

# The Law Commission

(LAW COM. No. 99)

## FAMILY LAW

### ORDERS FOR SALE OF PROPERTY UNDER THE MATRIMONIAL CAUSES ACT 1973

*Laid before Parliament by the Lord High Chancellor  
pursuant to section 3(2) of the Law Commissions Act 1965*

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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**THE LAW COMMISSION  
CRIMINAL LAW**

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THE LAW COMMISSION  
FAMILY LAW

*Item XIX of the Second Programme*

ORDERS FOR SALE OF PROPERTY UNDER  
THE MATRIMONIAL CAUSES ACT 1973

*To the Right Honourable the Lord Hailsham of St. Marylebone, C.H.,  
Lord High Chancellor of Great Britain*

**1. The problem**

1. The court has extensive powers<sup>1</sup> in divorce, nullity, and judicial separation proceedings to redistribute the parties' capital assets.<sup>2</sup> But it has no express power under the Matrimonial Causes Act 1973 to order a sale of property. It has from time to time<sup>3</sup> been suggested that the lack of such a power causes difficulty, particularly in the common case where the only substantial capital asset is the former matrimonial home which must be realised if appropriate financial arrangements are to be made.

2. Item XIX of our Second Programme constitutes a standing reference to us of all matters in the field of family law and it seemed to us that this particular question was an isolated one which could be examined and reported on without interfering with progress on other work in this field. We therefore decided to carry out a limited consultation amongst certain bodies and individuals<sup>4</sup> to ascertain whether the absence of a power to order sale causes real difficulties in practice.

**2. Views expressed on consultation**

3. On one view there are few, if any, difficulties. The correct procedure<sup>5</sup> for a party in proceedings for financial relief consequent on marital breakdown who seeks an order for the sale of property is generally thought to be to issue a summons under section 17 of the Married Women's Property Act 1882.<sup>6</sup> But even if this has not been done the court can give leave at the hearing—and even after judgment if the point is then taken—for the party seeking a sale to issue a *pro forma* summons. It is also said that the divorce court can in effect compel one party to sell property by making a lump sum order which could only be met

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<sup>1</sup> Matrimonial Causes Act 1973, ss. 23 and 24; set out in Appendix 2.

<sup>2</sup> By means of a lump sum order under s. 23(1)(c), or a property adjustment order (i.e. transfer or settlement of property, and variation of ante-nuptial and post-nuptial settlements) under s. 24.

<sup>3</sup> Latterly by Mr. Alec Samuels, Reader in Law at Southampton University, who wrote to us in February 1979 suggesting reform.

<sup>4</sup> Listed in Appendix 3.

<sup>5</sup> See *Glenn v. Glenn* [1973] 1 W.L.R. 1016, 1019 *per* Dunn J.; but cf. *Ward v. Ward and Greene* [1980] 1 W.L.R. 4, 5] where the Court of Appeal suggested that a power to order sale did exist under the 1973 Act.

<sup>6</sup> As extended by the Matrimonial Causes (Property and Maintenance) Act 1958, s. 7(7). If the property is jointly owned the appropriate procedure is an application under the Law of Property Act 1925, s. 30.

by sale;<sup>7</sup> and it was suggested to us that the court could achieve the same result by ordering particular property to be held on trust for sale under the power to order a settlement of property contained in section 24(1)(b) of the 1973 Act and then ordering the immediate execution of that trust.

4. On the other hand, our consultation confirmed that the present situation under which it is usually considered necessary to issue two sets of proceedings may cause confusion, inconvenience, delay and some increase in costs. It was also said that the present procedures sometimes constitute a trap for the unwary litigant because some judges and registrars might not feel able to make an order for sale in the absence of an appropriate summons. More generally, it seems unfortunate that procedure should be unnecessarily complicated by multiplying pieces of paper headed "Married Women's Property Act" or "Law of Property Act" for no purpose other than to give the court formal authority to make an appropriate order.<sup>8</sup>

5. In the consultative note which we circulated, we suggested that there might be a further, less easily definable but perhaps more serious, objection to the present practice of resorting to separate applications under section 17 of the 1882 Act and section 30 of the 1925 Act. Use of these proceedings in situations of marital breakdown had (we said)—

"been consistently discouraged by the Court of Appeal because these procedures are primarily concerned with the parties' entitlement as a matter of strict property law, which is substantially irrelevant in the context of the discretionary jurisdiction exercisable in matrimonial proceedings: see, e.g. *Williams v. Williams* [1976] Ch. 278; *Fielding v. Fielding* [1977] 1 W.L.R. 1146, 1148 *per* Ormrod L. J. If the old procedures have to be used because of a procedural gap in the Matrimonial Causes Act 1973 it is possible that advocates will be encouraged to base their case to an undue extent on an approach which, in this context, is outdated. In this connection, it is worth pointing out that some registrars still seem to place greater reliance on property entitlement in such cases than may be warranted in the light of the Court of Appeal decisions; see *The Matrimonial Jurisdiction of Registrars* by W. Barrington Baker and others (1977) paras. 3.19–21."

