings are mentioned in 70% of MoA, and cars in 28%. Other forms of property are mentioned less often than these (Table 3.1).

*Table 3.1. Types of property mentioned in minutes of agreement*

Family home	83%
Pensions	57%
Capital sum or consideration	51%
Aliment or periodical allowance	28%
Furniture & plenishings	70%
Car	28%
Investments	19%
Bank accounts	12%
Total	(n=590)

#### *The family home*

For the great majority of couples, the family home is their most important asset. We were able to infer from information in the agreements that 94% of agreements were made by couples who were owner occupiers. The great majority of these were joint owners (91%). Sole title was held by the woman in 3% of cases and by the man in 6%.

Of the 481 (83%) agreements that made some provision about the family home, the most common agreement, in 38% of these, was to transfer the sole title of the home to the woman. A sale and division of free proceeds was agreed in 33% of cases; and transfer to the man agreed in 25% of cases. A variety of arrangements were made in the remaining 4% of cases, such as a deferred sale until a particular event or when a youngest child finished full-time education.

#### *Pensions*

Over half of agreements (57%) had a specific clause about pensions, compared to 12% in the 1992 study. The great majority of agreements with such a specific clause (81%) discharged any claim to any pension the other party might have. In only 19% of these agreements, or in 11% of all agreements, was there any provision for some form of pension sharing. This is a higher proportion than found in the 1992 dataset where only 3% of agreements made provision for pension sharing. In 42 MoA, 7% of the total, a copy of a pension sharing agreement was included with the MoA.

### *Capital sum or consideration*

Just over half (51%) of agreements mention a capital sum or consideration to be paid, a higher proportion than in 1992, when 30% of agreements made any such mention. The most common provision was for a sum to be paid by the man to the woman, in almost two thirds of cases. Most agreements gave some indication of what the capital sum payment represented. Just over half (52%) stated this sum represented the recipient's interest, or part interest, in the family home. Other agreements stated this sum was agreed in exchange for the recipient's renunciation of their occupancy rights in the family home (16 MoA), or their (half) share of matrimonial property (10 MoA), or a variety of other reasons. No reason was given in one quarter (25%) of cases in which a transfer of a capital sum was agreed.

### **Spousal support and periodical allowance**

There was a specific clause about ongoing spousal support and periodical allowance in just over one quarter of agreements (28%). As with pensions, the main point in the great majority of these clauses (23% overall; 82% of MoA with specific mention) was to expressly exclude any ongoing support between the parties. Some form of spousal support or periodical allowance was agreed in 5% of all agreements. In most of these cases (85%), a period of payment was specified, most typically for three years. This compares with the discussion of periodical allowance in 15% of MoA, with something payable in 10% of the total in the 1992 research. Thus, the subject was raised almost twice as often but a payable sum agreed half as often. A clean financial break between the parties (as opposed to between parent and child) has become an even stronger norm than it was nearly 20 years earlier.

### **Children**

While chapter 7 discusses in greater detail what agreements were made with regard to children, and the views of parties and solicitors about these, brief mention is made here about residence, contact and child support.

Of the 258 agreements that had detail about children, residence was discussed and agreed in 188; 73% of cases. The mother was the residential parent in 90% of these cases, the father in 4% and joint or shared care was agreed in 6% of cases where residence was agreed. Contact was discussed in two thirds (171; 66%) of cases and, of these, mainly (80%) stating "as agreed between the parties" rather than specific arrangements. Specific times were mentioned in 42 cases.

An agreement about financial support of children was made in almost two-thirds (65%) of agreements with details about the children. In all but three of these MoA (99%), child support was to be paid to the mother of the children (and in one it was agreed to pay the child directly).

### **The legal process**

As discussed in chapter 2, section 16 of the Family Law (Scotland) Act 1985 makes specific provision for the challenge and review of agreements about financial provision but the courts have only limited power to interfere with such agreements. Almost all agreements in the 2010 dataset made provision for or recorded aspects of the legal process in reaching agreement so that the agreement itself is legally robust, minimising the scope for future challenge. In almost all of the agreements, and in all of them drawn up by solicitors, there appear standard clauses, though worded differently but with recurring phrases and similar substance, many in the shadow of section 16. Examples of commonly occurring specific standard clauses and their frequency are given in Table 3.2.

Table 3.2 Standard clauses used in minutes of agreement

	N	% of MoA with clause
Parties warrant they have made full disclosure	179	30%
Parties agree the terms of agreement are fair and reasonable	458	78%
Parties agree the law of Scotland will govern the agreement	238/581*	40%
The MoA represents the full and final agreement and parties will make no further claim in respect of capital sum, property transfer orders, spousal aliment	402/441**	91%
MoA is irrevocable and binding for all time regardless of any material change in the circumstances of either party	201	35%
Renunciation of rights of succession	455/495***	92%
If any clause is deemed unenforceable the remaining clauses will prevail	186	32%
Parties had the opportunity of obtaining independent legal advice	548	93%
Parties had the benefit of independent legal advice	423/478↵	73%
Relevant statutes have been fully explained to the parties	91	15%
Each party will meet their own costs in respect of MoA	506	86%
Total	590	

\*data not collected for 9 Moa hence 581 and not 590

\*\* This is the figure for MoA entered into by spouses and civil partners on which the details of the types of claims encompassed by the full and final clause were collated (n=441 MoA).

\*\*\* This is the figure for the 495 MoA entered into by spouses and civil partners (and excludes those entered into by cohabitants and those already divorced)

↵ data only collected on 478 MoA

One of the great benefits of the Scottish system of private ordering of the consequences of relationship breakdown, reduced to the form of a minute of agreement, is its flexibility and openness to bespoke arrangements. While parties are advised by solicitors, the detail and form of the agreements they conclude are capable of reflecting

their individual settlements. The variety of agreements we looked at suggested a range, from those which were clearly bespoke to those which were of fairly standard form but with alterations.

The preceding summary will be elaborated in the following chapters that will draw further on the dataset of separation agreements, as well as from interviews with parties and with solicitors about the making of the agreement, its aftermath, and their overall assessments.

## Chapter 4

### Property: the family home

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#### The legal context

Scots law operates a system of strict separation of property during marriage and civil partnership with the relationship itself having no direct effect on the property of the parties.<sup>55</sup> The significance of the family home, both as the practical setting for family life and as a key asset owned by many couples, is however acknowledged in the application of some specific legal provisions. While separation of property respects the individual and equal capacity of spouses and partners, where the family home is held in sole title the application of the principle may result in vulnerability in respect of a non-entitled spouse or partner, particularly in the context of domestic abuse. To address this concern, spouses and civil partners who do not have legal title to the family home, nonetheless have statutory occupancy rights in terms of section 1 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981. These rights arise automatically on marriage or civil partnership provided there is a relevant family home. Unmarried cohabitants do not have automatic occupancy rights, but they may apply to the court for the grant of occupancy rights in terms of section 18 of the Act. In this way, the practical significance of the family home is recognised, not through legal ownership but through occupancy rights.

During marriage or civil partnership, ownership is determined according to the normal rules of property but, on divorce or dissolution, the starting point for court-based orders of financial provision is fair sharing of matrimonial property.<sup>56</sup> For this purpose, matrimonial property is defined as:

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 furnishings for such home; or

(b) during the marriage but before the relevant date.<sup>57</sup>

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<sup>55</sup> Family Law (Scotland) Act 1985, s.24.

<sup>56</sup> *Ibid*, s.9(1)(a).

<sup>57</sup> *Ibid*, s10(4). A similar provision is set out in s10(4A) in respect of civil partnerships.

The family home is thus clearly included within the fund of matrimonial property and its significance as the foundation for future family life is further recognised in the exception relating to the date of acquisition.

### **Owner occupation**

For many families, the family home is likely to be their most significant asset both in terms of property ownership and as the focus of family life. Throughout the 20<sup>th</sup> century, owner occupation has been growing in Scotland and currently 64% of all households and 71% of households with two adults and one or two children own their family home.<sup>58</sup> Against that background it was anticipated that the family home would feature strongly in any separation agreement and in our sample of 590 MoA, 94% of agreements were made by couples who were owner occupiers and specific agreement concerning the home was made in 83% (490 MoA). This was higher than the percentage in the 1992 sample, where the family home featured in 74% of the sample. Clearly, such agreements are property driven.

It is increasingly common for couples to buy their home in joint names, and this is often tied to the practicalities of borrowing limits and mortgage arrangements. In those agreements made by owner occupiers (94% of the sample), there was a very clear tendency towards joint ownership. In 91% of these agreements, the family home was jointly owned. Where the property was held in sole title, in 6% it was in the name of the male party (28) and in 3% in the name of the female (17). In many agreements, details of ownership were expressly stated and in others could be inferred from information included about the sale or transfer of the property. In only 7% was there insufficient information to enable us to conclude who owned the home.

It is in the nature of minutes of agreement that often there is only limited detail about the property being considered and therefore very little can be gleaned about the value of the family homes in question. Specific values were included in less than 5% of the agreements and, in those, the values ranged from £17,000 to £725,000. The existence of a mortgage was mentioned in 53% of the agreements (310) and details of the level of the debt were given in 11. In only 4% (23) was it expressly stated that there was no outstanding mortgage.

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<sup>58</sup> The Scottish Government (2012) *Scotland's People Annual Report: Results from 2011 Scottish Household Survey*, Edinburgh: The Scottish Government, p.17.

## Who stays, who goes: the status quo

### *The initial arrangements*

Minutes of agreement include details of the parties, their current address at the time of entering into the agreement and the address of the family home, and from that information we were able to gain a picture of who was living in the family home at the point when the agreement was made.

*Table 4.1 Residence in the family home at time of agreement*

Man	24%
Woman	41%
Both parties	13%
Neither party	11%
Unclear	10%
Total	N=590

The fact that 13% of parties were still co-resident in the family home need not affect the classification of these agreements as “separation” agreements since it is well established that a couple may have ceased to “cohabit as husband and wife” even when they are both still resident in the family home.<sup>59</sup> The fact that 77 agreements still gave the same address for both parties at the point when the agreement was concluded may be some indication of the relatively early stage at which those parties seek to arrange the property and other consequences of their relationship breakdown. It should also be noted, however, that the sample of agreements we studied had been made during economic recession and at a time of considerable difficulty in the housing market. It is likely that this was also a significant factor for some couples as the following discussion illustrates.

The question of who was resident in the family home during the process of negotiation and at the time when agreement was reached, and the potential impact this might have on the final outcome, was explored in interviews with both parties and solicitors. For some parties, remaining in the home during the breakdown of their relationship was a key concern in terms of providing stability and continuity for their children. As one party explained,

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<sup>59</sup> See eg *Buczynska v Buczynski* 1989 SLT 558.

“it was purely somewhere for the children to come. So yes I could rent a flat but ... the children have had so much upset this is probably the one bit of stability they’ve currently got”. [Party 1]

The questions of who initially leaves and who stays in the home might be influenced by perceptions of “fairness” and also by issues of practicality:

“I didn’t feel at that stage, that I should move out because my partner in fact had an affair and a whole period of ridiculous lying and nonsense so I didn’t feel I should move out, and he didn’t feel he could afford to move out.” [Party 12]

Several solicitors highlighted the potential advantages of remaining in the family home:

“If you have the wife in the house who genuinely can’t afford to move anywhere else of comparable style, and there are children, then she will just hang on as long, and the advice would be, hang on as long as possible in the house.” [Solicitor 3]

As one solicitor explained, the advantages of being the one who remains resident in the family home during the process of negotiation might be psychological and financial:

“Should I move out? The question usually answered by, well, tactically, that might be a great disadvantage to you, and the slower the marketing as it is now the more the disadvantage that that would be. So the person who thinks they would do the decent thing, they’re perfectly entitled to do that but they might take a short let for six months, and at the end of six months, they’re not really any further forward and then they’re a bit frustrated because their spouse is maybe not moving things forward as quickly as they would like, not that their spouse is necessarily to blame.” [Solicitor 12]

#### *Agreements about the home*

Where there was reference to the family home within the minutes of agreement (481), a range of terms was included. The most likely arrangement was transfer of the home to one of the parties (63%) followed by an agreement to sell (33%). One of the key innovations in the Family Law (Scotland) Act 1985 was the possibility of the court making a property transfer order and the usefulness of this type of order is certainly

supported by the evidence to the effect that this is what the majority of parties have agreed to do in the context of their own private arrangements.

*Table 4.2. Agreements made about the family home*

Transfer of sole title to the woman	38%
Sale and division of free proceeds	33%
Transfer of sole title to the man	25%
Other	4%
Total	N=481

Where the family home was transferred to one of the parties, it was most often to the woman. Two key themes, in many cases intertwined, emerged from interviews with both parties and solicitors which help to explain this gender difference: first, the focus of several of the female parties on the family home as the most important asset and, secondly, the need to provide for the children. It is commonly thought that, when a couple with children separate, the family home is usually transferred to the resident parent. In our sample, residence of the children was discussed and agreed in 188 agreements and of these the mother was the residential parent in 90%. In 48% of those cases sole title in the family home was given to the mother, compared with transfer of sole title to the woman in 38% of all agreements which dealt with the home. While having primary care of the children increased the likelihood that the family home would be transferred to the resident parent, it is noteworthy that the majority of resident parents with care of children under 16 did not remain in the family home and have the title transferred to them.

While the role of the solicitor will predominantly be seeking to achieve what the client wants, it will also require highlighting the practicalities:

“women seem to want to come in and under all circumstances keep the house, but financial reality has to take a kick in there” [Solicitor 1]

and possibly even the benefits of taking a different approach. As one solicitor recounted:

“I had a client who desperately, desperately wanted to hold on to the family home and we had all the way through it ... spoken about that and how we could go about doing that and one day I said to her, you know, please don’t think I’m

talking out of turn but she really liked to go to the local theatre and I said this deal that we have on the table here means that you are not going to have enough money to go to the theatre each week because you want to hold on to this huge house ... and then we had to go back to the drawing board and renegotiate something else which worked for her and allowed her to live.” [Solicitor 5]

The overriding need and desire to provide for children can be a very significant factor in reaching agreement and this is particularly evident in agreements concerning the family home. As highlighted by one solicitor,

“although the people are in an adversarial situation, they’re encouraged by lawyers to ring fence questions of the children. And if the children are settled in that home, and that’s near where their school is and where their friends are, it’s generally speaking taken to be good for the children to stay, if that can be funded.” [Solicitor 2]

This approach can often result in the parent who has residence of the children also receiving title to the family home. In our sample, however, while the home was transferred in a significant number of cases to the parent who had primary residence of the children (48%), in the majority of cases there was no such provision.

In only a very small percentage of agreements (3%) did the parties continue to retain joint title to the family home. This was for a variety of reasons, including waiting for the housing market to improve, delaying the sale until the children reached a certain age or stage in their education and letting the property. Similarly, where the agreement was to sell the home, only a minimal percentage (2%) provided for the sale to be deferred. Clearly, the preference in dealing with the family home was for an early and final settlement.

Where there was an agreement to sell the family home, the most common outcome was that the net proceeds of the sale would be divided equally (73 agreements). Unequal division of the net proceeds was agreed in a minimal number of agreements but, where it was, it was more often in favour of the woman. In terms of sharing the value of the

family home, the principle of fair sharing as equal sharing<sup>60</sup> was very strongly reflected in the sample of agreements.

### **Occupancy rights**

As outlined above, a spouse or civil partner who does not have legal title to the family home will nonetheless obtain statutory occupancy rights in respect of the property. As a general rule, assuming that there is a relevant family home and that the party has not already renounced occupancy rights, these will arise on marriage or registration of civil partnership and will terminate on divorce or dissolution. Such rights will be protected even where the entitled spouse seeks to sell or transfer the property to a third party and rights may exist in respect of several family homes. Unlike the definition of matrimonial property to be shared on divorce or dissolution, which focuses on the time when the asset was acquired, the definition of a family home for the purpose of protection of occupancy focuses on the purpose for which the home was made available.<sup>61</sup> In order to ensure that the owner of the family home is free to enjoy full rights of ownership of the property, it is therefore important to consider the continued existence of any statutory occupancy rights and this is reflected by the specific reference to occupancy rights in a significant number of our sample of agreements.

In 52% of all agreements, either or both parties agreed to renounce occupancy rights in the family home and a similar percentage agreed to grant formal renunciation. In 27%, the rights were renounced by the man, in 15% by the woman and in 10% by both. In 27% of all agreements, there was renunciation of occupancy rights by both parties in any future property which either party might acquire. This could be seen as an additional measure of protection since it would be unlikely that any future property would qualify as a “family home” within the definition in the 1981 Act as it would not be “a family residence”.<sup>62</sup>

### **The place of third parties**

Minutes of agreement in the context of relationship breakdown are private contractual arrangements between two parties but in some cases they may also have implications for the rights of third parties. Account is taken of the rights of third parties in the Family Law (Scotland) Act 1985, section 15(1) of which provides that “[t]he court shall not

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<sup>60</sup> 1985 Act, ss.9(1)(a) and 10(1).

<sup>61</sup> Matrimonial Homes (Family Protection) (Scotland) Act 1981, s.22.

<sup>62</sup> 1981 Act, s.22.

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.” In terms of the family home, third party rights are most obviously relevant where there is an outstanding mortgage in respect of the property and this is specifically provided for in section 15(2) to the effect that 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.” To what extent is the role of third parties reflected in our sample of minutes of agreement?

The agreements which we looked at were made during a period of severe economic recession and it is likely that the depressed housing market and limited availability of lending facilities would have had an impact on at least some of the specific arrangements that were made. The availability of borrowing facilities might have an impact not only on the possibility of securing alternative accommodation, but also on the process of negotiation and agreement between the parties themselves:

“so we agreed on a figure of how much I could get, that was the top figure that any building society was willing to loan to me as a single person and he agreed to it. I think he would have liked a little bit more, but you know that was my limit”. [Party 10]

Several parties referred to problems in the housing market as having influenced their decision to postpone the sale of their family home. In one interview, a man described how their intentions in respect of the family home changed over time, with an original plan to sell being replaced by transfer to the woman:

“the house was actually on the market for nearly a year and we have about 60 people come to look at it. People did put in smaller offers and she thought about it and thought, maybe I could afford to buy it.” [Party 22]

The additional problems posed by recent experience of the housing market were mentioned by several solicitors and summed up succinctly as follows:

“It used to be that sometimes you had a very difficult separation and a long discussion about the value ... of matrimonial property, and the minute of

agreement which provided for, amongst other things, the sale of the house and then it went on the market. But of course, then it sold, and then it was all done. Well now, the last phase is not “a” follows “b” follows “c” in quite such a happy scenario ... depending on where the clients are living, we get finished this long process for the separation agreement and then we put the house on the market. A year later we still haven’t sold it. That’s a possibility.” [Solicitor 12]

### **Consideration and capital sums**

The first principle applied by the courts when making orders for financial provision on divorce is the principle of fair sharing<sup>63</sup> which is presumed, in the absence of special circumstances,<sup>64</sup> to be equal sharing.<sup>65</sup> It was therefore anticipated that a similar pattern of sharing might be present in the sample of MoA. The 1985 Act provides the court with a range of orders which can be used to achieve this outcome of sharing and, in particular, specific provision is made for capital sum payment and property transfer orders.<sup>66</sup> As outlined above, considerable use of property transfer was evident in our sample in respect of the family home. There was also significant use of capital sum payments (51%) as a method of resolving financial and property consequences of separation. These were used to pay a sum to the woman (192 MoA) in almost twice as many cases as to the man (108 MoA) with the value of the capital sum ranging from £285 to £662,000.

*Table 4.3 Method of payment*

One-off payment	257
Instalments	39
Bespoke: eg on sale of house; retirement; death	4
Total	300

While the 1985 Act makes provision for the payment of a capital sum at a future date or in instalments, it is clear from our sample of agreements that there is a very strong preference for immediate and clean break settlement. In passing, and with reference to the introduction in 2006 of section 3A of the Divorce (Scotland) Act 1976 providing for a court to postpone decree of divorce where there was a religious impediment to remarry

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<sup>63</sup> 1985 Act, s9(1)(a).

<sup>64</sup> *Ibid*, s10(6).

<sup>65</sup> *Ibid*., s10(1).

<sup>66</sup> *Ibid*., s8(1).

(the Jewish 'get' provision), it was interesting to note that the date for payment of the final instalment in one agreement was to be the date when the 'get' was granted.

In 53% of the same total sample, there was reference to an outstanding mortgage and it was clear in the detail of some individual agreements that arrangements were to be made between the parties themselves in terms of terminating existing borrowing arrangements and securing new mortgage provision. The additional challenges posed by the housing and financial markets were reflected in several of the interviews with both parties and solicitors. One solicitor mentioned the possibility that, in the situation where one party could not obtain a new mortgage, "you can leave it in joint names for the time being and agree who's to pay the mortgage" [Solicitor 2]. Another referred to having occasionally come across "some weird and wonderful mechanisms" [Solicitor 6] devised in an attempt to accommodate the difficulties posed by lenders and a lack of suitable available mortgages. The dangers of leaving mortgage arrangements unresolved were highlighted in the experience of a solicitor who reflected:

"I can remember one couple in particular that they wanted me to draw up an agreement, which lasted about 25 years, until the mortgage was paid off, and I said no, because there are so many things that can go wrong in that 25 year period." [Solicitor 1]

### **Tenants: the missing dimension?**

As shown above, property ownership, and in particular ownership of the family home, is the key driver behind the majority of separation agreements. But what of those couples who do not fall within the group of owner occupiers and who are instead tenants either within the public or private sector? In only nine agreements out of the full data set of 590 were the parties described as tenants, slightly lower than the 19 similar agreements identified in the 1992 research. In a further 20 agreements, tenure of the family home was not expressly stated although it was likely that they were tenants.

## Chapter 5

### Property: pensions and their redistribution

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Pensions can represent a major component of a couple's assets and for spouses and civil partners (but not cohabitants) that portion of a pension that has been built up over the course of a marriage or civil partnership is clearly part of their matrimonial property. Thus, what separating couples (married and civil partners) discuss and agree about pension assets is an important part of the story about any agreement they reach for financial provision.

#### **Pensions in the earlier study**

The Scottish Law Commission in its 1981 Report on Aliment and Financial Provision,<sup>67</sup> which formed the basis for the 1985 Act, made clear its view that pensions represented an important, and complex, component of matrimonial property. Research they commissioned on family property in 1979 found that 56% of couples had private pension assets.<sup>68</sup> In the 1992 study, discussion and agreement about pensions were largely absent from minutes of agreement. Only 12% of agreements then had a specific clause on pensions, and only 3% of the total number of agreements made provision for pension sharing or transfer of pension assets to the other partner. Although pensions were infrequently evident in these outcomes, interview data showed that they were the subject of much discussion and played a significant part in the negotiation process, often in the form of a trade-off for other assets. In interviews men said they were keen or had been advised to protect and maintain their pensions and bargained accordingly.<sup>69</sup> When interviewed about two years after making the agreement, women reported that they were ill-informed at the time about the value of their husband's pensions and of their rights related to pensions under section 10(2) of the Family Law (Scotland) Act 1985,<sup>70</sup> raising questions about whether an agreement could be fair without a spouse having knowledge of his or her former partner's pension assets.

#### **The visibility of pensions in 2010 agreements**

We collected information from agreements using a standardised pro forma (see Appendix 2) about a wide range of assets a couple might have, including pensions.

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<sup>67</sup> Scottish Law Commission, *Report on Aliment and Financial Provision*, 1981, Edinburgh.

<sup>68</sup> *Ibid*, at p.76.

<sup>69</sup> Wasoff, McGuckin and Edwards 1997, p. 19.

<sup>70</sup> *Ibid* at p.iii.

Pensions were clearly a more visible and frequent feature of agreements in 2010 than in 1992. We found that 57% of all agreements had a specific clause about pensions, their mention second only in frequency to the family home, mentioned in 83% of agreements. In these, both parties' pensions were mentioned in over three quarters (77%), with the husband's pension only mentioned in 20% and the wife's in 3% of these agreements. The great majority of agreements with a specific pension clause (81%) discharged any claim to any pension the other party might have. In only 19% of these agreements, or in 11% of all agreements, was there any provision for some form of pension sharing. In 42 MoA, 7% of the total, a copy of a pension sharing agreement was included with the MoA. Amongst those agreements that shared pension assets in some way, a small number (6, < 2%) stated that one party's interest in the pension of the other was reflected in the capital sum or division of matrimonial property agreed. The pension to be shared was the husband's in 96% of agreements where any sharing was agreed.

Since pension assets accumulate over the life course, and become increasingly valuable as parties become older, it was expected that lengthier relationships would be more likely to mention pensions and less likely to discharge any claims on the pension of the other. This is indeed the case. In agreements where we had information about the length of the relationship, a clause on pensions was present in 58% of agreements for relationships of ten years duration or less, but featured in 74% where relationships were for over 20 years. In relationships of ten years or less, 92% discharged any claim on the pension of the other party, but in those of over 20 years, only 63% did so (Table 5.1). Furthermore, in longer relationships, it is more likely than in shorter ones that only the man's pension is mentioned in the agreement.

*Table 5.1 Percentage of agreements that mention pensions and discharge claims to them by length of relationship*

Length of relationship	% of agreements mentioning pensions	% of agreements that discharge any claim on the pension of the other party
0 to 10 years	58%	92%
11 to 20 years	66%	81%
Over 20 years	74%	63%
	N=315	N=315

Thus pensions receive specific mention in the majority of agreements but do not form part of the final financial settlement. We turn now to interviews with parties and solicitors to gain further insight into the reasons that, in the end, pensions were shared or, for the most part, not.

### **Reasons that pensions are shared (or not)**

An important reason that pensions are shared is that sharing pension assets reflects the statutory provision in the 1985 Act, section 10(5) of which regards pensions built up during a marriage (and civil partnership) as matrimonial property. In some cases, a pension sharing agreement was the result of legal advice to the recipient that they were entitled to a share of their spouse’s pension. Indeed, failure to do so could result in a successful challenge to the agreement. As one solicitor commented:

“I: To what extent do you find clients are willing to share their pension?”

R: I would put it this way, they’re never willing to share their pension; they just have to. What happens is husband does not want to share his pension and wife does not want a bit of paper saying she’ll get some money when she’s 65. . . . So pensions are real money; it’s just they don’t seem like it to the parties to these sort of disputes at the time the dispute’s settled – you can’t borrow against them, they’re not cash, you can’t buy the kids their tea, it’ll not get you a new car or a new house, it’s just a bit of paper . . . And there’s a fee attached to that as well.” [Solicitor 13]

But one person whose agreement included pension sharing spoke about the fairness of doing so:

- I: What is your view of the pension sharing aspect of your agreement? Is that a useful tool do you feel for division of assets?
- R: Yes. Yes. Yes, I do, I mean, overall I think it's absolutely fair and I think it makes it very straightforward if...as in our case, basically, [WIFE] is transferred something that's then hers...do you know what I mean... [Party 3]

Solicitors have become more experienced with the inclusion of pensions in negotiation and pension sharing in the agreement, as this solicitor observed:

- I: how useful a tool are pension sharing agreements?
- R: Oh invaluable. Completely invaluable. But the pension sharing agreement would be part of the Minute of Agreement ... and then the details of the pension share are set out in a schedule at the back.
- I: Have you encountered any problems with their use, pension sharing agreements?
- R: Not really, not any more. I mean obviously when they were new it was a bit difficult. But nowadays it's a fairly well trodden path. [Solicitor 1]

Another solicitor routinely advised about pensions using a systematic checklist (see Appendix 5) approach with clients and pressing for valuations:

"As a solicitor from a risk management point of view, I would be exceptionally nervous about pressing on with something without having pension valuations. What I tend to do is when I first meet with a client I have a pack that I take into every single meeting that I go into with a new client, where I have a check sheet of all the advice I have to give them. I don't do a huge long file for everyone, I just tick that I've given them advice on, you know, alternative dispute resolution, matrimonial property, contact with the children, all these things and I tick it and make sure that I've gone through that with them. Then the other thing I do is I give each of my clients an income and expenditure form and I give each of them an assets and liabilities form so that if at some point in time, the example that you're talking about, a woman came back and said to me, you know, my husband's pension was worth 300,000, he's just bought a Porsche and I would say, well, if I could just refer you back to the statement that you filled in for me of assets and

debts, you did not put in that statement that there was a pension and when I asked you about it, you said you did not want to go down that route because if you don't have that information then you've clearly not advised your client properly. You know, I would not, in fact I can't think of an example where I have not got pension valuations for my client [...] vouching for the spouse or the partner's pension and also we would have a SERPS valuation." [Solicitor 5]

There were a variety of reasons why agreements so often contained a standard phrase that the parties would not make a claim on each other's pensions, even though pensions were part of the negotiations between the parties. Those reasons included:

- Young couples or short marriages had minimal pension assets built up in the marriage
- Pensions were traded off against other assets
- The parties thought they had broadly equal pensions, and thus an equal division of the total pension pot would produce a result similar to making no claim
- The cost of a pension valuation was not seen as a worthwhile expense
- The party who was likely to claim a share of their ex-partner's pension did not choose to take legal advice, and stated in the agreement that they had had the opportunity to do so.
- Many parties mentioned various *relationship* reasons for not pursuing a claim that they thought would create conflict, damage a positive but fragile post-separation relationship, or undermine their joint efforts as parents

### **Trade-offs**

Trade-offs between pensions and other assets were common and for many pensions, even if they were not formally valued, provided an important resource in negotiations. The role of pensions in negotiation is illustrated by these two solicitors:

"Well, there are different ways of negotiating a settlement. I would first of all tell them what the law is, a pension is a joint asset regardless of whose name it's in, but there are ways and means of distributing their overall pot of cash, pension is only part of it and it may be that you could offset one party's interest in the pension against the other party's interest in the family home; it's called offsetting,

you know, and as long as each party comes out with a share of monies worth the same then that's a fair settlement." [Solicitor 10]

I: "how useful a tool do you find pension sharing agreements are when parties separate?

R: I think they're a pain in the neck, because they never quite understand how the different pensions schemes work and all that. I find it pretty complicated, but it can be quite useful in situations like if one party's going to keep the house and the other will keep their pension. So the set off situation can be very useful." [Solicitor 8]

For men, an important reason for conceding immediate assets was their wish to keep their pensions intact. Some men commented that a greater share of the family home would be more valuable to their ex-wife than his pension, as in this example:

R: "I mean we did get them [their pensions] valued because obviously I've been working longer than she had so my pension fund was worth more but that was part of the deal. We wanted to make sure that she had the money, if in effect she would have ended up having to have some of my pension fund, as far as I understand it, that would have made, you know, same split of assets, it would have made the settlement, she would have ended up with less cash assets, property and things like that, it seemed like the fairest way in the end so that she had more assets that she could use to buy property.

I: So you did trade off the value of the pensions against the value of the home then?

R: Yeah." [Party 16]

Others observed, as in the following example, that, with their good earning prospects that would allow them to secure another mortgage, they were financially able to concede part of their share of the family home in exchange for leaving their pensions intact.

R: "No, I think, I was quite happy. To be fair, I think, the solicitor, me having a solicitor would have probably just complicated things because I was quite willing to, as long as she didn't get my pension then, I was quite happy for her to have what she wanted because I set up my own new life. . . . That's the

way I was looking at it: that I'm not taking it from her I'm taking it from the kids, they need a settee, a telly, and the other things were just, they meant nothing to me." [Party 19]

Some solicitors confirmed that many men were keen to protect their pensions, which they did not view as a joint asset, as in these examples:

"Pensions, people get very possessive about their pensions, particularly people with large pension pots, they do get quite...they have this notion that, you know, you're not going to touch it, whereas, regardless of that, it is a joint asset and a lot of people have a lot of difficulty getting their head around that." [Solicitor 10]

"Men, some men come in and want to keep the pension at all costs. So, very few men, it depends on the age of the man, the elder, older men, take ill that their wives are entitled to a share of their pension, because as far as they are seeing, she just minded the kids, and of course we all know how easy that is, and it was them that put the food on the table and them that went out and earned the money. I haven't had too many of that, but that tends to be an older generational thing." [Solicitor 1]

Women often explained that they had a greater need for a larger share of immediately realisable assets, typically mothers with low paid, part time or no recent employment history, who would be unable to secure a mortgage on their own either to remain in the family home or to move elsewhere. In such cases, a deferred asset was less valuable to them than immediate cash, and, sometimes extensive, negotiation beforehand is not recorded in the agreement. One woman commented that her house would provide for her in later life when asked,

I: "Did you try and get some part of that pension for the years that you were married to him?"

R: No, it all just went into one bundle and the idea that the house was my pension, you know, one day I'll downsize." [Party 11]

Solicitors made similar observations:

“You can have men, who say, you can have half my pension, or women want, a lot of women want cash now, they don't want, if you say, well this is for your financial security for when you retire, they're not interested in that, they want the money now.” [Solicitor 1]

“You know, it's [a pension is] not money. It's not what you can put in your pocket or buy the kids porridge with. ... for the women they need a home now. They don't have that future look, you know, they can't look to the future.” [Solicitor 4]

“I would say that most people will be looking at pensions, for sure. But what you might find is that, again in a kind of typical scenario, I mean, if there's ever such a thing, but if you have a wife in a house and there are two or three children, or whatever, and the husband's working and the wife's maybe got some level of income, then it's more important for her to get somewhere to stay with the children and cash is more important for her and the husband will very often then trade off his, her, a pension for giving her more capital by way of house policies or whatever. . . , That's fairly typical kind of scenario. And in the Minute of Agreement really, it wouldn't really reflect the fact that they've actually looked at that type of thing.” [Solicitor 6]

Solicitors also remarked that pension trade-offs were very common in negotiation as a means of avoiding or resolving conflict.

### **Trade-off risk**

There is a risk that a trade-off of a pension claim for other assets in the absence of a valuation might not be a fair trade. The value of a share of a pension can be worth far more than a sum of cash offered to offset a pension claim, as in this example:

“I had another property, but she did not want a claim, she didn't ask for a share of that. But she wanted half of my pension for the duration...of our marriage.

I: And did you agree to that then?

R: Well I had no choice. I tried to negotiate that with her. I tried to, well I proposed that I would give her a further sum of money in cash in the region of...I worked out my contribution to my pension over that time and I offered her a half of that which came to something like £12,500. And so she, but she declined that. And obviously she took advice and she could have...I mean what I proposed to her, she could invest that privately or some other way...If, I mean she, if it was possible for her to kind of re-invest a sum, a certain sum into that [her own small pension]. I don't know. But anyway, so she didn't want a share of the other property but... she wanted, that's what she wanted and she got that.

I: So the £12,000 that you offered her, did she turn that down?

R: She did.

I: And so did you have to get it formally valued through other people, your pension and give her a greater amount of it, did you?

R: Yes ... And ... they did the valuation and once the data was submitted and worked out obviously the 50 per cent, what 50 per cent of that. And so once it was all through they had, they transferred that amount, I think something like £47,000. " [Party 20]

### **Equal pensions**

For couples with similar pensions, it made sense to agree to keep their own and no claim against the other, as in this example:

"at that time when we separated they [their pensions] were both the same. So there was no need for...no need for me to claim and I just wanted it done amicably. I wanted a settlement done and just get on with our lives." [Party 15]

### **Relationship objectives**

Some respondents did not wish to pursue a pension claim, in order to further a relationship objective:

I: "You and your ex-wife could have had your pensions valued, and you may have benefitted there if her pension was greater than yours, but actually that wasn't your primary concern.

R: No, it wasn't. I knew that. Obviously the financial side of things we had agreed that she took care of a side and I took care of a side and that pretty much balanced everything up to what a pension is, a bit higher and mine is obviously a bit lower. I think we got a decent balance. We were able to talk about it. We were quite happy about it, and that's how it went." [Party 5]

Remaining amicable and moving on is more important for some parties than a pension claim, as in this example:

"So there was no need for...no need for me to claim and I just wanted it done amicably. I wanted a settlement done and just get on with our lives." [Party 15]

Solicitors also note that amicable parties may not wish to provoke the other party, and thus, avoid pension claims:

"I think the more amicable the separation is, the more amicable the parties are, I think. That's inclined to be an influence as to whether they claim on a pension or not." [Solicitor 7]

Thus, we can see that while pensions seem to be much in evidence in the course of reaching an agreement and routinely raised as an issue by solicitors, they are far less in evidence in the outcome agreement except inasmuch as the parties agree not to make a pension claim. Pension sharing is much discussed, but seldom agreed. But from interviews we can also see that potential pension assets are often exchanged for assets that have a higher priority for the receiving spouse, particularly to ensure that post-separation housing needs are met.

## Chapter 6

### Property and ongoing support: other assets and debts: periodical allowance

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#### Statutory context

According to the Family Law (Scotland) Act 1985, orders for financial provision on divorce must be justified by one or more of the section 9 principles. The first, and most commonly applied, is that the matrimonial property should be shared fairly between the parties.<sup>71</sup> As discussed above in chapter 4, “matrimonial property” is defined in section 10(4). For most families, the family home will be the most significant asset and, as discussed in chapter 4, this is clearly reflected in our sample of minutes of agreement. Pensions are also treated as matrimonial property and, as shown in chapter 5, while they are mentioned in a significant proportion of agreements, they are relatively rarely subject to sharing. A range of other assets might be included within the fund of matrimonial property to be shared and, in addition, property which does not fall within the definition might nonetheless be taken into account in deciding what provision is “reasonable having regard to the resources of the parties”.<sup>72</sup> To what extent was there evidence in the agreements of the valuation and sharing of assets other than houses and pensions?

Following the statutory framework, matrimonial property should be shared fairly and this redistribution of assets can be achieved by means of property transfer or capital sum payments. In addition to transferring property in order to achieve fair sharing, there might also be provision to take account of any economic advantage or disadvantage which has occurred within the context of the relationship – most obviously where the parties have followed a traditional model of breadwinner and homemaker;<sup>73</sup> to provide for future equal sharing of the economic burden of childcare;<sup>74</sup> to enable an ex-spouse who has been substantially dependent during the relationship to readjust<sup>75</sup> or for the relief of serious financial hardship as a result of the divorce.<sup>76</sup> These principles in the 1985 Act may result in property redistribution and sharing which extends beyond the fund of matrimonial property and in relation to the latter three principles may be

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<sup>71</sup> 1985 Act, s9(1)(a).

<sup>72</sup> *Ibid*, s8(2)(b).

<sup>73</sup> *Ibid*, s9(1)(b).

<sup>74</sup> *Ibid*, s9(1)(c).

<sup>75</sup> *Ibid*, s9(1)(d).

<sup>76</sup> *Ibid*, s9(1)(e).

achieved by means of ongoing, periodical allowance. Minutes of agreement, of course, need not follow these statutory rules but one aspect of interest in our research was to see to what extent they did.

The first statutory principle, in section 9(1)(a) of the 1985 Act, provides for “fair” sharing which, according to section 10(1), means “equal” sharing unless there are special circumstances<sup>77</sup> justifying sharing in some other proportion. To what extent is this statutory presumption, in favour of equal sharing of matrimonial property, reflected in the private agreements which parties make?

### **Other assets**

#### *Furniture and plenishings*

Furniture and plenishings were mentioned in 70% of the overall sample (415 MoA) and were subject to a range of agreed terms; most commonly, in 31% of the total sample of 590 separation agreements (185 agreements), a statement to the effect that they had already been shared and that the parties agreed that the sharing was fair.

*Table 6.1 Division of furniture and plenishings*

All to man	8%
All to woman	20%
Already shared and agreed to be fair	31%
To be shared as agreed	10%
Other	1%
Total	N=590

In only 5% of agreements was there a list of specific items either included in or annexed to the agreement itself.

#### *Cars*

Cars were mentioned in 28% of the sample of agreements, with 97 agreements referring to one car, 62 to two and only four agreements referring to three or more. The most common agreement in respect of cars was that each party should keep a car (9.8%). There was reference to car financing arrangements in 6% of agreements and, commonly, responsibility for paying for the car would remain with the person who had

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<sup>77</sup> Ibid, s10(6).

use of it. Overall, in the sample as a whole, there was little evidence of gender difference in terms of car ownership. In terms of responsibility for car payments, in seven agreements the man was to remain financially responsible for the woman's car whereas there was no evidence of the opposite arrangement.

#### *Bank accounts and investments*

There was reference to bank accounts, both joint and sole, in 12% of the MoA (73 agreements) and most commonly it was agreed that they should be divided equally (5%). Where all the proceeds of the account were to go to one party only, there was no significant difference between men and women: 15 agreements provided for the money to go to the man and 14 to the woman.

Other investments were mentioned in 19% of the sample (111 agreements) and, of these, the majority of investments were jointly owned (59). Where investments were held in sole names, they were twice as likely to be held by men (14) as by women (7). In 6% of the overall sample (36 agreements) the investments took the form of endowment policies, which were most likely related to mortgages. Only 3% of agreements included reference to shares, 2% to ISAs and 3% to other, unspecified policies.

The value of investments was discernible in only a very small number of agreements (9) and of these, six were under £40,000. The fact that the most common form of investment was an endowment policy, and thus probably tied to borrowing rather than a sign of wealth, further strengthens the view that minutes of agreement, while driven by property, are not the preserve of the wealthy.

In terms of sharing options for investments, there was little difference between (1) all being given to the woman (4%), (2) all to the man (4%) or (3) equally shared between both (4%). While, the high incidence of provision relating to the family home indicates that these separation agreements are primarily property driven, the relatively low evidence of investments is an indication that the parties who make agreements are not particularly wealthy.

#### *Other significant assets*

Other significant assets were included in 15% of the sample of agreements (90 MoA) as follows:

*Table 6.2 Other significant assets*

Type of asset	Number of agreements in which mentioned
Business	22
Heritage (other than the family home)	38
Business and other heritage	8
Timeshare	4
Caravan/mobile home/boat	8
All of business, caravan, cash inheritance	1
All of business, heritage, timeshare, caravans	1
Jewellery/fine art/antiques	2
Pets	5
Airmiles account	1

In view of the relatively small number of agreements dealing with assets other than the family home or pensions, there was little evidence of any significant patterns of sharing or disposal.

#### *Businesses and farms*

In general, the evidence in relation to both businesses and other heritable property was that approximately twice as many men as women owned such property and there was little evidence of sharing of these assets as part of any financial settlement.

Business property and, in particular, farms, have given rise to some difficulties in the context of judicial decisions concerning financial provision and similar concerns emerged in some of the interviews. The practical problems of valuation of business interests and partnership property were highlighted and the influence of case law in this context was stressed in the following comments from one solicitor:

“The farmer will argue that she’s [his ex-partner] entitled to nothing because there is some authority that might suggest that but you ... can’t just say I want a share of the increase [in value] full stop, you have to argue why you want a share of the increase, is it an economic advantage or disadvantage argument or is it the case that there is one authority that suggests the increase is matrimonial

property. There's actually another one that says anything you buy during the marriage becomes matrimonial property as well, so, for example, if you have stock and you buy new stock that then becomes matrimonial property. It's quite a sophisticated area really." [Solicitor 11]

## **Debts**

When financial provision is dealt with by the courts, they are instructed, in terms of section 10 of the Family Law (Scotland) Act 1985, to share the net value of the matrimonial property and it is similarly evident in minutes of agreement that part of the negotiation and settlement process is the calculation of assets and debts. As one solicitor commented in interview,

"generally speaking, for your average case, in my experience it really is a matter of arithmetic." [Solicitor 13]

Specific debts or arrears were mentioned in 19% of all minutes of agreement (114) and of these 57 were joint debts. In 50% of all agreements, the parties agreed to take responsibility for debts in their own name. Specific details were given of a range of debts with the most common (36) taking the form of personal loans. Other common debts included overdrafts (13), credit card debts (11), arrears (11) and combinations of these (39). The value of debts was known in only a small number of agreements (21) and, based on these, the mean value of debts and arrears, excluding mortgages, was £19,336, with specified total amounts ranging from just under £7000 to £28,500. While 35 agreements referred to only one debt, multiple debts up to 15 were listed in 62 agreements. In some agreements, the impression was more of a sharing of debts rather than a sharing of assets.

## **Periodical allowance**

While orders for periodical allowance are permitted in terms of the 1985 Act, they may only be justified by three of the section 9 principles<sup>78</sup> and even then are intended to be used as a last resort, where the other orders are not appropriate or sufficient.<sup>79</sup> The clear preference of the statutory framework is for a one off sharing of matrimonial property by means of either property transfer or capital sum payment and this preference was strongly reflected in our sample of minutes of agreement. Aside from

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<sup>78</sup> ss.9(1)(c), (d) and (e).

<sup>79</sup> s.13(2).

ongoing maintenance for children, which is discussed in chapter 7, the clear evidence from these agreements is that there is very little ongoing support between ex-spouses or partners and little explicit recognition of career disadvantage or continuing inequality in terms of the financial burden of childcare, beyond what might be included in the sharing of the family home.

At the time of the 1992 research, spousal aliment or periodical allowance following divorce was already rare: discussed in 15% of agreements and payable in only 10%. It has become even more rare, with payment being provided for in only 5% of minutes of agreement in the present study. In all cases where it was agreed, it was to be paid to the woman. The amounts payable ranged from £50 to £3250 per calendar month and, in contrast to provision for maintenance in respect of children, no specific terms were included in respect of increase or variation of awards. Although it might be argued that this decline in periodical allowance is very much in line with the aims of the 1985 Act (for a clean break), it is in stark contrast to the continuing gendered nature of primary responsibility for children, with residence resting with the mother in 90% of agreements which made provision for children.<sup>80</sup>

In interviews with solicitors, there was some difference in experience perhaps related to different client base, with one commenting of periodical allowance that:

“most of the time it’s not mentioned in [my minutes of agreement] and it tends to only be mentioned where ... the mother has younger children and therefore can’t earn an appropriate standard of living.” [Solicitor 1]

Another solicitor expressed some surprise at our findings of very low incidence of periodical allowance and acknowledged the importance of some ongoing provision in a range of cases:

“It may be small, it may be £100 a month, something like that, but that may make all the difference to someone being able to repay a mortgage and to stay where they are.” [Solicitor 10]

The same solicitor, confirmed however that periodical allowance would usually be:

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<sup>80</sup> For further discussion, see chapter 8.

“looked at as an adjustment allowance, it’s really to allow one party to adjust to ... the reduced standard of living. Normally three years is deemed to be sort of sufficient for them to perhaps increase their hours at work or look for a job or ... really adjust to the situation.”

### **Equal sharing**

Assets beyond the family home played a relatively small part in the minutes of agreement. As most agreements did not provide details of the value of assets or of the overall fund of matrimonial property and other resources, it was not possible to assess to what extent the sharing provided in the agreements represented an equal share of matrimonial property. As anticipated, there was little evidence in the narrative of these deeds of any account being taken of economic advantage or disadvantage which might have been experienced by either party in the context of their relationship. These issues were, however, explored with parties in the course of interviews and in many there was acceptance and in some cases support for the principle of equal sharing; highlighted, for example, in the following comment:

“I think we walked away from our marriage and our financial situation ... fifty-fifty ... I didn’t want him ever to think that he hadn’t got a good deal, if you like, out of the settlement, that I’d kind of got everything and he walked away with nothing and that he was at a disadvantage.” [Party 10]

The trend towards equal sharing was also confirmed in interviews with solicitors. One solicitor, while acknowledging the possibility that “sometimes you can negotiate something that’s not 50:50”, commented that: “I would still say ... the vast majority are still looking at a 50:50 split”.

In interviews, there was also some reference to the standard of a 60:40 split and this seemed to be a fairly common response to the suggestion that one party had suffered an economic disadvantage in the course of the relationship or had future childcare responsibilities which might hamper full return to employment. As might be expected, the views of parties differed in respect of the suggestion that there should be some recognition in financial settlements of childcare and domestic labour. One woman, who had worked part time while also caring for the children, commented that the idea that she had suffered an economic disadvantage which might be taken into account in the agreed settlement:

“didn’t really cross my mind. I was never the ambitious type, I was happy in my work and didn’t really ... although, you know, extra money would have come in handy.” [Party 10]

From the perspective of a man, who had agreed to a settlement based roughly on a 60:40 split to reflect economic disadvantage to his ex-wife, there was the following reflection:

“Well 60:40 is a pretty harsh settlement from my end of the telescope, but if you accept that and that was tough to get used to and the implications of it, after that I suppose you could judge it fair and reasonable.”

“A mother is saddled with children typically. Children are very expensive. A man can wander off and his nurturing requirements are fewer. So it’s logical perhaps that they come out with less.” [Party 28]

### **Conclusions**

While minutes of agreement need not follow strictly the statutory provisions of the 1985 Act, in terms of the sharing of property other than the home or pensions and in terms of reliance on equal sharing, the clear picture from our sample was that parties sought nothing more and in fact, generally rather less, than the Act provides. The focus was most clearly on the family home and there was relatively little reference to or actual sharing of other property. In any sharing that there was, it was evident that there was a strong preference for equality and a clean financial break.