Several commentators expressed agreement with this view. In this connection we were particularly impressed with the view of the Association of County Court and District Registrars that a "straightforward power to order sale would give a *real* power which may well produce a more realistic attitude in litigants when considering compromise, as well as assisting the Court."

### 3. Our main recommendation

6. Although some commentators did not think that the absence of an express power to order sale caused real problems, none was opposed to such a power being conferred, and some thought that problems did arise under the present rules. We therefore consider that it is desirable, if only for the avoidance of

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<sup>7</sup> *Glenn v. Glenn*, above. Moreover, if a person ordered to make a lump sum payment fails to do so the court may enforce his liability by means of a charging order and an order for sale may then be made: Administration of Justice Act 1956, s. 35 (and, in relation to property other than land and interests therein, R.S.C. 0.50 r.2; C.C.R. 0.25 r. 6A); see also para. 14, below.

<sup>8</sup> See *Ward v. Ward and Greene* (n.5 above), *per* Ormrod L.J.

doubt,<sup>9</sup> to confer such a power when the court makes an order for financial relief in divorce, judicial separation and nullity proceedings under the Matrimonial Causes Act 1973, and we so recommend.

7. It will be noted that we do not propose that the power should be available in proceedings under section 27 of the Matrimonial Causes Act<sup>10</sup> for an order on the ground that one party to a marriage has failed to provide reasonable maintenance for the other or for a child of the family. We do not think that it would be appropriate to give the court a wide power to order sale in proceedings which are not based on the breakdown of the marriage and which are designed to provide maintenance (even though that maintenance may take the form of a lump sum order).

#### 4. Cases where an order for sale should be available

8. We now have to consider whether the proposed power to order sale should be available in all cases where a financial order is made in divorce, judicial separation and nullity proceedings, or whether the power should be restricted, for example, to cases where a lump sum order is made and the court considers that it should be satisfied out of the proceeds of sale of the former matrimonial home. In discussing this question we think that it should be kept in mind that the Matrimonial Causes Act 1973 is designed “to accord to the courts the widest possible powers in readjusting the financial position of the parties and to afford to the courts the necessary machinery to that end, . . .”<sup>11</sup> It should also be remembered that in the exercise of their adjustive financial jurisdiction consequent on matrimonial breakdown, courts have to deal with an almost infinite variety of factual situations. The court therefore needs, and generally now has, power to achieve whatever result is appropriate in the interests of the spouses and children. Flexibility is the keynote of the legislation, and we do not think that it would be appropriate to adopt a restrictive approach to the ambit of the additional power which we now recommend should be conferred on the court. Accordingly we propose that the power to order sale should be available whenever the court, in proceedings for divorce, judicial separation or nullity makes a lump sum, transfer or settlement of property, variation of settlement,<sup>12</sup> or secured periodical payments order—that is to say whenever it makes an order which involves capital assets.

9. The usefulness of the power will no doubt mostly lie in connection with orders for payment of lump sums, particularly where the order is to be satisfied out of the proceeds of sale of the former matrimonial home. In the nature of things we believe that it would not often be appropriate to attach an order to sell to an order transferring property from one spouse to the other or varying a settlement. Nevertheless, it is possible to visualise cases in which it would be helpful for the court to have power to direct a sale in support of such orders. For example, in the case of transfer of property orders, the property available

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<sup>9</sup> We do not think that the matter can be regarded as concluded by *Ward v. Ward and Greene* (n.5 above) since the views expressed in that case were *obiter*.

<sup>10</sup> As amended by the Domestic Proceedings and Magistrates' Courts Act 1978, s. 63.

<sup>11</sup> *Wachtel v. Wachtel* [1973] Fam. 72, 91 *per* Lord Denning M.R.