## Chapter 7

### Children: residence, contact and child maintenance

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This chapter presents a detailed description of the arrangements for the future care and provision for children found in the random sample of 590 separation agreements entered into in 2010. The chapter begins by outlining the relevant legal framework and, where relevant, includes the views of party interviewees and solicitors on the inclusion of provisions dealing with children within a minute of agreement. It will be seen that both child contact and child support arrangements are susceptible to change following agreement. There were 258 MoA which gave details on children in the data set (44%). Of these, residence of the child was discussed in 73% of cases and the issues of child contact and on-going financial support were discussed in two-thirds of cases.

#### **Legal framework: residence and contact**

The Children (Scotland) Act 1995 contains a list of (non-exhaustive) parental responsibilities and rights in respect of children at sections 1 and 2 of the Act. These include the right of a parent to have the child living with them or to otherwise regulate the child's residence as well as the right and responsibility to safeguard and promote the child's health, development and welfare; to provide guidance and direction to the child; to act as the child's legal representative; and, to maintain personal relations and direct contact with the child when the parent is not living with the child. These parental responsibilities and rights (PRR) continue until the child reaches the age of 16<sup>81</sup> and thereafter parents have no "rights" in respect of their children but, under the 1995 Act, they retain the responsibility to provide direction and guidance to their offspring until that young person reaches the age of 18.<sup>82</sup>

Parents who have PRRs retain these when they separate and they are free to come to their own arrangements about the future care and upbringing of their child/ren. It is only if they cannot agree that they may ask a court to decide for them. In so doing the court would apply the principles at section 11 of the 1995 Act. These are that the welfare of the child is the court's paramount consideration; that the court will not make an order unless it is better for the child that an order be made than none be made at all (the minimal intervention principle); and the requirement to give a child the

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<sup>81</sup> Children (Scotland) Act 1995, s.1(2)(a).

<sup>82</sup> Ibid, s1(2)(b).

opportunity to express their views, and to have regard to those views. Since the passage of the Family Law (Scotland) Act 2006, courts have also been under a statutory duty to consider the need to protect a child from abuse, or risk of abuse, when considering making an order relating to PRR.

Even when parents do not go to court, they are themselves under a statutory duty to give their child an opportunity to express their view on any major decision affecting them under section 6 of the 1995 Act. Which parent the child is to live with, and the amount of contact the child is to have with the parent they no longer live with, is clearly such a major decision. When the child does express a view, parents are to “have regard to this view.”

### **Legal framework: child maintenance<sup>83</sup>**

There are two statutory regimes governing financial support of children in Scotland. These are the Family Law (Scotland) Act 1985 and the Child Support Act 1991 (as amended). When introduced, the Child Support Act 1991 had the effect of removing the issue of child support payments from consideration by the courts in all but a limited number of situations.<sup>84</sup> Instead, couples who are unable to agree child support arrangements are usually directed by their solicitors to apply to the child support agency (CSA). Under the provisions of the 1991 Act that were in force in 2010 (the year of the study), application could be made to the CSA by either parent provided at least one of the parents was a non-resident parent (i.e. did not live with the child).<sup>85</sup> The CSA would then make a maintenance calculation and collect payments from a non-resident parent before distributing them to the resident parent up until the child reached the age of 16. However, where the child continues in full time non-advanced education, the CSA would continue to take payments until the child attained the age of 19.<sup>86</sup>

The Family Law (Scotland) Act 1985 remains relevant to the issue of child maintenance despite the passage of the 1991 Act, as children can claim financial support from their

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<sup>83</sup> The term “child maintenance” will be used as a generic term which includes both aliment and child support.

<sup>84</sup> Child Support Act 1991, s8 bars the court from making, varying or reviving a maintenance order. However, “top up” maintenance can be ordered by the court where the non-resident parent has sufficient resources to fully satisfy the maximum payable under the CSA formula and the court considers it appropriate in all the circumstances, or where the amount is to cover expenses incurred at an educational establishment (such as private school fees) or where the child is in receipt of disability living allowance or is disabled.

<sup>85</sup> Child Support Act 1991, s3.

<sup>86</sup> This had increased to the age of 20 under the Child Maintenance and Other Payments Act 2008.

parents under this Act up until the age of 25 providing they are “reasonably and appropriately undergoing instruction at an educational establishment or training for employment or for a trade, profession or vocation” under section 1(5)(b), although, in such instances support would be payable direct to the child and usually not be mentioned in a MoA between separating couples.

### **The number and ages of children in the data set**

Although a duty to support dependent children in education continues until the age of 25 in Scotland, most MoA only recorded details of children when they were aged 16 or under (consistent with the definition of a child under the relevant sections of the 1995 Act) and usually simply stated in the first paragraph that there were “no children under the age of sixteen” where this was the case. However, details of children aged 16 and over might be given where they had been under the age of 16 at the time of separation or where they had siblings under this age at the time of separation. In total, the dates of birth of 46 young people aged 16 to 24 were given.

There were 438 children mentioned in these 258 MoA. 38% mentioned just one child; 45% mentioned two children; 15% mentioned three children and just 3% mentioned four children. There were no MoA which mentioned more than four children.

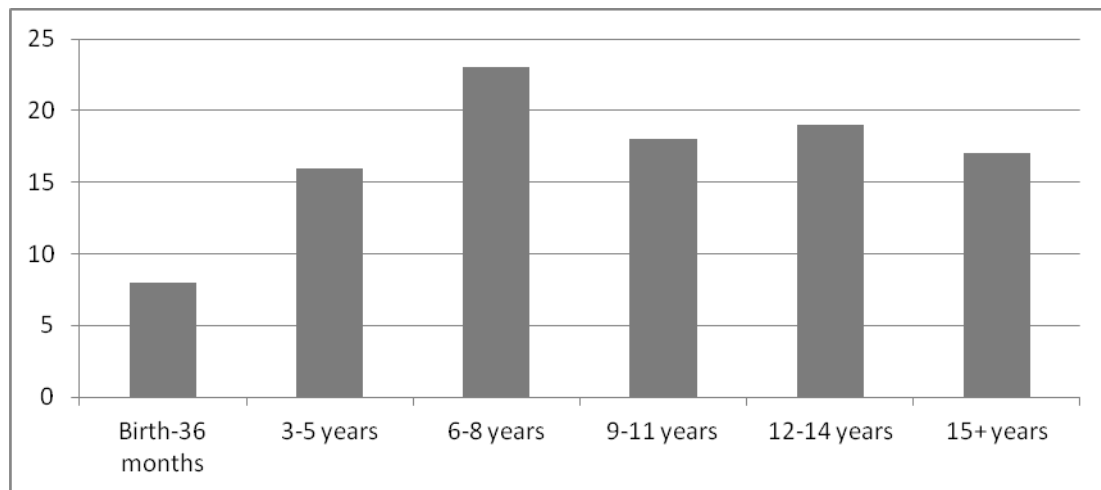
26% of MoA which mentioned children stated: “The First Party and the Second Party shall continue to share the responsibility to safeguard and promote the children’s health, development and welfare and to direct and to guide them”; while in just over a quarter the parties expressly agreed to “consult with each other and take account of the views of the other in any matter of importance affecting or concerning the children.”

*Fig.7.1* illustrates the ages of the youngest (or only) child in each of these 258 MoA at the time of registration. In 40% of all MoA more than two years had elapsed between separation and registration and this impacted on the numbers of infant children at the time of registration of the MoA.<sup>87</sup>

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<sup>87</sup> For a discussion of the length of time between separation and registration see chapter 8.

Fig. 7.1 Age of youngest child mentioned at the date of registration of MoA (percentages)



### Relationship type and children

Only 30% of cohabitant couples in the data set mention children, compared to 48% of spouses or former spouses. Cohabitant couples also tended to have fewer children than spouses – with 68% having just one child and only 20% having two. Only one cohabitant couple had three children and none had four. This may be because having children may propel a couple into marriage with 7% of spouses in the dataset having had their first child either before the date of their marriage or within the first 6 months.<sup>88</sup>

While the issue of residence was discussed to a similar extent by spouses and cohabitant couples in their MoA, agreements over contact and child maintenance were both less likely to be included in MoA entered into by cohabitant couples. Only 50% of cohabitant couples mentioned contact (compared to 68% of spouses) and only 35% of cohabitant couples agreed child support (compared to 58% of spouses).

Only one of the five MoA entered into by same-sex couples mentioned children, however it was uncovered in interview that there was a child in one of the two civil partnerships included in the study. The child had quite deliberately been left out of the MoA as only the child's birth mother had PRR and she did not want her ex-partner to have "any formal role in my daughter's life." She had not insisted on child maintenance and they arranged contact informally between them.

<sup>88</sup> In 31 of the MoA the oldest child had been born before the date of their parents' marriage while in a further eight the first child was born within six months of the marriage.

## Residence

Although only 73% of the 258 agreements that gave details of children, expressly stated who the child was to live with, a further 23 MoA which did not mention residence nonetheless stipulated to whom child maintenance was payable. From this we were able to discern the residence in 82% of MoA where details of children were given.

It is interesting to note that, at a time when other jurisdictions are seriously considering a presumption of shared residence post separation, the couples entering into these out-of-court agreements most usually agreed the child/ren would continue to live with their mother. This was agreed in 90% of MoA, while in 4% of agreements residence with the father was agreed. The phrase “shared care” was only mentioned in 5% of MoA but nonetheless, any child maintenance payable in these MoA was to the mother. There was one MoA which expressly stated the child was free to reside with either parent.

As *Table 7.1* below illustrates, MoA were most likely to include a statement of which parent the child was to live with when the youngest/only child was aged 9-11, followed by those with very young (infant) children.

*Table 7.1: Whether residence is mentioned by age of youngest child at time of Registration (n.239 MoA)<sup>89</sup>*

Age of child	Birth-36 months (n.31)	3-5 years (n.51)	6-8 years (n.56)	9-11 years (n.35)	12-14 years (n.43)	15+ years (n.23)
Residence expressly stated?	84%	78%	80%	89%	67%	39%

It may be that the greater independence of children aged between 9-11 (which reduces the labour intensity of their care) results in a greater discussion between parents as to with whom they should live. At the same time, such children are still primary school age and more malleable to adult control (and adult decisions) than teenagers. By the time children reached 12 and over, the inclusion of residence as an issue in MoA started to fall.

<sup>89</sup> Only 239 MoA give the dates of birth of the children.

It was agreed that 13% of children aged 12-14 would live with their father. This is far higher than the usual 3-5% across all other age groups (although caution should be exercised as the actual numbers are small). *Table 7:2* illustrates the agreed residence of the child by age.

*Table 7:2: Who the child lives with by age of youngest child at time of registration (n.199)*

Age of child	Birth -36 mths (n.29)	3-5 years (n.42)	6-8 years (n.47)	9-11 years (n.30)	12-14 years (n.32)	15+ years (n.19)	Total
Mother	<b>93%</b> 27	<b>93%</b> 39	<b>85%</b> 40	<b>97%</b> 29	<b>78%</b> 25	<b>95%</b> 18	178
Father	<b>3%</b> 1	<b>0%</b> 0	<b>4%</b> 2	<b>3%</b> 1	<b>13%</b> 4	<b>5%</b> 1	9
Both	<b>3%</b> 1	<b>7%</b> 3	<b>11%</b> 5	<b>0%</b> 0	<b>9%</b> 3*	<b>0%</b> 0	12

Of the 239 MoA which give the dates of birth of the children, data on who the child is to live with was either given or deducible from the person in receipt of child maintenance in 199 MoA.

\*this includes one child who was said to be “free to reside with either parent”

### **Contact**

Contact was discussed in two thirds of the MoA which gave details about children.<sup>90</sup> Most of these (80%) stated that the contact would take place “as agreed between the parties” rather than giving precise times. Only 25% of the MoA which discussed contact stipulated specific times, however notably, 44% of those that did not give specific times of contact nonetheless stipulated that the contact the parties agreed would include some residential (overnight) contact.

In those MoA which did stipulate contact times, the most prevalent amount of contact was 5-8 days a month (35%), followed by 9-12 days a month (24%) and 13+ days a month (24%). Only 17% stipulated four days or less in a month.

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<sup>90</sup> Being n=171 of 258 MoA.

Solicitors pointed out that the reason MoA usually omit to specify days and times for contact is that, unlike agreements over property, an agreement over child contact is not enforceable:

“If they stopped contact then I can produce the minute of agreement for the court and the court will say, that’s lovely, I’m glad to see that in 2010 they thought that, but now contact has stopped, and we look at the present. So, you know, it’s not really helpful but often people like it in. You know, it’s a, sort of, it’s a fall-back for them” [Solicitor 4]

While one solicitor observed rather starkly:

“If you were to let me have the children next Saturday and you don’t, I can’t send sheriff officers in to go and get the children.” [Solicitor 2]

Several solicitors pointed out, enforcement aside, that having fixed times was often not terribly helpful as circumstances would invariably change as the child grew:

“If you put in specific hours of contact and so on, then that’s going to go out of date so quickly because children grow up and they do different things and they’ve got gym on a Thursday when they used to go and see their dad and what have you. And so parents really have to be flexible.” [Solicitor 6]

Nonetheless not all solicitors were so negative about including specific contact times in an agreement:

“That’s kind of for me changed as in the past I thought it wasn’t worth the paper it was written on, an agreement regarding children and contact arrangements, but ... I think psychologically at least it sets out what the agreement is, that there is this agreement, which is far, far better than going to court ... and if one party doesn’t obtemper the agreement then ... you’d be saying well there’s an agreement, that was signed by both parties and why there has been this change of mind and the other party would have to justify that, I suppose. So definitely minutes of agreement are the answer.” [Solicitor 8]

As stated earlier in this chapter, both courts and parents are under a duty to give their children an opportunity to express a view when they are making a major decision affecting that child. In 19% of MoA which included details of children, the parties agreed they would consult with the child as far as practicable when reaching any major decision affecting that child.

### **Parties' perspectives on fixed contact times**

Half the 30 parties interviewed had dependent children below 16 years of age. The interviews with parties revealed that in the three years between the MoA and the interview, contact arrangements had often had to be modified, sometimes due to one party moving further away. This could create problems for both parties, but the interviews also revealed the parties usually could find their own solutions without having recourse to lawyers:

“My wife decided that she was moving back to where we lived originally which is away down the coast. So, now it’s too far to drive down to pick them up for dinner ... by the time I’d get them here they’d have to turn round and go back again. So ... we’ve decided that we’ve put our house on the market and we’re going down, we’re going to move down to the, sort of, [name] area to be closer”.  
[Party 19]

“I work shifts and initially he used to just have them when I was working but then, you know, it just wasn’t working like that, you know. The kids didn’t know where they were going ... so we came to this agreement so that he would have them every second weekend so that I could then request work those weekends.”  
[Party 9]

When fathers had extricated themselves from the family unit and not maintained regular contact, mothers lamented this lack of contact between their children and their father:

“This is now three and a half weeks since he’s phoned them or contacted them. I’m emailing, because I’ve always been ... the boys need to know when you’re going to see them, it can’t be last minute, we need a routine.” [Party 21]

However, a parent not exercising contact was one area the parties concerned realised was not enforceable by either a minute or a court:

“I can’t dictate to him when he should see his children. That’s the only thing really that I would say I felt was, not unfair but like if I wasn’t letting him see the children he could then go to court and make me, you know, let him see the children but I can’t force him to see them.” [Party 9]

### **Child maintenance**

As for contact arrangement, an agreement over alimentary payments for children, or child support, was mentioned in around two-thirds of the MoA which gave details on children.<sup>91</sup> However, as 6% of these stated that no child maintenance would be paid by either party, this means just 59% of MoA in which there were details of children included details of the amount of maintenance to be paid, and to whom.<sup>92</sup> To put it another way, 41% of MoA in which details of children were given did not include an agreement in respect of child maintenance.

In 99% of agreements, where financial support was agreed, it was payable to the mother of the child and in only 1% of these MoA was it payable to the father.

*Table 7:3 Whether child support agreed by age of youngest child at time of registration (n.239)*

Age of child	Birth-36 mths (n.31)	3-5 years (n.51)	6-8 years (n.56)	9-11 years (n.35)	12-14 years (n.43)	15+ years (n.23)	Total number
Maintenance of child included in MoA	65% 20	57% 29	64% 36	60% 20	53% 23	70% 16	144*

\* While 153 MoA contained details on child support, data on the ages of the children was missing for nine of these.

<sup>91</sup> Being n=167 out of 258 MoA giving details of children.

<sup>92</sup> Being n=153 out of 258 MoA giving details of children.

It can be seen from *Table 7:3* that agreement over child maintenance was most likely to be included in a MoA when children were aged 15 and over. This may be affected by parties' awareness of the looming (or present) need to support children during further education.

In 61% of the 153 MoA which included information on child maintenance, it was agreed the support would be payable in advance, while in 58% it was agreed interest would be payable on any arrears. This was usually at the judicial rate of 8%.

Interviews with parties revealed that even when they had not included an agreement about child maintenance in their MoA, they had nonetheless sometimes subsequently entered into an arrangement:

“For the first good while he wasn’t [giving me any money] and then I complained to him about it and then he was starting to give me money. Then it would be when it suited him, he’d give me money and then eventually I had to go to the CSA.” [Party 13]

Yet those that had agreed financial support for children in their MoA were not always receiving what they had agreed:

“He has his own business and so we agreed a percentage that he would pay, which I think is based, you know, loosely on the CSA ... He tells me his business isn’t doing very well and hence there’s not a lot of money coming in, so payments are a lot lower than they were when we made the agreement and it’s sporadic.” [Party 11]

Others confirmed they had been and continued to be determined they would not push for child maintenance payments:

“When I went to see the lawyer, and she says, oh, well, what about maintenance and what about ... and I says, no, I says, I don’t want anything else [just the home].” [Party 24]

Those making the payments were sometimes resentful:

“It’s just a bit of a bone of contention that I have that I hate paying her money because, you know, I know how bad she was with it and I’m never convinced that it actually goes towards what the kids, I mean, I know it pays part of the rent, et cetera, but, you know, she’s so, frivolous with the money.” [Party 19]

One mother had agreed child support of £500pcm for her children based on “going through bills and how much it costs for clothing, clubs, haircuts, food, kind of thing.” She was therefore shocked when her ex husband applied to the CSA around 18 months after their agreement had been registered and the child support dropped to just £260pcm. She stated:

“to me, the Child Support Agency is for absent fathers who you struggle to get anything off ... I just never considered it, because we’d got the agreement, and because he’d agreed to the 500, and because I didn’t think it was an unfair amount to support two children. I was very surprised when he did.” [Party 21]

#### *Durability of private agreements on child maintenance*

When couples enter into an agreement about the amount of child maintenance payable this can be overturned by a subsequent application to the CSA as section 9(3) of the Child Support Act 1991 stipulates that, “the existence of a maintenance agreement shall not prevent any party to the agreement, or any other person, from applying for a maintenance assessment with respect to any child to or for whose benefit periodical payments are to be made or secured under the agreement.” Such an application to the CSA can be made provided the agreement has been in place for a year.<sup>93</sup>

Consequently, under section 9(4) of the 1991 Act, if parties agree to restrict the right of any person to apply for a maintenance assessment, that provision shall be void. Nonetheless, in seven of the data set MoA the parties agreed neither one of them would apply to the CSA and in a further five they agreed this would be the case as long as the terms of the MoA were adhered to. Only 44% of the 153 agreements including details of child maintenance included a clause stipulating that if the CSA made a maintenance calculation then the agreement regarding child maintenance in the MoA would fail.

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<sup>93</sup> Child Support Act 1991, s4(10).

However, two-thirds of the 153 MoA, which included information on child maintenance, did include express provision for variation upon a material change in the circumstances of one or other party. Most usually (47%) the party's agreed to give one month's written notice to the other party and, failing agreement, they agreed they could go to court. An example was:

“In the event of any material change in the financial circumstances of either party or the said child, either party may apply to the other for a variation of the amount of aliment provided for by giving one month's written notice. If the parties are unable to agree the amount to be paid in the changed circumstances, either party shall be entitled to apply to the Child Support Agency/their successors for a determination insofar as that Agency has jurisdiction, and/or to apply to a court of competent jurisdiction for variation of this agreement insofar as the court has jurisdiction based on the material change of circumstances in terms of section 7(2) of the Family Law (Scotland) Act 1985 or any amendment or re-enactment thereof.”

In a further 39% of the MoA which included a statement on the variation of child maintenance, it was agreed that parties could go to either the CSA or court, if they were unable to agree the variation after one month's written notice. One month is a very short notice period – it effectively means the paying party informing the payee that the amount will reduce the following month. However, there were no MoA which gave a longer notice period than this.

#### *Amount of child maintenance and how it was calculated*

Of the 153 MoA which specified the amount of child maintenance that was to be paid, two-thirds (n=100) stipulated the amount per child. However a significant number omitted to stipulate the proportional breakdown (n=29), while a further 19 simply said it was for “both” or “all” the children. This could potentially create problems when the eldest child reaches the agreed age at which support is to stop.

However, based on an analysis of the 100 MoA which do stipulate the amount payable per child, the most prevalent amount was between £201-£300 per month. This was payable to a quarter of lone children, 44% of children in two-children families and a third of children in families with three or four children.

The amount payable to lone children was often greater than the amount payable to larger families and 15% of lone children were to receive between £751-£1,000 child support pcm. This compares to just 5% of children in two-children families receiving this amount.

By contrast, in two of the three families which had four children, the amount payable was under £100 child support pcm per child.

The reducing amounts per child in larger families is consistent with the formula under the Child Support Act 1991 in force at the time these agreements were entered into which was 25% of net disposable income for three children, 20% of net income for two children and 15% of net disposable income for one child. Both solicitors and parties in interview described utilising the formula under this Act when calculating child maintenance. Using the child support formula arguably reduces the likelihood of one or other party going to the CSA for a maintenance calculation. Additionally, in 17 MoA the agreement merely stated the parties would arrange maintenance of the children through the CSA, and no amount was given.

#### *Termination of maintenance payments for children*

140 MoA stated when child maintenance would end. This term of the MoA varied widely, in contrast to many of the standard clauses in agreements, suggesting this may either be an issue parties haggle over or that the contrasting regimes of 1985 and 1991 Acts mean the solicitors advising parties are less clear in the guidance they give.

The most common agreement (42%) was that child maintenance would continue as long as the child was under 18 and in education (so both conditions had to be satisfied), while 7% simply stated it would stop when the child turned 18, meaning that a significant number of the children would still be at school at the time the child support stopped. A further 15% agreed that the child maintenance would continue until the child was 18 unless that child was still dependent or in education beyond their 18<sup>th</sup> birthday (ie: it was not necessary for the child to satisfy both the age and education criteria, as just being dependent was sufficient). Just 7% stipulated that child maintenance would continue until the child was 19, if in education (in line with the 1991 Act).

At the lower end of the scale, 5% stipulated that child maintenance would continue only until the child turned 16 (although in half of these it would continue if the child remained in education). In one agreement, leaving school was the sole criterion for the cessation of payments in respect of the child (1%) and in one MoA maintenance was to continue until the child turned 17 or left school (1%).

At the more generous end of the scale, 4% of MoA stated child maintenance would continue until the child was 25 years of age, as long as they were in education – in line with the provisions of the 1985 Act, except that only one of these MoA expressly stated the money should go to the child directly once they reached 18 years of age. Finally, in 17% of MoA, it was agreed child maintenance would be paid as long as the child remained dependent and no age was stipulated.

### **A note on adult dependants**

Although only half the interviewees had dependent children under 16, interviews revealed a further four (13%) had children over this age and either finishing school or in further or higher education at the time they entered into agreement. Two of their MoA had included some details on the on-going support of these adult children and two had not. One father seemed to accept pragmatically the need for him to continue to support his children through university, while the other observed that the provisions need not have been in the MoA but that his wife had insisted and he had decided he was not going to enter into an argument over it.

By contrast, a mother with two dependent adult children lamented the fact she had not been able to include agreement on support of her children in her MoA because of their age. Rather she had been advised her son would have to take his father to court if he wanted support.

“we were told, and this is where the law is all wrong because it put the onus on us... that being myself and my older son, whose father was obliged to support him financially until he was 25. But he’d have to take him to court.” [Party 14]

This interviewee had another son with a disability who was on a Government training scheme after being unemployed for six months. She pointed out:

“that in itself created a horrible situation because I would never have liked my younger son to know that, yes, his father was responsible for supporting his older brother because he’s cleverer academically, but he’s not obliged to support you.” [Party 14]

The support of young adult dependants is perhaps a policy area that has been rather neglected. This study indicates that the burden of the ongoing support for young adult children may not be borne equitably by separated parents – having regard to the resources of those parents.

Ten of the data set MoA did include a clause to the effect that nothing in the agreement would prevent the child from claiming aliment in their own right under the 1985 Act.

### **Conclusion**

Unlike the division of property, the future care of children and the payment for that future care is an on-going commitment for parental couples when they separate. Child contact arrangements are susceptible to change due to the changing activities and wishes of both parents and children. Private child maintenance arrangements may be overturned by an application to the CSA or by the changing circumstances of the parents (such as redundancy).<sup>94</sup> Nonetheless, almost two-thirds of parties entering into MoA include agreement on child contact and/ or maintenance, perhaps reflecting that:

“they’re at the stage where they can actually talk about it and agree it and they both trust each other to the extent that they can put that together and sign a minute of agreement.” [Solicitor 4]

Many solicitors therefore were of the view that if parties have been able to reach agreement in their original MoA, it is likely they will be able to renegotiate in a changed set of circumstances.

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<sup>94</sup> Four parent interviewees had been made redundant in the three years since registration of their MoA (13%).

## Chapter 8

### Parties' perspectives on their minute of agreement

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The chapter recounts the party interviewees' descriptions of the process they went through that resulted in the registered MoA. This includes their motivations for seeking legal advice, the nature of the advice they received and the cost of legal advice. It also considers the role their solicitor played during negotiations and the extent to which the terms of the MoA have been adhered to. The chapter ends with a note on interviewees' satisfaction with the agreements they entered into and their assessment of their present standard of living in comparison with when they were living with the other party to their agreement.

It is perhaps worth observing at the start of this chapter that, while parties were aware they had taken advice and reached an agreement about property, they were not always so clear on the existence of a document known as a "minute of agreement." One observed:

"You're probably going to ask me at some point, did I agree to enter into a minute of agreement. And to tell you nothing but the truth, I don't remember being consulted." [Party 14]

However, this was not the response across the board and one party stated:

"I think everything was in that, that we, well I thought we needed, you have to make everything clear ... it was made very clear to me that if I stopped making payments or, you know, didn't, if something is broken it will be straight to court, it's a legal binding contract, you can't break it." [Party 27]

#### **When parties seek legal advice**

When couples ending their marriage or civil partnership divide their property, the value of the property divided is usually calculated by reference to the date of separation.<sup>95</sup> Where unmarried couples are concerned, they have only one year from the date of

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<sup>95</sup> Under s10(3)(a)&(b) property is valued at the "relevant date" and this is the earlier of either the date when the parties ceased to cohabit or the serving of a summons in a divorce action. Where it is agreed property is to be transferred from one party to the other, the date of the valuation may be either the date of a court making an order, or a date agreed by the parties under s10(3A) of the Family Law (Scotland) Act 1985.

separation to lodge a claim for financial provision.<sup>96</sup> Agreement over the date of separation is therefore of huge significance.

In the data set, 91% of MoA stated the date of separation and a surprising finding was that the parties had sometimes been separated for a significant period of time before entering into a formal written agreement in respect of the division of their property. Ten percent had been separated for five or more years, while the longest interval of time between separation and registration of a MoA was 13 years. That said, more typically it was the case that over a third (36%) of parties to a MoA had entered into the agreement within a year of separation and a further 25% did so within one to two years. By the time three years since separation had elapsed 86% of the parties had registered their MoA.

Consistent with these findings, interviews with parties revealed significant variation between the time of separation and the taking of legal advice, as well as in respect of the initial motivating factor for taking legal advice. It appeared that it was most usually women who sought legal advice first and male interviewees usually cited “wanting to get divorced” as their reason unless they were not having contact with their children, as described by the following interviewee:

“She didn’t provide me with any contact details, an address where they were living. The only thing I could do was send her text messages which she chose to ignore, so I had to go to a solicitor.” [Party 1]

Individuals exposed to abusive or otherwise unreasonable behaviour were also more likely to seek advice proactively (rather than doing so in response to the other party doing so first). For example, one woman who had been in a cohabiting relationship described how her former partner had put her out of the house and she had had to stay at her mother’s house with her son where she received threats and damage to her car. This prompted her to seek advice as:

“I was asking what my rights were to the house and all that kind of thing. Obviously I was worried about ... because things were in my name, what do I do and all that kind of thing. It was the lawyer that then advised me that you need

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<sup>96</sup> Family Law (Scotland) Act 2006, s28(8).

to notify all these people that you're not there anymore and start the ball rolling to disassociate yourself from him and that address, kind of thing." [Party 13 ]

The behaviour of a spouse or partner could sometimes propel a person to take advice before they even separated:

"I asked for legal advice before I left actually because, I mean, my husband had an alcohol problem ... so time and time again so I went to a solicitor, I said, you know what, I can't take a lot more of this, I said I don't want to leave but I'm going to have to leave and she sort of told me, you know, what I was entitled to and, you know." [Party 25]

Pragmatically, the need for legal advice to effect an already agreed transfer of the family home was obviously a key motivating factor propelling the party wanting the house to seek legal advice:

"I wanted to buy the house out as well. I had to go and see about that. So I felt I needed to see a solicitor and then I think he felt he had to as well, after that." [Party 15]

However in some instances, years of settled separated life might pass before one party took any legal advice:

"We'd been separated for about seven years by that time ... and there was no ill feelings or anything at that time. But he didn't tell me that he was going to do this. I got home one evening from work to find paperwork, this legal paperwork through my letterbox." [Party 14]

### **Separate legal advice**

On divorce, courts may set aside or vary any agreement which was not "fair and reasonable" at the time it was made and therefore a MoA might be open to challenge on this basis if the parties did not have the benefit of separate legal advice.<sup>97</sup> While 93% of MoA stated the parties had had the opportunity of obtaining separate legal advice, only 73% of MoA expressly stated both parties had actually done so, while 5% said one party had declined to take advice (most usually the male party).

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<sup>97</sup> Family Law (Scotland) Act 1985, s16(1)(b). See discussion in chapter 2.

Among the 30 party interviewees, over two thirds stated that both parties had taken some legal advice, while a quarter of interviewees stated that their former spouse or cohabiting partner had not taken advice. Only one interviewee had not taken separate legal advice stating:

“Maybe an important factor is that my dad had been divorced as well so I asked him quite a lot about things, you know.” [Party 19]

However, a further interviewee expressed surprise that his ex-wife’s solicitor had written to him to advise him to seek separate advice:

“they put in a sentence in the covering letter which was we strongly advise you to take independent legal advice ... So, I then went to the trouble of getting a solicitor and going through the documents and they basically said, it means this and I said, well, that’s what I thought it meant ... fortunately it was not too expensive but it annoyed me.” [Party 3]

Although not all individuals could see the point in each party to the agreement having separate legal advice, they were usually grateful for the end product – the written agreement. The individual quoted immediately above also stated:

“my only quibbles are about the process by which it was arrived at, I think, in terms of the agreement I’d give it nine [out of ten].” [Party 3]

Interviewees whose spouses or partners had failed to take legal advice, said they would have liked it if they had, as then they would know that what they had asked for in settlement was fair.

### **Nature of the advice received**

There are a range processes that are often referred to as methods of “alternative dispute resolution” (ADR). This is because they offer an “alternative” to the adversarial approach typified by a court action - in which each solicitor acts in the best interests of their client without regard for the impact on the other party or wider family. In Scotland, solicitors may undertake training to become accredited lawyer mediators or to be

known as a “collaborative lawyer.”<sup>98</sup> At the time of writing,<sup>99</sup> there are 403 solicitors registered with the Family Law Association of Scotland,<sup>100</sup> with 24% being listed as collaborative lawyers and 10% listed as acting as comprehensive accredited lawyer mediators (CALM). Interviews with parties revealed that it is often purely by chance that they find themselves (or their estranged spouse) being advised by someone who engages in these alternative methods.<sup>101</sup>

In practice, a CALM mediator sees both parties together (possibly with a co-mediator) and seeks to broker agreement between the parties over a series of meetings. The set of proposals arrived at (called a summary of mediation) are usually then taken by the parties to their respective solicitors for approval before they may be put into a MoA to be registered and, only then, would they become legally binding upon the parties. An advantage to the client is that mediation costs less than appointments with solicitors typically do, while it may also potentially be quicker than the four way communication at arm’s length that is the norm when both parties have their own solicitor and only ever meet separately.

Collaborative law, in practice, similarly involves both parties meeting around a table but this time they do so with the lawyers who are acting as solicitor for each party. These solicitors, trained in the collaborative law process, consider the potential impact of what is agreed on both clients and on the wider family unit. What is discussed is minuted and sent to the parties after the meeting and they can reflect on this and discuss their position alone with their solicitor prior to the next collaborative meeting. In general however, all discussions take place with both parties and solicitors present and concerns raised in private individual meetings are brought “to the table” when all four individuals meet. It is fundamental to collaborative law that the solicitors formally agree that they will not resort to court action involving the parties they represent.

It is also possible for separated couples to broker agreement using family mediation services provided by non-lawyers. Relationships Scotland has a network of affiliated local services which provide counselling and family mediation and the organisation’s website states the main aim of family mediation is to:

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<sup>98</sup> More detail on the training undertaken is given in chapter 9.

<sup>99</sup> 24.05.13

<sup>100</sup> [http://www.familylawassociation.org/public/familylawassociation\\_memberdirectory.asp](http://www.familylawassociation.org/public/familylawassociation_memberdirectory.asp)

Website accessed on 24.05.13

<sup>101</sup> Solicitors’ views on ADR are covered in the next chapter.

“improve communication, reduce conflict and to agree on practical, workable arrangements for the future, taking into account children’s views, needs and feelings. Our focus is on putting children’s needs first. Family mediation is for parents whose relationship is over and is for all sorts of families – married or unmarried, separated or never having lived together, younger or older.<sup>102</sup>

Advice on property and related issues might also be available from Citizens Advice Bureaux (CAB) and advice centres across Scotland. These sometimes offer clinics in which advice is available from legally qualified individuals (and law students), usually working on a pro bono basis. Four interviewees mentioned seeking advice from a CAB at some stage in relation to their separation.

### **Parties’ assessments of ADR**

Only one MoA mentioned that collaborative process had been used in the brokering of agreement and two other interviewees had experience of collaborative process. In these two cases this had been used to resolve a single issue (one party taking the children abroad and liability for capital gains tax) rather than for the entire process.

No MoA mentioned that CALM mediation had been used in brokering the agreement and no parties interviewed had experience of this. However five MoA mentioned family mediation would be used in the future if the couples could not agree a matter of major import to their child and three interviewees said they had attempted family mediation – one of whom had successfully used this process to reach agreement (prior to having lawyers put it into legal terminology as part of a MoA).

One party explained that mediation had failed for them because:

“I think we just weren’t communicating at all on any level by that point, so even sitting in a room together. He left me and I was just finding it emotionally very difficult.” [Party 11]

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<sup>102</sup> <http://www.relationships-scotland.org.uk/about-us/our-services> accessed on 24.5.13

While another explained that mediation had failed for them because:

“my partner, originally, wouldn’t move out the house and wouldn’t divide up any property without solicitors so in the end we had [both] mediation and solicitors. It was all very costly.” [Party 12].<sup>103</sup>

This former cohabitant, who had owned her home - prior to her partner moving in and putting the house in joint names, stated it was only when she phoned a solicitor (almost a year since the relationship had ended) that:

“he said, ‘Oh gosh. If that’s when you separated you’re just about at the end of the period from where you can do anything.’” [Party 12]

The one interviewee who had successfully reached agreement with his former spouse through mediators believed that person had been well informed about the law:

“Yes, I think it was pretty clear, one specific thing being we had four children and she was pretty clear about what slice went to my wife at the time financially and so on, so we got a lot of steer from her, yes.” [Party 28]

I: So what did she say was the appropriate division of property then?

R: 40/60.

I: What was that based on?

R: Precedent”

All three of the parties who had had the benefit of legally qualified individuals assisting them to reach agreement through collaborative process offered an overall positive assessment of the process (even when they might not have been satisfied by the outcome). However, one explained he had only agreed to it because it would be the “cheapest way of doing it” but that his solicitor said he would not take part as he believed collaborative law to be “nonsense.” Consequently this interviewee had picked the name of a collaborative lawyer from a list of names. He said:

“I was the only male in the room, because we both had female lawyers, not many people do collaborative law ... and I thought mmm, am I getting, you know, are

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<sup>103</sup> Note, “separation” need not necessarily refer to the couples living apart but that they are no longer living together “as husband and wife” as per s13(2) Divorce (Scotland) Act 1976.

these two solicitors friendly because some of the things I suggested and she [solicitor] suggested, you know, we didn't, we didn't harmonise all the time.” [Party 27]

However, they did reach agreement over time and he summed the process up in this way:

“It's quite clean cut, it was very easy,, we didn't have to go into court and fight, we kind of argued over a table, you know, and a cup of tea.” [Party 27]

Parties who had not been given the opportunity of alternative processes for reaching agreement (and who were often unaware they existed) gave mixed responses as to whether or not they would have liked the opportunity to use mediation or collaborative law. Most were negative, some citing domestic abuse or mental health issues as making the prospect too excruciating. One woman who had had an abusive partner observed:

“I mean he could talk till the cows come home to lots of other people about, oh I love her and oh just, and I think he would have done that in mediation, ... he would have put on a difference face.” [Party 26]

One interviewee would clearly have liked the opportunity to use ADR, stating she had gone to a Citizens Advice Bureau and been told she “absolutely must see a solicitor” and that it has to be a “separate solicitor.” She was unhappy with this and stated that upon meeting with a solicitor she had said:

“I said, you know, I don't want to do this, you know, it's just it's not natural to me, I just want to sit and talk and sort something out, but then she just said it's not the way it works.” [Party 25]

### **Role of lawyers in reaching agreement**

94% of those entering into MoA are homeowners and the issue of the sale of the home or the transfer of it to one party is a key issue which often brings them into contact with solicitors and may lead to them entering into a MoA dealing with the division of all matrimonial property and discharging any future claims one party may have against the

other. Only three MoA in the data set appeared to have been drafted and registered by the parties without the benefit of legal advice.<sup>104</sup>

In interview, one respondent explained how, in an effort to avoid legal fees, he had spent £25 and downloaded a pro forma separation agreement which he had filled in and got his wife to sign prior to registering it. Neither took legal advice. By the time of the interview with him, however, he had spent £13,000 on legal fees and had been forced to pay an additional £10,000 to his wife out of negotiations flowing from his wife's discovery of what she was actually entitled to in law, following a later consultation with a solicitor. This interviewee continued to occupy the jointly owned home and ran his own business. He had given his ex-wife £5,000 and omitted to mention his pension. This was the largest amount spent on legal costs cited by any of the interviewees. When asked if he felt it would have been better if he had taken legal advice at the very beginning of the process, he stated?

“Yes. I mean hindsight is obviously a wonderful thing but it was the circumstances at the time; because I was skint basically, and I knew that as soon as you see a solicitor you're into hundreds of pounds, it puts people off. I did go to the Citizens Advice Bureau when she did a bunk and obviously when we had first split up just to see where we stand, and I mean they were very good but they can only point you into the direction of different agencies to help you. There wasn't a lot of advice they could actually give me, not legal advice anyway. That would have needed to come from a solicitor.” [Party 1]

A number of interviewees asserted they already knew what they wanted to include in their agreement and that, having negotiated between themselves, they just wanted to seek legal advice to “formalise matters” or to have their agreement put into “legalese. They may not have been fully aware of the significance of some of the clauses their solicitors included in the MoA and the possible impact on them had some of these clauses been omitted.

Not all interviewees minimised the role of their legal adviser to quite the same extent, as some had relied on that person to keep the process of negotiation moving when they felt the other party was deliberately blocking the resolution of the outstanding issues (such

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<sup>104</sup> A number of factors gave this impression from the layout of the document, the use of outdated (or English) legal terms and the omission of many standard clauses.

as not getting valuations or insisting on a larger capital sum). Those who were particularly vulnerable, such as victims of domestic abuse, appreciated having someone in their corner, taking on an unreasonable ex-partner:

“she probably was a bit hard ... more hard ball than me, I think she initially said, we would go to an offer of something and I’m like, oh he’ll never accept that. She said, yeah but it doesn’t matter, we know he’s not going to, but we’ll start there and work our way up, kind of thing. So she was very good and did try to get the best, kind of a deal, for myself. I probably was my own worst enemy because I was just, like, I just want it sorted. [Party 13]

Another victim of domestic abuse (who had been assaulted by her ex-partner when she met him to obtain his written renunciation of occupancy rights) said that seeing a solicitor,

“made, I think, my ex partner then have to go to a solicitor and it made, it took it out of my hands in that way and made it seem more formal, which was necessary, I think, as well.” [Party 26]

Others in less precarious positions, however, did not necessarily like the formality:

“I also think they need to, they need to make it a bit more user friendly, shall we say. It’s too stuffy. It’s all about them and them and their legalese and the language and what have you. And there’s a way, there’s a certain way that they feel that they’re superior. We’re all human beings. We all came from the same place and we will go back to the same place. It’s about treating people with humility, I think we should maybe aim for that.” [Party 14]

It was notable however that in some cases solicitors had clearly poured “oil on troubled waters,” as it was the interviewee who had initially had gone to see their solicitor with a view to taking their partner to court, and the solicitor had diffused their drive to do this by pointing out the costs and uncertainty involved and by explaining what it would actually involve, process-wise.

### **Cost of legal advice**

The cost of legal advice was an issue that was of concern to the interview respondents. Those that did not qualify for legal aid typically stated their MoA and divorce had cost

between £1,500 and £6,000, with solicitors quoted as charging £200 per hour. This had propelled some of those who were able to negotiate between themselves to do so and only to seek advice for the final formalisation of their agreement:

“I didn’t have the finance for a lawyer to seek after anything that I possibly wanted ... We were quite amicable with the fact that we knew what each other wanted from this - we’d been together 20 years or whatever - so we were quite happy at the time what she would keep and what I would keep with regard to what was best for the children as well.” [Party 5]

Cost also meant parties who found themselves having to negotiate with the help of solicitors nonetheless tried to avoid a court action which would cost significantly more. In some instances, this meant parties simply settled for what was being offered to them rather than pushing for more. One woman, whose husband had promised her the equity in the home but later reneged on this, stated:

“my solicitor had said to me that instead of agreeing to that I could take it to court ... but if you do and you lose you lose everything and you have to pay the costs, so it’s up to you what route you want to take? And I said; well ... I’ll just agree to what’s been agreed rather than take it to court.” [Party 6]

Only one of the dataset MoA mentioned that one of the parties was in receipt of legal aid. In interview however, seven of the 30 respondents had either been in receipt of legal aid or their ex spouse or partner had been (all women).

During the year that the dataset MoA were registered (2010), anyone with a disposable income of less than £26,239 could qualify for legal aid. As MoA do not require a solicitor to go to court on behalf of their client, the work may be done under “advice and assistance” and, at the time, solicitors were able to ascertain whether they believed the client qualified.<sup>105</sup> The costs of the advice and assistance given may be clawed back by the Scottish Legal Aid Board out of the value of property the client recovers or preserves as a result of the MoA.

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<sup>105</sup> By sight of bank statements and a letter from the Department of Work and Pensions, for example.

As solicitors doing legal aid work are typically paid around a third of those with clients paying privately, legally aided interviewees usually cited a smaller total cost for the advice they had received (£35-£500). However, some of these women had had the family home transferred to them and thought their legal costs had been taken out of the remortgage by their solicitor and they were uncertain of the total cost.

One legally aided woman had incurred legal fees of £7,000 and had spent a significant investment of time and energy challenging this because she had actually increased her mortgage at the time the home was transferred to her in order to take the matrimonial debt. So it was debt, rather than asset, she had retained. The Scottish Legal Aid Board eventually cut her bill to £3,000 as a result of her appeal.

One recipient of legal aid, who was also a victim of domestic abuse, observed:

“I think I was concerned about the legal aid and would I qualify ... legal aid is really important, otherwise I wouldn't have been able to get the Minute of Agreement.” [Party 26]

However some parties were resentful if their spouse or former partner was able to get legal aid for advice and assistance as they perceived this meant that other party was in a stronger position as, but for the legal aid, they might not be able to afford the negotiations:

“I think, she was trying to use that, saying that she was getting legal aid, but I don't think she was and that's why she didn't go for my pension because she couldn't afford it.” [Party 19]

One interviewee believed his wife being in receipt of legal aid might have lengthened the process as, in his view, the service given by legal aid solicitors is at a lower level causing the non-legal aid solicitor to have to keep chasing up the other one. However, another interviewee responded in the following way when asked if he thought his ex-partner being in receipt of legal aid had made any difference to the way the process proceeded:

“I wouldn't think so because, I mean, basically she couldn't afford to pay for a lawyer but she needed to have a lawyer. So, you know, you can't do these things for yourself.” [Party 4]

### **Sticking to the agreement**

As the interviews with parties were conducted three years after the MoA were entered into, it was possible to ask parties whether there had been problems sticking to any of the terms they had agreed. Overwhelmingly the terms of the MoA had been put into effect, which may be due in part to the fact that in a significant number of MoA there had been a clean financial break between the parties. The scope for a party to break an obligation was therefore effectively removed. That said, two respondents observed that they had retained ownership of heritable property beyond the agreed date of sale in the MoA because the value had dropped so significantly; rather they had decided to wait until the market improved, this being possible because repartnering meant they were all housed elsewhere. Another respondent said they were intending to proceed with the sale, but whereas the MoA had said she was to receive the first £140,000, it was now the case that they would be lucky if the property fetched this at sale. Thus they had agreed between themselves that her ex-spouse would take just £20,000 from the sale price and she would take the rest of the net equity in the property.

Where agreements did include provision for ongoing payments (spousal aliment, periodical allowance or child maintenance), the scope for a material change to affect the payments obviously exists as described in the previous chapter and three interviewees reported a drop in the child maintenance they received. One of the mothers affected in this way said:

“I have to take him (ex-husband) by his word but since the divorce he hasn’t come forth with his accounts like he’s meant to have done ... Now if you go back to the solicitor that’s just cost me money to do that. I was thinking the other day I could find out whether I could write to his solicitor myself and do it that way and not get a solicitor involved on my end.” [Party 11]

Another interviewee (who was still married to her spouse) was not getting the instalments of the capital sum transfer that had been agreed and which was intended to enable her to pay off the mortgage as well as covering aliment:

“he used to give me £3,500 a month because our mortgage is £1,500 and now he’s reduced that to £2,500 with his change of job so, you know, it’s a battle all the time and I’m trying to make him understand, you know, that with him doing that, that has reduced my circumstances quite a lot.” [Party 2]

Her situation was complicated by her husband working in the Middle East, leading to problems with enforcement of the terms of the MoA.

Although MoA are legally binding, with the force of a court order, enforcement by having sheriff officers serve an ex spouse with papers may not be something parties who have previously negotiated an agreement wish to do and the cost of this enforcement may also be a barrier.

I: "So it's actually fallen the amount that he's giving you from when you first entered into the agreement?"

R: Yeah.

I: Has that made things difficult because obviously you're having to have some degree of contact with him with the children going to see him every week?

R: Yeah but it would cost me to try to enforce anything." [Party 11]

Solicitors were also of the view that cost might be a barrier here:

"Ultimately you've got to trust your estranged spouse to honour the agreement. If they don't, you've got a bit of paper saying you can get it back from them. Now if they're working, all you do is serve a charge and arrest his wages. But you have to pay your solicitor to do a wee bit more; the world doesn't roll it out on a plate for you. And it's like all these disputes; is it worth the legal fees to pursue the debt? How much is the debt worth?" [Solicitor 13]

### **Life after agreement**

Both male and female interviewees generally believed their life was better post agreement. All men but one reported their financial situation was either the same or better than when they were married but 25% of women interviewees reported income falling below £15,000.

"It's very difficult for women to manage on their own financially with kids after divorce, because you never have enough money. You're ... very few women would be in a position where they would be earning as much as, or more than the husband whom they departed from would. And I don't know any single mothers who are well off financially. I really don't. And I think that's what

forces women into second relationships and marriages as well. But I didn't do that. I was determined to bring my kids up on my own ..." [Party 14]

Nonetheless a theme among women was that even though they did not have the money for a better standard of life they considered they had a better quality of life:

"I would say it's slightly more relaxed, and I don't mean that in a bad way, just, you know, the fact that things got quite fraught for a few years before we separated." [Party 10]

Another woman observed:

R: "Mental well being has improved. Yeah, just I think for all of us. Well, for me and the kids and I would say it's improved in terms of the choices that we've been able to make.

I: And if it was purely to do with finances, would they have improved or stayed the same or diminished?

R: Diminished." [Party 26]

Both men and women appreciated having control of their own finances. However some men lamented having to do household chores now they were on their own.

"I no longer have somebody that does the cleaning, the washing, the tidying, you know, so that's why it's changed because I've got to bloody do it and I can't be bothered." [Party 1]

Around half of all interviewees reported that either they, or their ex spouse/partner were now married to, or living with, a new partner and this contributed to their assessment of their present standard of living:

"I'm with a new partner and both of us work ... So because we've got two decent salaries coming in ... I've definitely got a much better standard of living now." [Party 13]

### **Satisfaction with the agreement**

All interviewees were asked the following question:

Even though you probably had to compromise on some aspects of the agreement, how satisfied would you say you are overall with your MoA on a scale of 1 – 10, where 1 is “extremely dissatisfied” and 10 is “extremely satisfied”?

Thirteen (43%) of interviewees rated their MoA a “9” or a “10.” For example:

“I would probably say ten because, although it was horrible at the time, it allowed me to keep the property that I still live in and that I call my home and it allowed me to get divorced and move on with my life.” [Party 17]

A further ten (one third) rated it either a “7” or “8”; while six said “5” or “6”. Parties who had experienced extreme stress around the time of negotiations or their former spouse had defeated one of the terms of the agreement tended to score lower. For example:

“Probably round about five, I think, because of the monthly payments [going down], and I don’t suppose that’s the fault of the minute.” [Party 21]

However, despite not necessarily liking the terms of the final MoA, many parties appeared able to rise above this and move on:

“it was a fairly hard knock to take to come out of this with less than half of the assets, but I think having knuckled down to that I think the nature of the minute of agreement was very fair and reasonable, so eight plus, maybe nine.” [Party 28]

However, some resented having to make ongoing payments:

“I would say probably about seven or eight, because I'm still paying money to my ex.” [Party 27]

Only one respondent said “3” or less and this was because he considered poor advice had left him liable to pay capital gains tax if his wife were to transfer heritable property to him. Nonetheless this same interviewee observed:

“It probably gives me some degree of - what would you say? – stability, because if there wasn’t such a thing as a minute of agreement, I think we would have been really in schtook.” [Party 22]

This was a sentiment that was repeated by several interviewees:

“if you’ve got it in black and white you can’t go again and say, no that’s not what was agreed. You know, and it’s just protection for you” [Party 15]

### **Conclusion**

Couples who separate do so for a number of reasons and across a range of circumstances, and therefore there is considerable variation in the forces propelling them into the taking of legal advice. However, their collective experiences highlight the importance of affordable and accurate advice available from legally qualified individuals, as well as the importance of having a choice in the actual process they enter into.

## Chapter 9

### Solicitors' perspectives on minutes of agreement

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This chapter presents solicitors' perspectives on the role of minutes of agreement in settling the division of property and any on-going support when couples separate. Included is a discussion of the impact of the Family Law (Scotland) Act 1985 on the advice given by solicitors as well as their views on the durability of the agreements entered into. The chapter ends with solicitors' thoughts on the impact of alternative methods of dispute resolution (in the form of lawyer led mediation and collaborative law) on the provision of advice and assistance by family lawyers in Scotland.

#### **Reaching agreement with and without the use of courts**

Most separating couples do not go to see a solicitor with a specific intention of entering into a minute of agreement. As one solicitor put it:

“People don't come in asking for a minute of agreement. They come in because their marriage has broken down. Sometimes they come in raging and they just want to go a straight to court. Or they want you to fight, or they want to run away but what we try to do always is explain to them that the matter ought to settle in the form of a minute of agreement. The minute of agreement is not a goal, it's a tool.” [Solicitor 2]

Thirteen solicitors were interviewed as part of the present research (six men and seven women), all of whom do litigation in family actions if necessary. However almost all expressed the desire to avoid going to court if at all possible:

“My practice is based on the fact that I don't think the court should be used for family matters, particularly children, but the more they can sort matters out between themselves, it's better for everyone. It just saves them money and they don't have the added stress of going to court.” [Solicitor 1]

“The phrase I always use is that the court is the worst place to come to any family law decision, unless it's the only place.” [Solicitor 2]

That said, almost half the solicitors interviewed stated that between 40%-50% of their family law cases went to court at some stage and a further quarter of solicitors estimated between 5-15% of their family law cases went to court. By contrast one stated "I have only been to court four times in the last 16 months" and another, that going to court would be "exceptional." The solicitor interviewees were fairly unanimous in stating that it was usually disputes over children or the need for protective orders that would propel a case into court.

"I mean, there's been cases where they needed to raise a court action because either they weren't getting any contact or, you know, the child was in a bad position and they wanted the child to live with them." [Solicitor 9]

Where disputes over property were concerned it was usually where there was a dispute over the value of an asset or over whether something was matrimonial property or not that might propel the case to court.

"You can have arguments about whether an asset is or isn't matrimonial property. You can have arguments about to what extent do you take in the source of funds used to acquire an asset. Valuations of companies - that, and the other issue I suppose might be if someone is seeking an unequal division". [Solicitor 3]

Solicitors were clear that it was counterproductive to diminish the matrimonial property pot:

"The only people that I truly believe that benefit out of litigation are solicitors, you know. Most people do not have so much money that they can afford to spend, you know £20,000 on court fees. I am sure most people would rather that that was left in the kitty between them." [Solicitor 10]

Several solicitors described trying to dissuade clients from going to court:

"I always say to clients that want to go to court, you know, what happens there is a sheriff looks at the facts and makes a decision and it's usually a decision that nobody particularly likes. This gives them the control or, you know, at least a

modicum of control to navigate through what do we have, how can we make this work for us..." [Solicitor 5]

They were also clear on why a MoA was beneficial in contrast to going to court:

"The existence of minutes of agreement allows a binding arrangement to be made by negotiation. But without the dangers of judicial intervention, if you like.

I: And which dangers would they be?

R: Well, I think if we had the English – I can't comment on the English system as such, but I'm aware they need the approval of the court ... and that might open up things that have previously been shut down." [Solicitor 12]

Solicitors predicted that a negotiated agreement would be better suited to the parties' requirements than a court order:

"It takes away the difficulties with court. The lack of certainty with court. The cost of court and it makes the settlement between the parties more likely to succeed because they have both worked towards that. It's not imposed from somebody else." [Solicitor 4]

The MoA may not be a goal of the client when they first take legal advice but it is often a goal of the solicitor and the existence of this tool may influence the whole process:

"In my initial letters, if a client comes in, I would be writing to the other partner to say this is the way forward, we want these things agreed in a minute of agreement, go and see a solicitor so we can enter into a discussion with them. So that's really from the word go, you're trying to have things set down in a minute of agreement." [Solicitor 8]

Clearly, reaching a negotiated settlement drives a lot of the work family law practitioners engage in, however, importantly, the fact that it is possible to take family law cases to court in Scotland is also a factor that aids agreement outside of it:

"[court] is very much a last resort and it quite often can focus people's minds, you know, okay give her an extra £5,000 or whatever it is because it's still

preferable to, you know, the amount that you might lose if you go to court.”  
[Solicitor 10]

Even when an action has been raised in court, MoA still have a function as the parties may still reach agreement outwith the court system (through negotiation) and simply include in the MoA that they will lodge a joint minute in court asking for the action to be dismissed (at least all craves except divorce). In the research data set, 11% of MoA referred to a prior subsisting court action.<sup>106</sup> In a third of these the parties agreed in their MoA to dismiss the court action, and in two-thirds they agreed to dismiss the action with the exception of the crave for divorce. The details of what they agreed in respect of financial provision were contained within the MoA – just as for parties who had not raised a court action.

### **Bargaining in the shadow of the law**

It may be said that parties who enter into minutes of agreement are bargaining in the shadow of the law contained within the Family Law (Scotland) Act 1985 because they usually do so following a process of advice and negotiation involving solicitors who know how court cases are decided under the 1985 Act provisions. The principles of the 1985 Act were described in chapter 2 of this report, together with discussion of the importance of a “clean break” solution. Solicitors were clear that these statutory provisions assist them in offering guidance to clients.

“In Scotland we can predict what is likely to happen. Therefore, it’s much more easy to say to somebody, this is the kind of agreement which should be reasonable.” [Solicitor 2]

"The minute of agreement was always around but I think it may have become a more popular way of taking things forward because for many couples the Family Law Scotland Act 1985 is a process of definition and adding up and dividing and going from there." [Solicitor 12]

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<sup>106</sup> 15% of these actions were between cohabiting couples (rather than spouses) which is the same proportion of cohabitants as across the data set as a whole. As cohabitants have only a year in which to make a financial claim upon separation, one might have expected this proportion to be higher as they sought to ensure their claim did not become time barred.

“The legislation is good. The Family Law Act 1985, in my opinion, is one of the best bits of legislation ever passed. I think it’s a terrific Act. Basically it’s a 50/50 split unless there’s special circumstances.” [Solicitor 13]

### **Explaining the law**

Solicitors were asked to what extent the individuals coming to see them, already knew what they wanted to happen in respect of the division of property. They varied in their responses from “not at all” to “most do,” however they were clear of their obligation to their client:

“People come in and say, I've discussed this, this is what we've agreed, and when I look at it, it doesn't represent what I think the law suggests they should get. But, my professional responsibilities are to give them advice, and sometimes it's trying to get over the hurdle that they don't want the advice, this is what they've decided and they just want me to put it in writing and how that conflicts with my legal obligations to them, to give them advice.” [Solicitor 1]

“They know what they want in it, but they don't appreciate what their legal rights and obligations are. Because the agreement has to be negotiated in the shadow of what the court would do if they were not to negotiate.” [Solicitor 2]

“There are often some issues that they haven't thought about when they're coming, and they maybe, for instance, don't know anything about pensions. And they don't maybe appreciate that pensions are a part of the matrimonial assets.” [Solicitor 6]

The approach taken by solicitors, in advising clients, was summed up succinctly by the following solicitor:

“The first thing is to get all the hard core information, who wants what and what's the value of things, and then ascertain what's matrimonial, what isn't, and then put values on these ... the next stage is look at the particular circumstances of this marriage. And the starting off point is a fair division, which usually means 50:50 but it doesn't have to be, and you can have special circumstances and then go through the things like economic advantages, disadvantages, source of funds argument, hardship, children, what have you.” [Solicitor 6]

Once clients knew their entitlement in law, this could be a relief for them:

“Maybe, I’m flattering myself, but when you tell them that they have all sorts of rights, if they’re financially disadvantaged, they actually are emboldened by that. There are loads of things they can do if they are in a difficult financial situation.”  
[Solicitor 8]

Generally solicitors preferred it if the other party also had a solicitor representing them as they found this could encourage an intransigent party to accept their obligations in law:

“The strongest ally if you act for one party, in getting the other party to behave reasonably, is that they actually go and see their own solicitor. That’s the thing that most straightens it out. So maybe you’ve got some correspondence with the unrepresented party, and a lot of the time you’re wasting your breath, but if instead of corresponding with you, they go to see a solicitor, the solicitor who’s ultimately looking out for their interest tells them various things and says, no, no, no, you’ve got to get a pension evaluation, you can’t not get that ...” [Solicitor 12]

Avoiding later challenges to the terms of the MoA on the basis that it was not fair and reasonable when entered into was another reason solicitors liked both parties to have separate legal advice:

“I always like everybody to have legal advice or I put a clause in that says, having been offered the opportunity to take legal advice, declined to do so. So that at least the courts can see, well, okay, we gave him the chance but he didn’t want it.” [Solicitor 4]

### **The matrimonial property pot**

The first step in reaching an agreement about the division of assets is, of course, to glean what those assets are.

“Most family lawyers, you will find the ones who do this regularly, start with a schedule of assets and liabilities. That’s your working document. Have you got

stocks and shares? Pensions, all your pensions? Houses, do you own any other houses? Did you buy your granny's house? You know, what all have you got? And liabilities. I don't care whose name it's in. Credit cards, debts, secured loans and to be honest in this office we have now got to the stage where if people say they have a house we always do a search and you'll find that actually their double glazing had a standard security over the property, et cetera." [Solicitor 4]

Most solicitors interviewed also said they insisted on evidence of the value of the assets (vouching), and they would not put in the MoA that there had been full disclosure of assets unless this had been forthcoming. However, only 30% of the MoA in the dataset actually included a clause stating that both parties warranted they had made full disclosure; while 3% included a clause stating they had agreed not to seek full disclosure.

As well as the assets, it is also necessary to know the resources of the parties so that it can be determined if the proposed division of property is reasonable.<sup>107</sup> Solicitors sometimes experienced difficulties in establishing the extent of these – particularly when one or other spouse had their own business.

"I've had a few suggestions from wives, particularly where husbands were self-employed and they did 'homers' and all the rest of it and I have to say, that's quite difficult, because you cannot raise a court action and then just go on a fishing expedition, you have to have evidence and sometimes that's really difficult, whereas they know they're doing it and they know they're doing 'cash in hand' jobs, but they have just no idea how much and how often, and that's really difficult." [Solicitor 1]

When the other party refuses to cooperate in such cases, it may be that:

"You need the court. You can say, well this man has got this and this and this asset. And the man says, no I don't. Then of course you can't apply our firm and useful principles of law because we don't have the facts to which to apply them. And the court requires to make a finding in fact." [Solicitor 2]

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<sup>107</sup> s8(3) Family Law (Scotland) Act 1985

However, solicitors were generally of the view that most clients disclosed their assets and most (but not all) stressed that they encourage full disclosure.

**Fair share of matrimonial property: ss9(1)(a) and 10(1)**

Almost all solicitors stressed they take an equal share of matrimonial property as their starting point when advising clients:

“Can I just say my clients are told, the law says an equitable division, generally speaking that’s 50/50. Only in very special circumstances indeed would you get anything other than that. I have only had it once and that was when the lady had a [disabled] 25 year old, and it was quite clear that she was going to have to have the care of that child forever and a day and she got 55 per cent as opposed to 45 per cent.” [Solicitor 4]

“Well I think I would say nine times out of ten, you would be telling a client it’s going to be a fair division which will be 50/50.” [Solicitor 8]

One solicitor, who was not so opposed to going to court (and claimed many of his cases went to proof), stated:

“50/50 split means two things; acting for the wife, it’s the minimum you get. Acting for the husband, it’s the maximum she gets ... and if people want to moan about it well, that’s fine, we’ll just be flinging in a writ and taking you to court. And you can kick and scream and do what the heck you like, it’s going to be a 50/50 split.” [Solicitor 13]

**Economic advantage and disadvantage: s9(1)(b)**

However there were some instances in which some solicitors said they would attempt a deviation from the 50/50 split – one of which was actually given by the solicitor just cited above:

“I’ll give an example, say you and your wife, before you had children, both worked in computer support, you were both on call night and day, you both had the same salary, but your wife stopped work because you had three children under five, and she’s been working as a school secretary ... she still can’t do the

nights and weekends of cover, bring in extra payments, because (a) she's stopped and (b) she's got the children most of the time, and the youngest child's only first or second year at school, so there's a few years before she can just go off at two in the morning because there's been a call, whereas you only have them two nights a week, so it's easy to arrange the two nights not to be your on call nights." [Solicitor 13]

Another solicitor stated she would seek a disproportionate split where,

"(The wife) has given up a good job to raise children, to perhaps move around the country supporting her husband ... and her claim is greater than a wife who has still remained in a full-time job and has perhaps, you know, employed a nanny or whatever, and she has still maintained her job prospects. It's really to compensate, it's to compensate for job prospects, to compensate for loss of income." [Solicitor 10]

However one solicitor observed:

"Well in the '85 Act, 9(1)(b) is not particularly important because 9(1)b in the '85 Act is only one of five criteria. And 9(1)(a) along with section 10 is easily the most important one. It, 9(1)b and 9(1)c, are really garnish to the main meal of 9(1)a." [Solicitor 2]

### **Cost of caring for the children: s9(1)(c)**

Solicitors were of the view that this section is effectively redundant due to the Child Support Act 1991.

"There's the section 9(1)(c) of the Family Law Act, which allows the courts to adjust financial settlements to have regard for the obligation for the care and upbringing of children. In my experience, that gets no use at all in Scotland because universally it's considered to be offset by the alimentary obligation. You won't have any hardship in relationship to bringing up the children because the CSA will fix a fair aliment and you'll always be paid." [Solicitor 13]

Prior to the 1991 Act, however this section might have resulted in a greater capital sum settlement:

“Before the CSA came in, there was a very strong tendency in Scotland to give the wife the house, to give the wife 70/80/90 per cent of the capital asset, in return for paying £2 a week, some nominal sum. But basically the husband with the higher income yielded the property to the wife with the lower income and things like that, so that the children could live where they had always stayed, in return for him being able to restart again with his higher income and a very low alimentary obligation ... And that was completely destroyed by the CSA Act.”  
[Solicitor 13]

This theme was repeated by other solicitors who had been in practice at the time:

“The damnable thing about minutes of agreement nowadays is the 12 month rule for child support [because] if either party applies for a child support calculation after a year from the deed, then that will supersede the alimentary provision of the agreement. Now that 12 month rule means that a lot of good minutes of agreement are not being entered into. The government say, well point to us these minutes of agreement, but I can’t because they’re not there. These are the minutes of agreement which are not being entered into because of the 12 month rule.” [Solicitor 2]

### **Post divorce hardship: s9(1)(d) & 9(1)(e)**

Financial provision which enables a party who has been dependent on the other to a significant degree during the marriage to adjust to the divorce may be effected as part of the capital sum transferred to that person, or may take the form of a periodical allowance - where the available resources for a capital sum transfer would be insufficient to cover this. This is also the case when the financial provision is intended to offer relief of serious financial hardship caused by the divorce.<sup>108</sup> Most of the solicitors interviewed seemed to feel that these provisions were increasingly of limited usefulness:

“I mean, people who are in their 40s and 50s now, maybe less so 60s, but people of that era, most husbands and wives have worked. There are very few traditional – I mean, can you use the word ‘traditional’ now for a family of mum

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<sup>108</sup> s 13 (2)(a) and (b) Family Law (Scotland) Act 1985

at home looking after the children? At best, you've had periods of maternity leave and interrupted employment." [Solicitor 13]

However, others found s. 9(1)(d) useful, pointing out that even though women may work, when they have children, they may need to build up those hours to become self-sufficient:

"it's the woman that takes the maternity leave, it's the woman that goes back part-time, and even if she perhaps started off, you know, on an equitable salary with the husband, that invariably is going to, you know, reduce a bit ... It's really looked at as an adjustment allowance, it's really to allow one party to adjust to, you know, the reduced standard of living. Normally three years is deemed to be sort of sufficient for them to perhaps increase their hours at work or look for a job or... really adjust to the situation." [Solicitor 10]

Solicitors thought it would be very rare that clients agreed to ongoing spousal support beyond the three year period, although one suggested:

"They're more likely to prefer to pay the mortgage until the kids get to a certain age, that kind of thing. It's not a terribly popular thing I don't think this, you know, an indefinite spousal maintenance situation". [Solicitor 8]

A key reason for solicitors not recommending parties agree indefinite terms is:

"The clean break principle is a very wise one, because you want to make, implement the terms of the agreement, relatively quickly, I would say, to stop any possibility of things going wrong." [Solicitor 1]

As discussed in the previous two chapters, it is these ongoing payments – for child support or spousal aliment that are the most susceptible to variation post agreement, often due to the changing circumstances of families.

### **Durability of agreements**

While all solicitors could recall giving advice to individuals who had questions related to a MoA they had entered into, they were equally clear that this was a minority of cases:

“... of all the minutes of agreement that [clients] enter into, probably 99 per cent you never look at again. But you have to just explain that the idea of the minute of agreement is for certainty, to be there if things go wrong.” [Solicitor 6]

The possible challenges are limited:

“Well the minute of agreement has a lot of clout. This is what the English don’t understand. That prenups, cohabitation agreements and so on, they are pretty well respected fully by the courts barring the considerations of force and fear, fraud, or section 16 of the ‘85 Act.” [Solicitor 2]

Key reasons cited by practitioners for the challenges they had been involved in were that there had not been disclosure of assets or one party had failed to take independent legal advice:

“I am dealing with one just now, where, and I keep reminding the client, please don’t go on about that agreement, because you know fine, you should have taken advice when you signed it. Well she did take advice from a Citizens Advice Bureau [and then] just one solicitor dealt with it and it’s just so, it’s completely ambiguous for both of them.” [Solicitor 3]

Some solicitors had also been approached by clients when aliment payments had dried up or become sporadic. Solicitors were of the view that this situation could usually be resolved by writing to the party in default and reminding them of the agreement:

“If the parties ex hypothesi have been able to reach an agreement. Therefore, ex hypothesi, they’re going to be able to reach an amended agreement.” [Solicitor 2]

“I would say most times some sort of agreement is reached. But, you know, I have had cases where I’ve had to instruct sheriff officers when for whatever reason the money hasn’t been forthcoming.” [Solicitor 10]

Because the MoA has the weight of a court order, it was very useful when attempts at renegotiation failed:

“in that scenario when somebody took a debt on and didn't pay it [and] your client paid it off, then what they do is we send the minute of agreement to sheriff officers, and we say in terms of this clause, she's paid this amount and could you serve a charge. Basically, the minute of agreement then takes the form of court decree, so you don't have to go back to court.” [Solicitor 1]

“You then use the agreement as a court document. So if he's a thousand pounds behind with what he said he was going to pay you can use that to arrest his wages, you can use it to arrest his bank account. So you can get your money back that way, it's whether or not, you know, that the person involved, you know, wants to go down that particular route, but that is open to them.” [Solicitor 10]

As one of the party interviewees had discovered, a potential problem is, of course, that one of the parties to the agreement goes to live in another jurisdiction. The Middle East in particular was mentioned by some solicitors but so was the Channel Islands. In such circumstances solicitors relied on newspaper advertisements to encourage the parties to make contact. In the MoA data set, 18 men and three women were recorded as living outside of the United Kingdom on their MoA.<sup>109</sup>

### **Solicitors' perspectives on alternative dispute resolution (ADR)**

The previous chapter described the practices of “comprehensive accredited lawyer mediators” (CALM) and also accredited collaborative lawyers. Among the 13 solicitors taking part in this research project, three were accredited collaborative lawyers, one accredited to do CALM and three were accredited to do both. That is a total of seven who stated they engaged in ADR (54% of the solicitors taking part).<sup>110</sup>

Solicitors explained the impact of training in ADR on their practice. In respect of CALM:

“I felt from the moment that I'd started the [CALM] training course it just made you look at the whole thing in a different way. And it made you much more careful about what you wrote in letters and how you dealt with the case generally because often in mediation there can be quite a lot of time spent

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<sup>109</sup> An additional 20 men and 15 women were living elsewhere in the United Kingdom.

<sup>110</sup> This contrasts with only 24% of the members of the Family Law Association of Scotland being accredited collaborative lawyers and only 10% doing CALM.

discussing what solicitors have put in letters and the way things have been said because it's an adversarial system [but] you look at it in a completely different way as a mediator." [Solicitor 9]

and in respect of collaborative law:

"I think it's made me even more passionate to work out solutions that are suitable for them, because collaborative law allows them to hear it from both sides, it's handy in the event that if one of the parties is being really stupid, they will have two solicitors against them. But, also, you can make suggestions in a collaborative situation, like if they're arguing about the pension share and the house, for instance, you can say, well how about this? Would that be a way forward? You can make suggestions to both of them that you wouldn't normally make in just an adversarial system." [Solicitor 1]

### **Benefits of ADR**

One solicitor who had been in practice since 1979 had noticed the impact of ADR upon family law practice:

"When I first started it was very much a kind of aggressive kind of horrible letters going back and forth and much more confrontational and adversarial. Whereas I think with these ... mediation and collaboration there is a lot more sophistication going on and the realisation that in family law an adversarial approach is not really going to serve your clients the best ... okay we might have all sorts of difficult issues to consider over the next short while, but at the end of the day these children will always be yours. And there will be certain life events that you'll want to see and mum will be there as well, or dad will be there as well, and really do you want to be able to dance at your daughter's wedding?" [Solicitor 9]

While another solicitor had clearly realised the benefits of this approach for ongoing business:

"I want that client to come back to our firm to get their will done or if they set up a business I want to take them to the commercial department ... It's very difficult I think for people to come away from these experiences with anything positive

out of it and I think that if we can do that and people can behave with a bit of dignity when they are separating, then the whole family is better for it.”  
[Solicitor 5]

Some solicitors who were not themselves trained in collaborative practice were nonetheless not hostile towards it and one described taking part in an alternative form of “negotiation”:

“We went to the offices of the other solicitor, and they found a room for my client and myself, and they found a room for their client and their solicitor, and then periodically the solicitors met and one of them went back and tried to persuade their client. We did get something sorted out. I suppose what we did was reduce four or eight weeks of letters into one afternoon, so ... but that was really a negotiation, rather than conciliation. I’m told that the lady didn’t want to meet my client again, but I wouldn’t have been very comfortable being in the room with both of them. I’d be willing to repeat it.” [Solicitor 12]

However practitioners were also aware that not all those undertaking family law work had been impacted by the move towards conciliatory family law practice:

“I think perhaps the problem arises when people go in to see solicitors that maybe have a criminal practice where they have got a very definite kind of attitude towards courts and everything else ... they think that being aggressive and the old Rottweiler analogy is the one that is going to serve their client well. But for the vast majority of cases, they can’t deliver, or they just aren’t able to achieve what they’re setting out to achieve ... and they say, oh well if don’t like it, just go somewhere else, so ... The poor people are then having to sort of pick up the pieces.” [Solicitor 9]

As observed in the previous chapter, whether or not separating couples come into contact with a solicitor who offers ADR as part of their practice is often chance.

## Chapter 10

### All settled?

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The perception underlying this research, that increasingly couples in Scotland seek to agree the consequences of separation and relationship breakdown rather than argue their claims in court, is borne out by the findings. What was already, in the early 1990s, a strong trend in favour of private settlement in the form of registered minutes of agreement,<sup>111</sup> has become even more pronounced. Not only in terms of the number of agreements registered, but also in the perspectives of parties and solicitors, and the practice is well established and largely welcomed.

The pattern which emerges in Scotland, is one of steady growth, reflecting a legal framework which respects party autonomy, a style of legal practice which encourages and supports settlement and a system of enforcement which welcomes and gives effect to private agreement. There is long standing legal certainty in respect of the enforceability of marriage contracts, defined broadly to include those made in contemplation of the relationship, during its subsistence and on its breakdown. Not only are they regarded as legally binding but also there is subsequently very limited scope for challenge. Such agreements can become directly enforceable by means of a simple system of registration and without judicial involvement and, while this study has shown relatively little direct evidence of the contribution of officially “alternative” forms of dispute resolution, such as mediation, it is clear that the role of “traditional” family lawyers has been strongly influenced by practices of negotiation, mediation and collaboration. In these practical ways, it is easy to see why many parties in Scotland regulate the consequences of separation, divorce and dissolution by means of private settlement. What is also evident, is the significance of the underlying family law framework. Willingness to settle, rather than to dispute, is informed by the confidence of both parties and solicitors that they can predict with relative clarity and certainty what the likely outcome would be if they did go to court. The current preference for private settlement rather than court action when relationships break down, is a reflection of the combination of these various factors.

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<sup>111</sup> Wasoff, McGuckin and Edwards, *Mutual Consent: Written Agreements in Family Law*, 1997; Wasoff, “Mutual Consent: Separation Agreements and the Outcomes of Private Ordering in Divorce” 2005 *Journal of Social Welfare and Family Law* 237.

The benefits of settlement in the regulation of relationships are well documented: Mnookin and Kornhauser, in their influential academic analysis of private ordering in 1979, listed a range of advantages not least of which is that:

“a consensual solution is by definition more likely to be consistent with the preferences of each spouse, and acceptable over time, than would a result imposed by a court.”<sup>112</sup>

More recently, and in a policy context, the benefits of reaching agreement, have been highlighted in England and Wales in terms of the Family Justice Review in 2011.<sup>113</sup>

Perhaps because the system in Scotland has developed gradually and with little obvious intervention, there has been relatively little opportunity or need for review and reflection. This research has confirmed that the practice is continuing to grow and broadly, whether by chance or careful design, it seems to work. As with the earlier research conducted in the 1990s, however, there are some issues which merit further consideration.

### **A clean break?**

Although the Scottish Law Commission, in its report preceding the Family Law (Scotland) Act 1985,<sup>114</sup> concluded that there was no single appropriate objective for the proposed statutory framework for financial provision on divorce, Scotland has become associated with a clear preference for a clean financial break on divorce. The primacy of section 9(1)(a), which is backward looking in its focus on the division of property acquired during the marriage, together with the limited availability of periodical allowance for ongoing payments, have in practice tended to lead the courts towards orders which create a one-off settlement between the parties. This is a tendency which is very strongly reflected in the minutes of agreement. While there is provision for ongoing support of children, ex-spousal maintenance has all but disappeared. The ideal of individual parties who are able to move on from a past relationship to independent new lives, which underpinned the 1985 Act, remains attractive but optimism must be tempered by the reality of, in many cases, a very limited fund of matrimonial assets, the continuing impact of childcare and other domestic caring responsibilities particularly on

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<sup>112</sup> “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88(5) *Yale Law Journal* 950 at 956 – 957.

<sup>113</sup> Family Justice Review: Final Report, 2011.

<sup>114</sup> *Report on Aliment and Financial Provision*, 1981, Report No.67.

women and the disappointing experience of equal pay and sex discrimination legislation. The relatively small funds of matrimonial property which many of these minutes of agreement appear to involve, and the highly gendered nature of the arrangements for ongoing childcare with the probable effect that will have on earning capacity and career development, raise some concerns about the practicability and fairness of a clean break based on the sharing of matrimonial property.

Such concerns have emerged in recent years in respect of the 1985 Act itself, most obviously in the comments of Lord Hope in *Miller v Miller; McFarlane v McFarlane*.<sup>115</sup> His perceived criticisms of the Scottish system have been strongly refuted,<sup>116</sup> but it is important to recognise that if the Scottish system for financial provision is not to be unduly harsh, particularly on the woman who has given up work or in other ways restricted her career in order to care for her family, the full possibilities of the five section 9 principles must be considered rather than undue focus on section 9(1)(a).<sup>117</sup> This study of minutes of agreement would tend to suggest that the key issue is often simply an equal sharing of assets. It might be argued that any unfairness created by focusing on a clean break is likely to be exacerbated in the context of a system which favours agreements. Agreements, which concentrate on early and full settlement, are inherently a good thing: the opportunity for default is minimal. It is easy to understand why, in making an agreement, it might be preferable to concentrate on a simple, one-off sharing of assets but there may be later injustice. Without further, ideally longitudinal research, it is difficult to assess the benefits of early settlement as compared to longer term alleviation of possible disadvantage.

### **Fair and equal**

Equality, in many forms and contexts, is a key driving force in modern family law and that is, to some extent, reflected in this research. Equal sharing of property is strongly endorsed but, while the language of equal responsibility in respect of children is quite widely used, the extent to which this formal equality leads to equality in practice is less clear. Issues of gender based difference emerge both from the agreements themselves and from the interviews.

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<sup>115</sup> [2006] UKHL 24.

<sup>116</sup> See, eg Clive, "Financial Provision on Divorce" (2006) *Edinburgh L Rev* 413.

<sup>117</sup> Norrie, "Clean break under attack" 2006 *JLSS* 16.

Section 9(1)(a) of the 1985 Act is sometimes misquoted as providing for equal sharing of matrimonial property. The starting point is of course “fair” sharing but it is presumed, unless special circumstances apply, that equal shares will be fair.<sup>118</sup> Leaving aside the niceties of the legal language, the headline message is equal shares and it is that message which is strongly reflected not only in the sample of minutes of agreement but also in the interviews with parties and solicitors. Although the written agreements themselves provide incomplete snapshots, equal sharing is a key objective in the words of many of the parties and solicitors who were interviewed. Section 9(1)(a) is, of course intended to be only the starting point for financial provision but if the other principles have been relatively rarely used in reported cases, they are even less evident in private settlements.

The dominance of “equality” as a guiding principle has become so strong that it can seem difficult to question its fairness. The interaction between equal and fair is particularly highlighted by what these minutes of agreement disclose about day to day responsibility for the care of children. The gender inequality of arrangements for the residence of children in these agreements is stark. There are of course many possible explanations behind why parties agree what they do in these formal agreements and it certainly cannot be concluded that individual fathers are not or do not wish to be actively involved in the ongoing care of their children but the evidence is nonetheless very strong that primary responsibility for children remains with the mother in 90% of these agreements. Against that background, it should be questioned whether equal shares are fair and even where there is sharing of property in some other proportions, the overall “fairness” of the agreements merits consideration.

This issue raises much broader questions about the purpose of financial provision itself. Fairness, as a guiding principle in this context, is questioned by Jonathan Herring in his article, “Why Financial Orders on Divorce Should be Unfair”.<sup>119</sup> What is appropriate depends to a great extent on our understanding of the purpose of family law. Is its aim in this context to provide for the welfare of parties, to protect their rights or to respect their autonomy?<sup>120</sup> Minutes of agreement are, by definition, private arrangements between two parties and the focus is unsurprisingly on what is fair and appropriate between them. Any wider, social objectives are to a large extent lacking. Whether the

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<sup>118</sup> s10(1).

<sup>119</sup> (2005) *International Journal of Law, Policy and the Family* 218.

<sup>120</sup> For discussion of a shift in judicial approaches to English ancillary relief, to reflect these different objectives, see Diduck, “What is Family Law For?” (2011) 64(1) *Current Legal Problems* 282.

growth of separation agreements is viewed as a success or not is very much dependent on what family law and family policy seeks to achieve. One obvious example for concern from a broader social policy perspective is the very limited evidence of pension sharing. From what is known of gender differences in employment, family responsibilities and pension provision, while these agreements may satisfy immediate tests for individual satisfaction, they may give cause for concern about longer term alleviation of poverty in later life.

### **In the shadow of the law**

This research would tend to suggest that, in various ways, private ordering in Scotland does take place in the shadow of the law. But what is the shadow of the law? In terms of financial provision on divorce, the meaning and impact of the statutory provisions is generally perceived as being clear and relatively consistent and therefore separation agreements by and large reflect what a court would be likely to do in the circumstances. What is agreed tends to be a shadow of the orders which a court might make in terms of the Family Law (Scotland) Act 1985. It might be argued that in some cases what is agreed is slightly “under” the shadow of the law as the threat of “ending up in court” may temper what are perceived as more controversial or demanding claims. In respect of arrangements for children, the position is less clear. The shadow of the Children (Scotland) Act 1995 is reflected to the extent that the language of shared and continuing parental responsibilities and rights is widely used but the formal legal equality of mothers and fathers is not reflected in the details of the agreements which are made. Social perceptions, and to some extent expectations, of increased equality of parenting are starkly at odds with what is agreed in these private arrangements in respect of residence of children.

The shadow of the law, specifically in terms of the possibility of seeking a child maintenance calculation under the Child Support Act 1991, has been criticised by some as interfering with private settlements and possibly deterring parties from making an agreement. Although this research cannot show to what extent, if any, the 1991 Act deters settlement, it is notable that no parties raised this as an issue in interviews. While the potential for disruption of carefully negotiated settlements by a later application for a statutory maintenance calculation is acknowledged, it may be that it remains a useful safeguard in light of the highly gendered nature of agreements about childcare taken in conjunction with the relatively limited provision for ongoing support, particularly for the parent with care.

As the balance between formal legislation and private ordering shifts, the question may become less one of “bargaining in the shadow of the law” and more one of the extent to which the legislation is “overshadowed” by private arrangement. Scots family law prides itself on a modern and coherent system of largely codified rules but to what extent are those rules used by families? While the statutory provisions are not being enforced directly through the courts, it can be argued that they underpin the private arrangements which are reduced to written form in minutes of agreement. This research has demonstrated a considerable level of match between the law in the statute books and the law in individual practice but there may be some areas for concern. The detailed provisions of the 1985 Act, and associated regulations, for pension sharing are clearly not being used to any great extent in private settlements. Of the five statutory principles set out in section 9, only the first appears to be used to any great extent. And while it is perhaps no great surprise, there is relatively little evidence that, in reaching these agreements, the guiding principle that children should be consulted<sup>121</sup> is being put into practice.

### **All settled?**

That parties and solicitors favour settlement is clear from this research and there is considerable evidence of its benefits, but why do they settle and what do they settle for? Settlement is perhaps always about compromise and the point at which parties will compromise appears in many cases to be gendered. While it was common for men to focus on the preservation of their pension, for women it was about stability, children and the family home. Whether this is merely an insight into human nature or a cause for concern is again dependent on what we perceive as the purpose of family law.

For solicitors, the benefits of settling rather than going to court were consistently highlighted and, undoubtedly, the recent history of minutes of agreement, as a means of coping with the consequences of relationship breakdown, is positive. For family law and its continued development, however, it is important to guard against complacency. A sense emerged that agreement was achievable in many cases but sometimes only where the parties settled for what was relatively straightforward: terms that fell within the range of “settled” law. In areas that were more legally controversial (such as whether or not business assets constitute matrimonial property), or resolution would be more

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<sup>121</sup> Children (Scotland) Act 1995, ss6 and 11.

practically time consuming or costly (such as the valuation of pensions), or more socially challenging (such as departures from formal equality), there was a tendency simply to settle for the easier option.

As more couples settle and fewer take the risk of court action, there is a danger that the level at which parties compromise may stagnate. A fear of court should not be the key driver of negotiation. As fewer cases reach court, there is a danger that precedent will be fixed and possibilities limited with “the impact of inhibiting family law practitioners to push the boundaries”.<sup>122</sup> What parties agree in private is clearly influenced by judicial precedent and, while court may not be the best place to resolve relationship matters, the role of judicial decisions in driving law forward and opening its application to public scrutiny should not be overlooked.

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<sup>122</sup> L.Mair, “Whither Whittome?” 2013 *JLSS* 27.

## **APPENDIX 1. METHODOLOGY**

The broad aim of this research was to add to our understanding of private ordering and its outcomes in the family justice system, taking Scotland as the case study example. Key objectives were to identify the extent to which minutes of agreement are used by couples to regulate the division of property upon separation and to describe the content of these agreements. It was therefore necessary to access a representative sample of registered minutes of agreement which are public documents stored in the National Records of Scotland.

Two further key objectives of the study were to examine the views and experiences of a sample of parties to the agreements in the study, as well as to document the experience of family lawyers in negotiating and drawing up minutes of agreement. Interviews were therefore conducted with parties and with solicitors. This appendix describes the approach taken to the collection and analysis of both the quantitative data (from the minutes of agreement) and the qualitative data (from the interviews).

### **Ethical considerations**

This research project was funded by the Economic and Social Research Council (ESRC) and the research has been undertaken in accordance with the six key principles of ethical research contained within the ESRC Framework for Research Ethics (FRE). These are: that research should be designed, reviewed and undertaken to ensure integrity, quality and transparency; that research staff and participants must be informed fully about the purpose, methods and intended possible uses of the research, what their participation in the research entails and what risks, if any, are involved; the confidentiality of information supplied by research participants and the anonymity of respondents must be respected; research participants must take part voluntarily; harm to research participants and researchers must be avoided in all instances and, finally, that the independence of research must be clear, and any conflicts of interest or partiality must be explicit.<sup>123</sup>

Also, in conformity with the FRE, the research proposal had to be approved by the University of Glasgow, College of Social Sciences ethics committee. A plain language statement had to be completed for research instruments (such as the letters inviting

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<sup>123</sup> ESRC (2010) Framework for Research Ethics. Available at: [http://www.esrc.ac.uk/\\_images/Framework-for-Research-Ethics\\_tcm8-4586.pdf](http://www.esrc.ac.uk/_images/Framework-for-Research-Ethics_tcm8-4586.pdf)

parties to take part) and care was taken to conform to the University of Glasgow's code of Good Research Practice.

Although minutes of agreement are public documents stored by the National Records of Scotland, they contain personal and sensitive information. They may also record a settlement that was reached during a distressing time for the individuals involved, possibly after protracted dispute. Extreme care therefore was taken in our approach to parties and in the handling of sensitive information. Our proposed research was discussed fully and at an early stage with Jane Brown, Senior Court Archivist, National Records of Scotland and permission granted to carry out our research in Thomas Thomson House, Edinburgh where the minutes of agreement were stored.

When we approached parties to the agreements seeking to interview them, we provided information about the study in a research information leaflet, as well as including a list of likely questions they may have, and the answers to these, on the back of the covering letter. Potential interviewees were invited to contact the principal investigator, Dr Jane Mair, if they had any concerns and were also given the contact details of the College of Social Sciences Ethics Officer should they have any concerns about the conduct of the research. Information about the research project was also available on the "current projects" pages of the Centre for Research on Families and Relationships (CRFR) and those invited to take part were directed to this page for additional information. This same process was used for solicitors.

The letter and research information leaflet made clear who was undertaking and funding the research and the content and purpose of the research (including the future uses of the findings for teaching and publishing purposes). They were also assured that their participation was voluntary and that, if they chose to take part, their responses would be anonymous and they could still decline to answer any question should they wish. These assurances were repeated at the start of each interview.

Only one party to an agreement was invited to take part and those invited were assured that we would not contact the other party to the agreement, even if they declined to take part. They were also assured that we would also not be contacting their solicitor to discuss the content of their MoA. We also made clear how we obtained their contact details and that we had no other information about them other than that which is contained within the MoA. Solicitors were informed that their name had either been on

the MoA (as a witness to a party signature) or we had found their details on the Family Law Association of Scotland website.

Consent was sought separately on the consent form for the recording of the interview. Respondents therefore had the opportunity to take part without consenting to the interview being recorded.

No names or addresses of parties or solicitors were entered into the statistical analysis data sets (SPSS and NVivo). As in this report, all quotes from interviews included in written material are anonymised with parties and solicitors being assigned a number. Their gender and age may also appear beside the quote if that aids understanding.

### **Data from minutes of agreement: sampling and collection**

Once minutes of agreement are registered in the Books of Council and Session, the actual minute itself is stored in boxes at the National Records of Scotland, along with all manner of other legal documents such as missives from the sale of heritable property, leases and wills. For the purposes of this study, minutes of agreement registered in the year 2010 were chosen as this would enable the parties who were interviewed to have achieved some distance from the process, and to gain an understanding of what followed the making of the agreement. In 2010, there were 737 numbered and dated boxes containing registered legal documents. We were told what the box numbers were for MoA registered at the beginning and end of 2010. We estimated the number of relevant MoA per box, and from this estimated how many boxes we would need to select to reach a target of 600 MoA. We inserted the start and end box numbers and the number of boxes we wished to randomly select into Excel, using a random number command. This generated an unordered (and not date ordered) list of random numbers within our range. We looked at the boxes in the order they appeared on the list, overlooking duplicate box numbers and, for each box, selected for close examination all the records that were relevant to our research. When we reached our target number, we stopped.

It was necessary to manually trawl through the boxes to find each minute of agreement. However the research team quickly became accustomed to identifying the relevant documents. There were however a number of minutes of agreements within the boxes that were not included in the research. Many of these dealt with the sale of the family home and the deposit of the net proceeds into the bank account of the parties' solicitors

(pending agreement as to their distribution), and no other issues were discussed. In other minutes dealing with the sale of property it was unclear what the relationship status was between the two named parties. Therefore, the criteria for the inclusion of a minute of agreement in the present study was as follows:

- The parties to the minute are two individuals.
- There is a reference to the parties being “in a relationship” or “cohabitants” or “spouses” or “civil partners.”
- The minute does not just concern heritable property but includes a discharge clause (stating the agreement represents the full and final settlement of all claims and/or discharging the parties’ rights to claim under the 1985 or 2006 Act).
- The minute deals with child contact or child support arrangements between parties who are not living together.
- The minute is an ante nuptial or pre cohabitation agreement.

The target of 600 minutes of agreement fitting the above criteria was reached after trawling 87 boxes – being 12% of the boxes for the year 2010. Given the random selection of boxes throughout the year, it may be inferred the same proportion of relevant minutes of agreement exist within the remaining boxes and this means there would have been 5,000 minutes of agreement fitting these criteria, registered in 2010.

#### *Data collection sheet*

Minutes of agreement may vary from around 5 to 15 pages in length. They contain a large amount of text (see **Appendix 5** for examples). In order to extract the pertinent points a pro forma data collection sheet was devised dealing with different types of assets and also child contact and child support. There was also a section near the end which listed 16 of the standard clauses found in most minutes of agreement – so that it was a simple case of putting a “Y” for yes next to the relevant field when the clause was present in the minute. This pro forma can be found in **Appendix 2**.

The relevant data from the minutes of agreement was typed onto the pro forma using a University of Glasgow, password protected laptop. Lists of potential party interviewees and solicitors were entered onto separate documents.

#### *Analysis of Quantitative data*

The data collected from the minutes of agreement and entered onto the data collection sheets was then coded and analysed using Predictive Analytics Software (SPSS). Once the data was coded, the principal methods used for analysing the data were frequency

tables and cross tabulations.

### **Party interview data**

The team aimed to obtain interviews with as diverse a group of parties as possible. Minutes of agreement that had a particular interest because of the issues they addressed were flagged for follow up interview at phase II of the data collection. Reasons for flagging a MOA for interview included:

- The presence of children but the *absence* of any discussion on child support or residence/contact.
- When contact arrangements *are* made (specific times stated / reference to shared care or where the children are to live with their father) and how that has panned out in practice.
- Agreements where child support is agreed.
- Agreements including a pension share agreement.
- Evidence of a prior subsisting court action.
- High value cases.
- High debt cases.
- Tenants.
- Same sex couples.
- Cohabitants.
- DIY agreements (3 in the dataset)

### *Response rate*

In order to control for interviewer bias, invitations to take part were sent to the first named party in the alphabet (using the first name of the parties), rather than a conscious decision to contact either the male or female party or the party who had retained the home or not. It was expected that we would achieve a response rate of around 10% as parties post separation / divorce experience a high degree of housing mobility. This is also the response rate that was obtained by Wasoff, McGuckin and Edwards in their study into the use of minutes of agreement, undertaken in 1996.

Postage paid addressed envelopes were sent out with the letters/research information leaflet and consent forms to increase the response rate. The first wave of 50 invitations obtained a response rate of 4% on first posting, rising to 9% when the reminders were sent three weeks later. It is usual for more women than men to agree to take part in

social research but in the first mail shot, twice as many men as women agreed to take part. Therefore subsequent (larger) mail shots continued to be sent to the first named party with no attempts to ensure a greater number of men were invited. The second mail shot was sent to 110 parties and obtained a response rate of 10% after the reminders were sent. As data collection time was running out it was then decided to send out a much larger third mail shot (266 parties). This only obtained a response rate of 5% but it meant no reminders had to be sent as the target of 30 interviews was achieved. In total 426 individuals were invited to take part. Around 60 mail shots were returned as “addressee not known.” The overall response rate was 7% because the majority of addresses only had one letter sent to them. Despite the promising response from men at the start of the interview stage of data collection, by the end of the project 17 women and 13 men had consented to being interviewed.

*Characteristics of party interviewees*

- **Relationship status:** 21 were spouses/former spouses and 6 had been cohabitants. 2 had been civil partners (both female). 1 was a (male) party to an ante nuptial agreement.
- **Children:** 50% had dependent children under the age of 16 at the time their MoA was registered.
- **Housing:** 16 interviewees were living in the former family home (it either being transferred to them or remaining in joint names) and 11 of these were female and 5 male. In three cases the other party to the relationship was living in the former family home and in 10 cases the family home had been sold (the party to the ante nuptial agreement is excluded).
- **Ages of party interviewees:**

Age	Number of Interviewees
26-35 years	n=3
36-45 years	n=8
46-55 years	n= 6
56-65 years	n=11
66+ years	n=2

**Solicitor interview data**

The aim was to interview between 10-15 solicitors. Individuals on the family law sub-

committee of the Law Society of Scotland expressed an interest in the present research from early in the research process and agreed to circulate information about the research to members. Five solicitor interviewees therefore contacted the research team expressing a desire to take part without any invitations being sent (and were then sent the mail shot with the consent form). It was only necessary to send out 26 invitations to solicitors to achieve a further eight interviews (a response rate of 31%) before the cut-off date for responses. Efforts were made to achieve a geographical spread and a mix of large firms and small, rural and urban and those doing 100% family law work to those doing a mix of family law and other work (usually property but also commercial and criminal work was mentioned by some).

#### *Characteristics of solicitor interviewees*

- **Sex:** 6 male and 7 female solicitors took part in the research.
- **Legal aid:** 6 worked in firms offering legal aid, the remainder did not.
- **FLAS:** 8 were members of the Family Law Association of Scotland and 4 were not.
- **ADR:** 7 had some training in alternative dispute resolution (such as collaborative law or CALM) and 6 had not.
- **Years in practice:** 7 had been in practice for over 30 years; 2 for between 20-30 years; 2 for between 10-20 years; and 2 for between 6-10 years.
- **Location:** 6 solicitors were from across the central belt of Scotland but the rest were spread across all the mainland areas of Scotland. Only 4 were based in city firms.

#### *Conduct of interviews*

Respondents returning the consent form were asked to provide their email address and telephone number and preferred time to be interviewed. They were then emailed with a choice of time slots within their preferred days / times for the actual interview. Once they responded with their chosen time, this was also confirmed by email. Around 5 individuals had to be contacted by telephone to arrange the interview – either because they did not have an email account or that email address did not work. All interviews were conducted by telephone as this is an expedient way of interviewing a number of people in a limited period of time and with limited resources. All but one interviews were recorded (as only one party declined consent for this).

Interviews with parties and with solicitors were guided by interview schedules. However thought was given before each individual interview as to the specific areas that

that particular party or solicitor would be questioned about. This was usually based on the reasons that they had been invited to take part in the first place. With party interviews in particular, open-ended accounts were sought of the processes leading up to and following the agreement. The interview schedules are attached at **Appendix 3** – party interviews and **Appendix 4** – solicitor interviews).

#### *Analysis of interview data*

The interview recordings were transcribed and anonymised and then coded using NVivo software. This software enables qualitative data to be analysed thematically as well as enabling the characteristics of the source of the data to be analysed (such as the age of participants, years in legal practice and so forth).

It was then possible to access the interview data by theme when writing about specific issues as part of this report and the research briefing. All individuals who took part in this research project – both solicitors and parties – will receive a copy of the research briefing published by the Centre for Research on Families and Relationships (CRFR), University of Edinburgh, which is due for publication at the same time as this report.

## APPENDIX 2: DATA COLLECTION SHEET

### Relationship:

M/CP/Cohab/"Relationship"	
Same sex / Hetero	
Place of Marriage/CP	
Date of commencement	
Date of Separation	

<b>FOR INTERVIEW?</b>	
Why?	
Case Number	
NA Box No.	
NA Archive Doc No.	
Date of Registration	
1 <sup>st</sup> Named Party M or F?	
Children under 16/18 OR no ref AT ALL?	

Still residing in SAME home?	
Which party still in mat home?	
Still in Scotland?	

<b>KEYWORD</b>	
<b>Mention of meeting definition of cohab?</b>	
<b>Clause that parties will not molest each other?</b>	

### FAMILY HOME

<b>Address:</b>	
Tenure ("o/o " or "T" - priv/public)	
Title (Joint or 1 or 2)	
Value?	
<b>Mortgage? Y/N</b>	
Value Outstanding of Mortgage?	
Who paying since <i>separation</i> ?	
Who paying post <i>agreement</i> ?	
Payments since separation to be recouped?	
<b>AGREE TO:</b>	
<b>SELL? Y/N</b>	
<i>When sell? eg: asap/delayed till specific event?</i>	
<i>Equal</i> division of proceeds? Y/N	
<i>Unequal</i> division of proceeds? Y/N	
<i>Who to get greater proportion of proceeds?</i>	
<b>Proportional Split of family home?</b>	
<b>TRANSFER? Y/N</b>	
To whom? 1 or 2 ?	
Who pays cost of transfer? 1 or 2?	
When transfer? eg: asap	

For <i>consideration</i> ? Y/N If so, amount?	
Mention of Source of funds for the purchase of home originally? If so how and how much?	
<b>OCCUPANCY RIGHTS in Family Home</b> renounced by 1 or 2?	
<b>Formal Renunciation</b> – agree to grant?	
<b>OCCUPANCY RIGHTS in future properties?</b> Renounce by 1 or 2?	
Formal Renunciation – agree to grant?	
<b>Special Destination / Survivorship Clause</b> Revoked if party die prior to sale/transfer?	
<b>Declaration of Solvency by either party? Which?</b>	

**PENSIONS/ SUPERANUATION** (other than in mention in broad exclusion clause)

Specific Clause (including in assets are own clause)? Y/N	
Whose? 1,2,both (3)	
Current value (s) if known?	
Full value kept by owner(s)?	
<b>SPECIFIC CLAUSE:</b> Discharging claim on others P?	
<b>Pension Sharing Order?</b>	
Where shared <i>Equal Share</i> ?	
Where shared <i>Unequal Share</i> ?	

**Furniture & Plenishings**

Mentioned?	
<b>Already shared</b> between parties?	
To be shared as agreed between the parties?	
All to one party? If so 1 or 2?	
Other?	

**CAR (s)**

<b>Number? Whose? 1, 2 or both?</b>	
Owner(s) Retain?	
Transfer Ownership? To 1 or 2?	
Any outstanding car loan?	
If so, who to continue payments?	
Parties to swap (more than 1 car)?	
Sell at least 1 vehicle with equal division of proceeds	
Parties to sell & greater proportion to 1 or 2?	Which?

**JOINT BANK ACCOUNTS (non ISA)**

<b>Number of Bank Accounts</b> in credit mentioned? (overdrawn a/c to debts)	
<b>Values if known?</b>	
<b>Equal division?</b>	
<b>Transfer a/c to one party?</b> Being 1 or 2?	
<b>Unequal Division? Y/N</b>	
<b>Greater amount to P1 or P2?</b>	

**INDIVIDUAL BANK ACCOUNTS**

Keep full value of <b>own</b> accounts? Y/N	
Transfer funds? Y/N	
Are Funds transferred to P1 or P2?	
Other?	

**JOINT ENDOWMENT / INVESTMENTS & ISA's/ Other 'policies'**

Mentioned? Y/N	
Number of different investments referred to?	
<i>List and give values if known?</i>	

**JOINT INVESTMENT ONE (COPY AND PASTE THE BELOW FOR EACH NEW INVESTMENT)**

To be <b>maintained until maturity</b> ? Yes/No	
If to be maintained who paying premiums?	
When mature who to get proceeds?	
<i>Equal</i> division of realised investment?	
<i>Unequal</i> division?	
<i>Greater value</i> to 1 or 2?	
Any Agreement to Transfer to 1 party only?	

**JOINT INVESTMENT TWO**

To be <b>maintained until maturity</b> ? Yes/No	
If to be maintained who paying premiums?	
When mature who to get proceeds?	
Investment to be Surrendered? Y/n	
<i>Equal</i> division of realised investment?	
<i>Unequal</i> division?	
<i>Greater value</i> to 1 or 2?	
Any Agreement to Transfer to 1 party only?	

**INDIVIDUAL ENDOWMENT/INVESTMENTS/ISA**

Mentioned? Y?N	
Whose?	
<b>Specific</b> clause excluding from division in Agreement?	
Full value to be kept by owners? Y /N	
Other?	

**LIFE POLICIES**

<b>Mentioned?</b> Y/N	
<b>Whose? (and number each)</b>	
Each keep own policy?	
Agree to maintain Joint policy?	
Other? What?eg: transfer rights and interest.	
Claims on pensions excluded in <b>specific clause</b> ?	

**Other Property**

<b>WHAT (eg: family business/caravan &amp; VALUE</b>	<b>In name of 1 or 2?</b>	<b>Retained by owner? y/n</b>	<b>Sold OR Transferred to whom?</b>	<b>Where sold: equal division or more to 1 or 2?</b>	<b>Where Transferred? For consideration?</b>

**Debts**

Are <b>SPECIFIC DEBTS</b> referred to y/n?	
Name on Debt if Known?      Type of Debt?	
Parties agree to take debts in their sole names?	
One party takes <b>all</b> debt? Who - 1 or 2?	
<i>Equal</i> share of total debt? Y/n	
<i>Unequal</i> share of total debt? Who take greater amount?	
Either party in net. debt post implementation of agreement? If so - 1 or 2 or both?	
Parties will be responsible for any debt in their sole name?	
Parties acknowledge there there is no outstanding debt in joint names?	
<b>Bankruptcy clause?</b> Advised in respect of s34 & s36 of Bankruptcy (S)Act 1985 and that cant contract out of the statutory provision?	

**Capital Sum Transfer /Periodical Allowance**

<b>Capital sum</b> specifically mentioned?	
Express clause saying none to be made?	

Where to be made – to whom?	
Value?	
When?	
One-off or in installments?	
Interest on arrears? If so, what? (eg: 8%)	
<b>Periodical allowance/ Spousal Aliment mentioned? Y/N</b>	
<b>SPECIFIC CLAUSE: stipulating NO financial support shall be paid by either party to the other?</b>	
To whom? 1 or 2	
Amount?	
How long for?	
Interest on arrears? If so, what?	
Term “period of adjustment” used? Y/N	

#### CHILDREN

<b>Are there any children of the marriage/relationship Y/N</b>	
<b>Residence &amp; Contact mentioned? Y or N</b>	
<b>Residence with whom?</b>	
Any reference to “ <b>shared care</b> ” (regardless of actual arrangement)?	
<b>Contact</b> arrangements mentioned? y/n	
<b>Specific times</b> stated? y/n	
Includes clause “ <b>as agreed between parties</b> ” irrespective of whether specific times given as well or not? Y or N	
<b>Residential?</b> At least some residential?	
Total number of <b>days pcm?</b>	
Of the days listed above how many (if any) <b>Overnight pcm?</b>	
Specific mention of <b>holiday</b> contact?	
Specific mention re: taking child <b>abroad</b> on holiday?	
Specific mention of <b>Christmas</b> or other religious festival?	

Specific mention of <b>Birthday</b> contact?	
Other?	

### Presence of Absence of standard clauses - Children

“ <i>both parties</i> shall continue to share resp. to safeguard and promote children’s welfare and to direct and guide them”?	
<b>PARENTAL RIGHTS</b>	
“ <i>resident parent agrees to CONSULT with other parent</i> health/education/welfare etc.	
“ <i>Arrangement capable of variation</i> when required if reasonably requested by the parties?	
<b>Consultation with child</b>	
<b>Parents agree to consult with child when making major decisions</b>	
Parents agree to consult with child when making decision about <b>contact</b> specifically?	

### Aliment of Child/ren

Aliment mentioned? Y/N	
<i>To Whom?</i> 1 or 2	
<i>Amount</i> pcm?	
Payable in advance?	
<i>Interest</i> to be charged on <i>arrears</i> ? How much?	
Amount to increase annually? If so, in line with Retail Price Index or payers income?	
Recipient parent has right to see <i>pay slips</i> ?	
Parties advise the agreement in subject to the 1991 Act and may be overturned by CSA notwithstanding agreement?	
Is provision made for the parties to seek to vary the amount of aliment?	
If so, what provision is that?	
Is Aliment to be ARRANGED VIA CSA?	
Notwithstanding the Agreement, may either parent make	

application to the CSA?	
Advised that if party makes a maintenance application will the private arrangement will fail?	
Mention of CMEC?	
Payer to make additional payments for exceptional expenditure (eg: school trips)?	
<b>What terminates obligation to aliment?</b> In terms of 1985 Act or 1991 Act or other?	
<b>Child Benefit?</b> Does MoA state who will receive?	

#### **DIVORCE /Cohabitation**

Are cohabitants by the definition in the 2006 act?	
Reference to any existing court action? If so – in Sheriff court or C of S?	
Agree to lodge a Joint Minute to Sist action with exception of crave for Divorce?	
Who may raise action for divorce on grounds of 1 year non-cohab? P1 or P2 or Either	
Who is to pay for that action?	
Clause stating other party will not defend action for divorce as long as not at variance with MoA?	
Penalty for defending action?	
Minute of agreement <b>in force in event of divorce</b> /dissolution? Y/N	
Mo A in force <b>UNTIL divorce?</b>	
<b>RECONCILIATION:</b> Provision that if parties reconcile MoA will be null and void?	
Provision that agreement in force notwithstanding temporary reconciliation that fails?	

#### **Presence or Absence of standard clauses - Property**

<b>Succession:</b> Renunciation of rights of succession prior to divorce/dissolution	
<b>Full &amp; Final settlement Or general exclusion clause.</b> General Exclusion Clause excludes claims for <b>CAPTIAL SUMS?</b>	

<p>General Exclusion Clause excludes claims for <b>PROPERTY TRANSFER ORDERS?</b></p> <p>PERIODICAL ALLOWANCE/ SPOUSAL ALIMENTS?</p> <p><b>PENSION SHARING OR PENSION EARMARKING ?</b></p> <p>General Exclusion excludes claims for <b>LIFE POLICIES?</b></p> <p><b>Other:</b></p>	
<b>Irrevocable and binding for all time coming? Irrespective of material change in circs?</b>	
“Binding only in respect of the matters referred to herein” / not purport to be full or final:	
Expressly excludes <b>FUTURE CLAIMS</b> under <b>1976, 1985 Act</b> or <b>2006 Act. LIST ACTS:</b>	
<b>ONLY</b> mention of property is statement that they agree <b>not to make claim</b> on other’s pr.	
<b>Provision for variation OR later agreement?</b> Which?	
In event any clause of MoA is declared unenforceable, remaining clauses will prevail?	
<b>Independent legal advice:</b> Both parties given the “ <b>OPPORTUNITY</b> ” of taking legal advice?	
Independent legal advice “ <b>OBTAINED</b> ” by both parties? Eg: “benefit of”	
Provisions of <b>1985 Act/ 2006 Act</b> have been <b>fully explained</b> to parties? Which?	
<b>Full disclosure / or agree not to ask for this?</b> Which?	
Both parties regard the terms of the agreement to be <b>fair and reasonable?</b>	
If party refuses to sign documents, <b>Sheriff clerk</b> may sign instead 1907 Act	
If party refuses to sign documents <b>ARBITER appointed</b> can sign?	
All other <b>matrimonial property / assets not dealt with</b> will be maintained as his or her absolute property.	
Law of Scotland to govern agreement?	
<b>OTHER:</b>	

**LEGAL PROCESS / DISPUTE RESOLUTION**

Any mention of Mediation or ADR? If so what?	
How is any dispute as to the interpretation of any paragraph herein to be resolved?	
Legal Aid being Received by either party? Who?	
<b>Agreement to each meet own costs in relation to the Minute of Agreement? OR 1 or 2 to pay?</b>	

**CONTACT DETAILS****Party 1 (Male in Hetero. couples)****Legal Advisor**

<b>Name:</b>	<b>Name &amp; or Firm:</b>
<b>Address:</b>	<b>Address of Firm:</b>
<b>Postcode</b>	<b>Postcode</b>
<b>Other: Phone, Age/occupation</b>	<b>Deduced from? (eg: solicitor witnessing his signature or stamp on front of MoA )</b>

**Party 2 (Female in Hetero. couples)****Legal Advisor**

<b>Name:</b>	<b>Name &amp; or Firm:</b>
<b>Address:</b>	<b>Address of Firm:</b>
<b>Postcode</b>	<b>Postcode</b>
<b>Other: Phone, Age/occupation</b>	<b>Deduced from? (eg: solicitor witnessing his signature or stamp on front of MoA )</b>

**CHILDREN? Y / N**

<b>Number of children?</b>
<b>Name of Child 1:</b>

<b>D.O.B</b>
<b>Name of Child 2:</b>
<b>D.O.B</b>
<b>Name of Child 3:</b>
<b>D.O.B</b>
<b>Name of Child 4:</b>
<b>D.O.B</b>

**Type of M of A - that is what does the agreement purport to do in first paragraph?**

<b>“Interim”?</b>	
<b>AGREEMENT IS ENTITLED “SEPARATION AGEEMENT”?</b>	
<b>Pre-nuptial/ pre CP</b>	
<b>cohabitation</b>	
<b>Exclude specified property from all future claims?</b>	
<b>Regulate financial matters with a view to divorce</b>	
<b>Other phrases used? what?</b>	

**Final Content Summary**

Reference to earlier pre-nup?		Children ONLY ? (1) C & R (2)Aliment (3) Both?	
Reference to earlier separation agreement?		Property ONLY? (1) Heritage (2) Other property. (3) Both (4) “MAKE NO CLAIM” ONLY	
Reference to anticipated future MoA?		BOTH Children & Property	

## APPENDIX 3: INTERVIEW SCHEDULE FOR PARTIES

### BACKGROUND / PROCESS

- FULL account of **children** of the marriage where relevant

#### Getting advice:

- **What prompted** you to obtain legal advice?
- **separate legal advice?** Did you obtain separate legal advice and if not, why not?

#### Court Action / MoA

- Did you consider (or DID you) raise a court action at all?
- At what stage was MOA suggested?

#### Consensus / disagreement

- **Most Important Issue in Dispute?** Thinking of the most important difference how was it resolved?
- **Solicitor help resolution?** How helpful do you feel your solicitor was in resolving differences? (and in what way did s/he effect this?)
- **Mediation or Collaborative law?** (If yes, what was positive about that process/ negative about that process? Did it achieve the outcome you wanted)

### THE CONTENT (WHAT THEY AGREED)

#### Family home?

- **why decide what they did?** What factors impacted on your decision about your home?
- **Impact of Occupation Rights?** Did the right of both of you to occupy the home affect your decision at all?
- **(where nil consideration)** Why did you agree to transfer title for no consideration?

#### Capital Sums

- Can I just check, what was the capital sum payment intended to cover?
- **Did it take into account the obligation to aliment the child/ren at all?**
- **Might you have agreed a larger capital sum if not for the fact the CSA can still make an assessment for child support even when couples have entered into an MoA covering child support?**

### **Spousal Aliment / Periodical Allowance**

- Did you consider the possibility of the working/higher earning party supporting the other party financially for a period of time to enable that party to adjust to being self supporting?

### **Pension sharing / Pension Credit**

- Did you consider the possibility of sharing the value of your pension(s) accumulated during the time of your marriage?
- Did you *take your entitlement to half the pension of the other party into account when dividing your other assets*

**Disclosure of Assets?** How confident are you that all assets were disclosed in the process?

**ANY OTHER ASSETS BESIDES x, y & z**

**DOES S/HE CONSIDER ONE PARTY WAS ECONOMICALLY DISADVANTAGED**

**DURING THE MARRIAGE – EG: earning less to stay at home to care for the children.**

**WHAT DIVISION OF PROPERTY did s/he consider appropriate – 50/50 or some other proportion? How does this compare to what was agreed.**

**Excluded Property?** Was any property/assets (eg: pensions) left out of the division? Do you think this was fair?

## **CHILDREN**

### **Child support**

- Did you consider the possibility of including in the MOA that the non-resident parent pays child support for the child/ren? If not, why not? (probe responses)
- **Does the NRP (or do you) pay child support even though it is not included in the Agreement?** If so, how was that arranged?

### **Contact and Residence**

- What did you agree?
- How has the contact you agreed panned out in practice?
- Is there anything in respect of the arrangements for the care and upbringing of the children that you wish you had included in the MoA? (eg: holiday contact / Christmas / Birthdays / Taking the child abroad / education & parent's evenings)

## THE FINISHED PRODUCT

### Length of process?

- How long a period of time elapsed between first seeking legal advice and the MOA?

### Impact of Cost on the Process?

- Do you think the **cost** of meeting with your solicitor impacted on the negotiations at all and if so, in what way?
- Did you inquire whether you were entitled to legal aid? If so, did you receive legal aid? (where legally aided, any clawback?)
- **what did the negotiations and the MOA cost you?**
- **Fair and Reasonable?** One of the clauses in the MOA was that the agreement was “fair and reasonable”, did you actually believe that to be the case at the time? Do you still believe that to be the case?
- **Satisfaction?** *Even though you probably had to compromise on some aspects of the agreement, how satisfied would you say you are overall with your MOA on a scale of 1 – 10, where 1 is “extremely dissatisfied” and 10 is “extremely satisfied”?*
- **Durability?** Have you encountered problems adhering to any of the terms of your agreement? **what about child support arrangements (esp: annual increments?)**

## FINALLY - Present Circumstances

**People’s assessment of MoA may vary depending on their personal circumstances (and these are particularly likely to change when couples separate) so it would be helpful to know what changes have occurred in your life since you entered into the MOA. So can I just check....**

- **Income?** By saying “yes”, when I say the income band into which you fall, please tell me your present income bracket?
  - Under 15,000
  - Over 15,000 but under 25,000
  - Over 25,000 but under 40,000
  - Over 40,000
- **Standard of living?** How do you **compare the standard of living/housing** now compared to when *living as a couple with the other party to the MOA?*

- **Impact of other factors?** Have any **other factors impacted** on that (such as marrying/partnering or new job?)
- **Contact between adult parties?** Do you have any **contact with the other party** to the MoA?  
If so, how would you describe your relationship with them?
- **Divorce:** Have you divorced since the MOA? Do you intend to? If no, why not? (are there any advantages in remaining spouses)?  
Where divorced – How helpful was having a MoA in place when obtaining divorce decree?
- **Year of Birth?**

*THANKYOU – the answers you have given will be very helpful in assessing the extent to which MoA help (separating) couples to reach agreement as well as informing suggestions for how the process might be improved.*

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## **APPENDIX 4: INTERVIEW SCHEDULE FOR SOLICITORS**

### **Solicitors' Practice**

“can I just quickly gather some information about your practice first...”

- **Family law Specialism?** Do you do specialise in family law (or general practice?)
- **Court work?** Do you do court work?
- **Legal Aid?** Do you do legal aid work?
- **Years in practice**
- **ADR? – Mediaton / collaborative practice** – to you practice this? How is this different to what did previously?
- **Separate Representation?** To what extent do couples initially come together to see you, or separately? (and what do you do when one party declines separate representation? )
- **Why?** What prompts them to seek advice in your view?

### **General questions**

“In your experience.....”

- **Whose MoA?** To what extent do clients have a clear idea of what they wish put in the MoA ?
- **1985 Act?** To what extent is what clients agree influenced by the principles of the 1985 Act?
  - **Esp economic advantage and disadvantage**
- **What approach?** What approach do you take to gleaning information about assets and resources?
- **How long?** How long does it take from the client first coming to see you, to the final executed MoA?
- **Sticking points?** What issues tend to be sticking points?
- **Negotiation?** To what extent do you negotiate directly with the legal representative of the other party?

### **Family Home**

“The majority of MoA include agreement about the matrimonial/family home.....”

- **What factors Impact?** In your experience, what factors impact on the decision in respect of the family home?
  - Is the party in occupation in a stronger position?
  - To what extent may occupancy rights act as a bargaining tool? (eg: for securing a capital sum payment for a party whose does not have title)

- **Mortgage considerations?** Have you ever had clients who wish to transfer title to one spouse but have been unable to obtain the agreement of a mortgage lender? What happens in such cases?

### **Pensions**

- **Useful?** How useful a tool are pension sharing agreements or pension credits?
- **Problems?** What problems have you encountered with their use?

### **Spousal Support**

“Spousal aliment and periodical allowances are absent from most MoA.....

- **Why?** Why do you think this is?

### **Children – contact & residence / child support**

“There is evidence of the existence of children in a significant number of MOA and yet no discussion of contact or residence or of child support .....

- **Why?** Why do you think this is?
- **Barriers to Child support?** What factors prevent parties agreeing child support in the MoA?  
(in particular is the fact a party may apply to the CSA/CMEC a factor?)

### **Third Parties**

“In some MoA, parties agree to take the debt of the other party and to indemnify that other party should the creditor pursue the debt....

- **Problems?** Do you envisage problems with this type of agreement?
- **Information?** Should the third party be informed in your view?

### **Court work**

“you indicated you do court work.....

- **Conciliation v Litigation?** To what extent do you encourage a client to enter into a MoA rather than litigation?
- **MoA from court action?** To what extent do you use MoA in cases that have initially gone to court?
- **Factors?** What factors persuade clients to abandon the court action and enter into a MoA?
- **JMA & MoA?** What degree of detail would you put on the JMA as opposed to the MoA when a court case is dismissed and a MoA entered into? Could this be seen as unnecessary replication/cost?

### **Finally**

- **Impact of Client?** Does *who* you’re advising impact on the advice you give (eg: stereotypically say a full time employed middle aged male with good pension

provision vs his spouse who is working part time and providing primary care of two primary school aged children?)

- **Full disclosure?** To what extent do you think clients fully disclose their assets? Would it be helpful for MoA to include a list of matrimonial assets and liabilities as standard?
- **Cost?** What would you say is the average cost (or range of costs) of a MoA and what factors impact on this.
- **Variation?** Have you ever been involved in a challenge made in respect of a registered MoA? If so, what happened?
- **Clawback?** Does the SLAB claw back costs when legally aided clients enter into a MoA?
- **How Many?** How many Minutes of Agreement do you estimate you would be involved in, in a year?

## APPENDIX 5: INITIAL ADVICE CHECKLIST [used by one solicitor]

Methods of Decision Making	Negotiation	
	Mediation	
	Litigation	
	- Views of the child	
Aliment	Spousal Aliment	
	Aliment for children	
	Financial support for young people	
	Child Support Agency	
Financial Support	Periodical Allowance	
	Lump Sum	
Matrimonial Home	Occupancy rights	
	Matrimonial property	
Children	Parental Rights and Responsibilities	
	Residence	
	Contact	
	Major decisions affecting the children	
	Education	
	Permission to leave the UK	
	Change in circumstances	
Pensions	Pension sharing	
	Discharging rights	
Other Financial Provision	Debts – sharing/discharging	

	Endowment policies	
	Bank accounts	
	Savings accounts	
	Furniture	
	Cars	
	Other assets	
Divorce	Grounds for Divorce	
	Court fees	
Standard clauses in MoA	Discharge for future claims	
	Agreement to remain in force	
	Discharge of rights on succession	
	Arbitration	
	Legal expenses	
	Legal advice for spouse	
	Importance of full disclosure	
	Registration of MoA	
Give to the client?	Schedule of Assets	
	Income and Expenditure	

Meeting Date.....

Client Name.....

Legal Representative.....

Client

signature.....

## APPENDIX 6: SAMPLE MINUTES OF AGREEMENT (separation)

### EXAMPLE 1: SPOUSES

#### MINUTE OF AGREEMENT

Between

MARK JAMES BROWN residing at  
19 Madeup Street, Pretendtown  
(hereinafter referred to as “Mr  
Brown”)

and

GILLIAN AMY BLACK or BROWN  
residing at care of 86 Main Road,  
Pretendtown (hereinafter referred  
to as “Mrs Brown”)

WHEREAS the parties were married at Glasgow on 1<sup>st</sup> August 2008 and WHEREAS the parties separated on 24<sup>th</sup> April 2009 and notwithstanding the date or dates herof and WHEREAS the parties intend to live separately in the future and wish to regulate the care arrangements for their son Adam Brian Brown who was born on 15<sup>th</sup> October 2007 and also financial and other matters THEREFORE the parties having taken separate and independent legal advice HAVE AGREED and DO HEREBY AGREE as follows:-

(FIRST) Both Mr Brown and Mrs Brown agree that they shall both retain their parental responsibilities and rights in relation to their son Adam Brian Brown born on 15<sup>th</sup> October 2007 in terms of Section 1 and Section 2 of the Children (Scotland) Act 1995 and acknowledged that the nature and extent of such responsibilities and rights has been explained to them by their respective legal advisors. Both Mr Brown and Mrs Brown agree that they shall both have regard to the views of the other (and their son, as may be appropriate having regard to his age and level of maturity) when considering any matter of importance affecting the welfare of the said child, including without prejudice to the foregoing generality, matters concerning his health, education, residence, religious education or social development and they undertake to keep each other appropriately informed in relation to such matters. They further agree that their son may be removed from the United Kingdom for the purpose of annual

holidays without the necessity of obtaining the prior written consent of the other and they will co-operate with each other in relation to the provision of their son's passport for the purposes of such holidays. By her execution of this Minute of Agreement Mrs Brown agrees to provide Mr Brown with their son's passport for such holidays on the basis that Mr Brown undertakes that he will return Adam's passport to Mrs Brown at the conclusion of such holidays and that Adam's passport will be held by Mrs Brown. Further, both Mr Brown and Mrs Brown agree that when they have made holiday arrangements for Adam they will provide each other with details of such holidays including destinations, dates and such information as may be reasonably requested by the other in connection with such holidays. Mr Brown and Mrs Brown also agree that their son Adam shall have his principal residence with Mrs Brown and that both Mr Brown and Mrs Brown agree that Mr Brown will have both residential and non-residential contact with the said child Adam Brian Brown as mutually agreed between them.

(SECOND) (a) Mr Brown shall pay to Mrs Brown the sum of £50 per week in the name of aliment for the said child Adam Brian Brown. Said payments of aliment shall be payable weekly in advance to Mrs Brown. Payment of aliment shall be made by credit transfer into such bank or other account as is nominated by Mrs Brown from time to time or by such other method designated by Mrs Brown. The said payments shall continue for so long as the said child resides with Mrs Brown, is under the age of eighteen years and unable to earn a livelihood or reasonably and appropriately undergoing instruction at an educational establishment or training for employment or for a trade, profession or vocation. The said sum of aliment shall be payable weekly in advance commencing as at the last date of execution of these presents with interest at a rate of eight per centum per annum on each instalment of unpaid aliment from its due date until paid. By her execution of this Minute of Agreement Mrs Brown accepts that Mr Brown has paid aliment for Adam prior to the execution of these presents and that no arrears of aliment have accrued. In the event of Mr Brown becoming unemployed, then any payment of aliment due in terms of this clause shall be suspended during said period or periods of unemployment. In the event of such unemployment Mr Brown

hereby undertakes to provide evidence of his unemployment without undue delay.

(b) In the event of any material change in the financial circumstances of either party or the said child, either party may apply to the other for a variation of the amount of aliment provided for by giving one month's written notice. If the parties are unable to agree the amount to be paid in the changed circumstances, either party shall be entitled to apply to the Child Support Agency/their successors for a determination insofar as that Agency has jurisdiction, and/or to apply to a Court of competent jurisdiction for variation of this Agreement insofar as the Court has jurisdiction based on the material change of circumstances in terms of Section 7(2) of the Family Law (Scotland) Act 1985 or any amendment or re-enactment thereof.

(c) Both Mr Brown and Mrs Brown acknowledge by their execution of this Minute of Agreement that they have been advised and accept that the terms of this Agreement is subject to the terms of the Child Support Act 1991 and Regulations made thereunder and that certain parts of this Agreement can be overturned by the Child Support Agency/their successors notwithstanding the agreement of the parties. Both parties accept that either party may apply to the Child Support Agency for a maintenance assessment to be made to replace this clause insofar as the Child Support Agency/their successors may have jurisdiction. In the event that an assessment is made then Mr Brown will have no further obligation in terms of this clause other than to make payment of any arrears which have arisen prior to the Child Support Agency/their successors' assessment being made. Mrs Brown shall be entitled to receive the whole Child Benefit payable in respect of the said child Adam Brian Brown for so long as he resides in her care.

(THIRD) With regard to the former matrimonial home at 19 Madeup Street, Pretendtown G53 0AA both Mr Brown and Mrs Brown agree that:-

- (i) Mr Brown will join with Mrs Brown in executing such conveyance, deeds and other documents as may be required to vest the whole right, title and interest in the said former matrimonial home at 19 Madeup Street, aforesaid in the sole name of Mrs Brown for the considerations set out in this Minute of Agreement and

the payment due by Mrs Brown to Mr Brown in terms of Clause Fourth herof and to revoke any special destination.

- (ii) The said conveyance will be completed as soon as practicably possible, but no later than 1 month from the last date of execution of these presents.
- (iii) In exchange for said conveyance (a) the parties will sign and Mrs Brown's agents will register the necessary Deed of Variation or Discharge of the existing Standard Security with Lloyds TSB Scotland plc over the said subjects in order to discharge Mr Brown from all liability and obligation in respect of the existing loan secured by said standard Security and (b) Mrs Brown will free and relieve Mr Brown of any unimplemented obligations due by the parties under said Standard Security. At settlement, Mr Brown is to deliver to Mrs Brown's solicitors such conveyance, deeds and other documents necessary to transfer title of said property to Mrs Brown's sole name together with a signed and notarised Renunciation of his Occupancy Rights in the said former matrimonial home. Further, as at the date of transfer Mrs Brown shall discharge and relieve Mr Brown of all obligations for the outgoings in respect of said property, including without prejudice to the foregoing generality the council tax, all fuel and telephone bills and household insurance.
- (iv) In the event of either Mr Brown or Mrs Brown failing to execute any of the documents hereinbefore referred to and which are required to give effect to the transfer of title of the said property to the sole name of Mrs Brown, either party shall be entitled to make an application to Glasgow Sheriff Court to authorise the Sheriff Clerk at Glasgow to sign any such deeds or documents on their behalf. If such proceedings are necessary the party who has failed to sign such deeds and document will be

responsible for the other party's reasonable legal expenses and costs.

- (v) By their execution of this Minute of agreement both Mr Brown and Mrs Brown agree that any survivorship destination contained within the Land Certificate relating to the said former matrimonial home at 19 Madeup Street, aforesaid is hereby revoked, evacuated and renounced by Mr Brown and Mrs Brown.

(FOURTH) For the consideration set out in the Minute of Agreement and with reference to the transfer of title of the former matrimonial home at 19 Madeup Street, aforesaid from the joint names of Mr Brown and Mrs Brown to the sole name of Mrs Brown, Mrs Brown shall pay to Mr Brown a capital sum of TWENTY THOUSAND POUNDS (£20,000) sterling WHICH CAPITAL SUM SHALL BE PAID BY Mrs Brown to Mr Brown as at the date of transfer of title of said property to Mrs Brown's sole name and in any event no later than 1 month from the last date of execution of this Minute of Agreement. Interest at the rate of eight per centum per annum will accrue on the said sum or any balance thereof from its due date until paid.

(FIFTH) By their execution of this Minute of Agreement both Mr Brown and Mrs Brown agree that Mr Brown will retain from the said former matrimonial home at 19 Madeup Street, aforesaid the television DVD player, computer, suite and hi-fi system. Mrs Brown will retain the remaining furniture and plenishings within the said former matrimonial home. By their execution of this Minute of Agreement both Mr Brown and Mrs Brown agree that they have received their fair share of the said furniture and plenishings and discharge any rights they may have in respect thereof.

(SIXTH) Except as hereinbefore provided, all other assets which may be construed as matrimonial assets for the purposes of the Family Law (Scotland) Act 1985 held by Mrs Brown or in her name shall be retained by Mrs Brown as her own absolute property. Similarly, all other assets held by Mr Brown or in his name shall be retained by Mr Brown as his own absolute property.

(SEVENTH) Except as hereinbefore provided, all other debts which may be construed as matrimonial debts for the purposes of the Family Law (Scotland) Act

1985 owned by Mrs Brown or in her name shall be retained by Mrs Brown as her own absolute debt and Mrs Brown accepts full liability for payment of any such debt. Similarly, all other debts owed by Mr Brown or in his name shall be retained by Mr Brown as his own absolute debts and Mr Brown accepts full liability for payment of any such debts. For the avoidance of doubt, in the event of either Mrs Brown or Mr Brown having arranged or incurred credit in the joint names of the parties or in that party's sole name the party who instigated the debt or incurred the credit undertakes to be solely responsible for payment of any such debt and also any interest charges or other costs that may have accrued in connection with the said debt, including legal expenses that may be incurred in connection with payment or enforcement of any such debt and either party will reimburse to the other party any such sum that may be incurred by that party in payment of a debt incurred by the other party without the knowledge of the party against whom the credit or creditors seek payment and to pay in full such debts of sums within seven days of being requested to do so.

(EIGHTH) Both Mr Brown and Mrs Brown hereby renounce and discharge for all time coming all succession rights, including their prior rights and legal rights and claims to mournings, aliment or aliment *ex jure representionius* and other rights of succession which may arise on the death of the other party under the Succession (Scotland) Act 1964 or any amendment or re-enactment thereof, or in Common Law to each other's Estate and they hereby discharge each other's Executors accordingly. They also hereby renounce their rights as surviving spouse under any pension scheme and by their signature of this Agreement hereby revoke the survivorship destination contained in the title to the matrimonial home referred to in Clause Third herof. Further, for the avoidance of doubt by their execution of this Minute of Agreement both Mr Brown and Mrs Brown revoke any testamentary writing/Will executed by them prior to the execution of these presents which includes provision in favour of the other and in particular for the avoidance of all doubt both discharge any rights they may have to inherit the other's estate in terms of any testamentary writing executed prior to the execution of this Minute of Agreement.

(NINTH) Both Mr Brown and Mrs Brown agree that the terms of this Minute of Agreement represent a full and final settlement of all financial claims

arising from the breakdown of their marriage and both parties hereby renounce and discharge for all time coming all and any rights they have or may have against the other, or against the Executors or Assignees of the other whether on divorce or otherwise to any other capital sum, property transfer order or aliment for himself or herself, or periodical allowance of whatever nature, whether under Common Law or Statute whether on divorce, death or bankruptcy and without prejudice to the foregoing generality, any claim in terms of the Divorce (Scotland) Act 1976 or any amendment or re-enactment thereof or in terms of the Family Law (Scotland) Act 1985, or any amendment or re-enactment thereof, including any rights in or to any pension, superannuation, or similar schemes, or life policies pertaining to the other party. For the avoidance of doubt, this Agreement operates to discharge each party (including that party's Estate) of the obligation to aliment the other party but not the child of the marriage Adam Brian Brown which obligation is governed by Clause Second herof. For the avoidance of doubt, this provision shall continue to apply irrespective of any alteration in the circumstances of either party.

(TENTH) By their execution of this Minute of Agreement both Mr Brown and Mrs Brown confirm and undertake that they have made a full disclosure of all matrimonial assets and debts acquired during the course of their marriage.

(ELEVENTH) Following upon signature of this Minute of Agreement and after the parties have been separated for a period of one year either party may raise an action for divorce against the other party on the grounds that the marriage has broken down irretrievably as evidenced by one year's non-cohabitation which action shall proceed as undefended provided always that the other craves in the said action are in accordance with the terms of this Minute of Agreement. The other party hereby undertakes to consent to the said divorce and to do all things or cause all things to be done which are necessary to signify said consent to the Court. In respect of such a divorce action each party will be responsible for their own legal costs.

(TWELFTH) For the avoidance of doubt, the provisions of this Minute of Agreement shall remain in full force and effect notwithstanding any Decree of Divorce which may follow hereon at the instance of either Mr Brown and

Mrs Brown and notwithstanding the temporary resumption of cohabitation of the parties for a period not exceeding 6 months. By their execution of this Minute of Agreement both Mr Brown and Mrs Brown agree that in the event of them resuming cohabitation for a period in excess of 6 months (and assuming that they have not divorced in the interim) the whole provisions of this Minute of Agreement shall be null and void.

(THIRTEENTH) Both parties hereby acknowledge that in reaching the terms of this Minute of Agreement they have been given the benefit of separate legal advice and further they acknowledge that having regard to the whole circumstances prevailing at the date of separation and at the date herof, the said terms of settlement are fair and reasonable.

(FOURTEENTH) Both Mr Brown and Mrs Brown hereby undertake to sign all deeds and other documents necessary to give effect to any provisions of this Minute of Agreement. In the event of either party refusing or delaying to sign any deed or other document which is necessary for him or her to sign to give effect to any of the provisions of this Minute of Agreement, either party shall be entitled to make an application to Glasgow Sheriff Court to authorise the Sheriff Clerk at Glasgow to sign any such deeds or documents on their behalf. If such proceedings are necessary the party who has failed to sign such deeds and documents will be responsible for the other party's reasonable legal expenses and costs.

(FIFTEENTH) Except as hereinbefore provided, each party shall meet their own legal costs in respect of the negotiation, preparation and registration of this Minute of Agreement. The cost of registering this Minute of Agreement and obtaining two extracts thereof will be born equally by Mr Brown and Mrs Brown. By their execution of this Minute of Agreement both Mr Brown and Mrs Brown agree that Mrs. Brown's solicitors will attend to the registration and obtaining two extracts of the Minute of Agreement

(SIXTEENTH) For the avoidance of doubt, this Minute of Agreement will be governed by and construed in accordance with the Law of Scotland. In the event of either party disputing any of the terms of this Minute of Agreement, by their execution of this Minute of Agreement both Mr Brown and Mrs Brown prorogate the exclusive jurisdiction of the Sheriffdom of Glasgow and Strathkelvin at Glasgow

(SEVENTEENTH) The expressions “date of signature” or “signature” in relation to this Minute of Agreement means the later of the two dates on which it has been signed by the parties.

(LASTLY) The parties hereby consent to registration of this minute of Agreement for preservation and execution in the Books of Council and Session and further agree that diligence proceedings can be instructed upon the basis of the registered Minute of Agreement to follow hereon: IN WITNESS WHEREOF this presents typewritten on this and the thirteen preceding pages are signed by me the said Mark James Brown at Goven on the twenty sixth day of February, Two thousand and ten before this witness Sandra Smith, Solicitor of 92 Summer Street, Anytown and are signed by me the said Gillian Amy Black or Brown at Glasgow on the Twenty sixth day of February Two Thousand and ten before this witness Gordon Solomon Anderson Solicitor of 45 Middle Street, Glasgow G14 5PO.

## EXAMPLE 2: COHABITANTS

### MINUTE OF AGREEMENT

Between

CATHERINE DONALDSON

also known as LYNCH

Residing at 72 Fettes Row,  
Gordonstown (hereinafter referred  
to as "Miss Lynch")

and

JAMES GEORGE LYNCH, residing  
at 28 Robert Road, Gordonstown,  
PA11 9AQ (hereinafter referred  
to as "Mr Lynch")

WHEREAS Miss Donaldson and Mr Lynch were previously involved in a relationship AND WHEREAS their cohabitation came to an end on or about 16<sup>th</sup> August 2008 AND WHEREAS Miss Donaldson has raised an action against Mr Lynch at Paisley Sheriff Court having court reference number F217/09 seeking a payment from him of a capital sum in terms of Section 28 of the Family Law (Scotland) Act 2006 AND WHEREAS Miss Donaldson and Mr Lynch have now reached agreement in settlement of that action

NOW THEREFORE they have agreed and do hereby agree as follows:-

1. Mr Lynch will market for sale the property at 72 Fettes Row, Gordonstown. He will instruct Fisher & Bobbit, 53 Low Road, Gordonstown, estate agents to deal with the marketing of the property. He will instruct his solicitors Fisher and Bobbit 53 Low

Road, Gordonstown to deal with the conveyancing in respect of the sale of the property. Miss Donaldson will meet the cost of the home report (£370) for the sale of the property together with the following outlays, namely, GSPC registration fee of £315.82.

2. Mr Lynch in consultation with Miss Donaldson will accept the first reasonable offer for the purchase of the property. The sale proceeds of the property will be applied in the following manner:-

(Firstly) redemption of the existing heritably secured loan with the Royal Bank of Scotland Plc. Under mortgage account number 99999999.

(Secondly) payment of the fees and outlays incurred by Fisher and Bobbit in connection with the marketing and sale of the property.

(Thirdly) reimbursement to Miss Donaldson of the cost of a home report and the other outlays incurred by her in respect of the marketing of the property.

(Fourthly) payment to Miss Donaldson of one half of the balance of the sale proceeds after the payment firstly secondly and thirdly herein provided for and

(Lastly) payment of the balance to Mr Lynch

3. For the avoidance of doubt it is provided that should it be necessary to discharge any heritably secured loan over the property or to discharge any inhibition against Mr Lynch, the costs of doing so will be deducted against Mr Lynch's share of the net sale proceeds hereinbefore provided for and will not be taken into account in calculating the payment due to Miss Donaldson. Mr Lynch hereby grants an irrevocable mandate to his solicitors Fisher and Bobbit to distribute the proceeds of sale in accordance with paragraph 2 herof and make payment to Miss Donaldson's solicitors Simon and Chandler 312 Dyke Lane, Paisley of the sums due to her in terms herof.
4. Payment to Miss Donaldson in terms of paragraph 2 herof will operate as a discharge of her claim for a capital sum in terms of Section 28 Family Law Scotland Act 2006 and all other financial claim competent by her against Mr Lynch. On payment being made to Miss Donaldson hereunder the parties will enter into a joint Minute providing for absolvitor with no expenses due to or by either party in respect of the court action hereinbefore referred to.

5. If for any reason beyond the control of either Miss Donaldson or Mr Lynch the parties are unable to market and sell the property as hereinbefore provided for, the terms of this Minute of Agreement will be null and void. In that event Miss Donaldson will be free to pursue the court action she sees fit and Mr Lynch will be able to advance whatever defence to it as he sees fit.
  
6. The Parties hereto consent to registration of this Minute of Agreement for preservation IN WITNESS WHEREOF these presents typewritten on this and the two presiding pages are subscribed by the said James George Lynch at Gordonstown on Fourteenth September Two Thousand and Ten before Malcolm Whittle, Solicitor, 53 Low Road Gordonstown, and by the said Catherine Donaldson at Gordonstown on the Twenty third day of the month and year last mentioned before Jeremy Walton, Solicitor, 312 Dyke Lane, Paisley.

## APPENDIX 7: SAMPLE MINUTE OF AGREEMENT (ante nuptial)

### MINUTE OF AGREEMENT

By

[P1]

Residing at [family home address]

In favour of

[P2]

WHEREAS John and Tanya are engaged to be married and wish to fix and determine their respective rights and interests in their own and each other's property or estate arising out of the intended marriage; AND WHEREAS the Parties wish to record that they accept the provisions of this Agreement in lieu of any other rights either may have in law or equity or on any other basis and in full discharge and satisfaction of such rights AND WHEREAS it is expedient that the Agreement be reduced to writing; NOW THEREFORE THE Parties, having been advised of their right to seek independent legal advice, DO HEREBY AGREE, contract, declare and record as follows:-

1. Upon entering into the marriage and at all times thereafter each of the parties shall separately have and retain all rights in his or her respective existing and future separate property, being either property listed in Parts 1 or 2 (as appropriate) of the Schedule or else future property purchased or acquired in the sole name of one or other of the parties. Each of them shall have the absolute and unrestricted right to dispose of such separate property free from any claim by the other by reason of their marriage or on any other basis and with the same effect as if they were unmarried notwithstanding any law or equitable distribution or community of property which might otherwise be applicable. For the avoidance of doubt, John's separate property as at the date herof is listed in Part 1 of the Schedule annexed to and forming part of this Agreement and

Tanya's separate property is listed in Part 2 of the Schedule annexed to and forming part of this Agreement and the parties' joint property is listed in Part 3 of the Schedule annexed hereto and forming part of this Agreement.

2. Each party shall during the marriage and during his or her lifetime keep and retain sole ownership, enjoyment, control and power of disposition of all property of every kind and nature whatsoever owned by that party at the time of the marriage to the exclusion of the other party, free and clear of any interest rights and claims of the other. The party not in ownership further waives any interest, right or claim to any increase in value of such separate property of the other and in other property exchanged or acquired with proceeds of sale or income generated from any such separate property. Any increase in value and other property so acquired in substitution shall be considered a part of and be owned as part of the separate property of such party who initially owned the property.
3. Each party shall during his or her lifetime continue the exclusive right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of or otherwise manage and control his or her own separate property without let, hindrance or claim by the other.
4. Each party shall also have and retain sole ownership of any gift or inheritance accruing to or received by such party free and clear of any claim by the other.
5. Upon termination of the marriage in whatever manner and for whatever reason each party shall keep his or her separate property free and clear from any claim by or interest whatsoever of the other and any such separate property shall not be divisible pursuant to any statute, common law or equity for the division of marital property and shall remain the property of the owner free and clear of any claim whatsoever of the other party. Neither party shall have any claim against the other to or in respect of the property of the other.
6. The parties hereby acknowledge and represent to each other that there may be jointly held property which they will acquire together during the course of or in contemplation of their marriage. This would include all sums deposited into any

bank accounts in their joint names as well as any substitutions thereof, exchanges thereof or increments thereto. It shall further include any property acquired with monies withdrawn from such joint accounts as well as any income from such properties, substitutions thereof, exchanges thereof and increases in value thereof and proceeds from the sale of such property. The parties shall have joint powers of control, ownership and disposal of such jointly owned property.

7. Subject to the foregoing, it is not the intention of the parties to have joint property acquired by them during the marriage. The exception shall be the matrimonial home, which may be purchase or build and put into joint names.
8. The parties agree that this Minute of Agreement is subject to any prior or subsequent written agreement entered into between them or any prior or subsequent written undertaking given by either of them or by any subsequent testamentary writing made by either of them in relation to their respective separate property or their joint property, present or future, and the terms of this Minute of Agreement shall be construed accordingly. Without prejudice to the foregoing generality, this Minute of Agreement is subject to the terms of the Minutes of Agreement entered into between the parties in respect of the heritable property at [address of family home] and also between [P2] in respect of the heritable property at [address 2], the ground floor flat at [address 3] and the ground and first floor flats at [address 4]
9. The parties acknowledge that each has been provided with full disclosure and details of the other's financial position and that based on such disclosure and details each understands the respective benefits which may accrue to the other in the absence of entering into this Minute of Agreement. The Parties each declare that they have either obtained independent legal advice or have been advised to do so and are aware of their entitlement to do so but declined to do so as the case may be and enter into this Agreement freely and voluntarily, without coercion or duress and with full knowledge and understanding of their rights and obligations arising herefrom.
10. In the event of separation or marital termination the parties agree and declare that no financial rights shall accrue to either of them against assets or income of the other arising from their marriage or on any other basis. Accordingly, each of

the parties waives, relinquishes any and all rights and claims against the other and releases the other from and in respect of any right or claim for support, aliment, maintenance or financial provision of any kind or any other payment of a similar nature whether temporary or permanent.

11. In the event of any of the terms or conditions of this Agreement being held to be unenforceable in whole or in part, this shall not jeopardise the remaining terms of this Agreement which shall nonetheless continue to be of full force and effect between the Parties.

#### Schedule

##### P1's Separate Property

1. 100% ownership for shares in a lettings company, [company number given] and [registered address given]
2. Property at [address]
3. House in [France]

##### P2's Separate Property

1. Address 2 (from earlier in Agreement)
2. House in Lanzarote, Canary Islands, Spain

##### Joint Property

1. Address of family home
  2. Joint Bank of Scotland Account
12. The Parties hereto consent to registration of this Agreement for preservation and execution: IN WITNESS WHEREOF