<sup>12</sup> Or an order extinguishing or reducing the interest under a settlement on either of the parties to the marriage.

for transfer might be the husband's shareholding in his family company. It could be entirely proper that the wife should have the benefit of the *value* of the shareholding (a matter which might not be readily quantifiable when the court's decision was made) but highly undesirable that she should be able to exercise the voting rights which she would have if the shares were transferred to her and she were permitted to retain them. In such a case the court could order the husband to transfer his shareholding (or part of it) to the wife, but also order that the holding be sold.<sup>13</sup> In effect, therefore, the court would have power to order the transfer of the proceeds of sale. Again, there might be cases where the husband's only substantial capital asset is a house, and it is considered that the wife should have a share of the value. The court could in such a case order him to transfer the share to the wife, and also make an order for the sale of the house. Sometimes—as, for example, where the land has development value—it might be appropriate to permit the sale to be postponed for a period, and the draft clauses annexed to this report would enable the court to make an order providing for this to be done.

10. Where the court exercises its powers to vary a nuptial settlement, it seems at first sight difficult to believe that a power to order the sale of the trust property could ever be appropriate. But it must be remembered that the "fund" in such a case may consist of the matrimonial home,<sup>14</sup> which should clearly be sold, and there may be other cases where the fund consists of special assets (such as shares in a private company) where the making of an order for sale would be proper. We therefore consider that it would be wrong to limit the scope of the power so that it would not be available in such cases.

11. In the case of secured periodical payments orders, the principal order is, it is true, of an income rather than of a capital nature. But such orders do involve capital assets; the capital element lies in the security which has to be provided. The purpose of an order to sell property<sup>15</sup> in connection with such an order would normally be to require the party against whom the principal order was made to convert existing unsuitable assets into assets acceptable as permanent security. We therefore consider that this possibility justifies the extension of the power to order a sale to such cases. There is on the other hand in our view no justification for extending the power to cases where the only financial order made is for unsecured periodical payments.

12. It should be noted that the proposed power would go beyond merely remedying the procedural defect to which we have referred, since it would enable a court to order a sale of property in which the applicant had, as a matter of property law, no claim to a beneficial interest. (Orders made on the authority of the 1882 and 1925 Acts are founded on the proposition that the applicant has

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<sup>13</sup> It may be in the interests of the husband's family that the holding be acquired by another member of the family, who is prepared to pay a proper price. To cover this and similar cases the draft clauses annexed to this report enable the court to require the property to be offered for sale to a specified person or class of persons.

<sup>14</sup> As in *Cook v. Cook* [1962] P. 235.

<sup>15</sup> In the ordinary case the party ordered to give security will be given the opportunity to provide acceptable security of his own choice. An order under the proposed power would accordingly be made only if he was likely to be unco-operative.

some beneficial interest in the property in question.) We do not think that this extension is objectionable; as we have already pointed out, under the matrimonial legislation the court has the widest power to redistribute all property owned by either party;<sup>16</sup> its powers are not limited to dealing with “family assets”,<sup>17</sup> and it needs “the utmost elasticity to deal with each case on its own facts.”<sup>18</sup>

## 5. Circumstances in which the power should be exercised

13. The court will have a wide discretion as to whether or not to exercise the power to order a sale. We think it is right that it should be guided in the exercise of the discretion by the comprehensive statutory guidelines<sup>19</sup> which govern the exercise of its existing “extremely wide powers”<sup>20</sup> to make property adjustment and other financial orders; the draft clauses annexed to this report so provide. These guidelines should ensure that the power is only exercised where it is appropriate to do so in securing the desired overall financial result. In our consultative note we expressed concern that a wholly unrestricted power to order sale would authorise the making of an order for sale against a spouse notwithstanding that he might have other means of complying with the lump sum or other financial orders made against him. In such circumstances an order for sale would be tantamount to an order for execution and as such both premature and excessive. Our concern about this led us to suggest that the enforceability of an order for sale made in support of a lump sum order should always be conditional on the principal order not being satisfied in some other way within a specified period. The majority of commentators were opposed to tying the court’s hands in such a way, and we now accept this view. We are satisfied that there would be little risk of unnecessary or oppressive orders being made; the fact that the court would have power, if need be, to order a sale should not affect the general principle that a party ordered to provide capital should be permitted to make his own proposals as to the method by which it is to be raised;<sup>21</sup> and if a party did consider that the discretion to order a sale had been exercised unnecessarily or inappropriately in the light of the statutory guidelines an appeal would lie in the usual way.

14. There may, of course, be cases in which, the court having made a lump sum order, it becomes necessary to enforce it. At the moment the court could do this by making a charging order on the respondent’s property, ultimately leading to a sale. The power contained in the draft clauses annexed to this report would be exercisable not only on making the main financial order, but at any time thereafter, and could thus be used, in appropriate circumstances, as a method of enforcement. This would enable the court to do directly what at the moment it can only do indirectly.<sup>22</sup>

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<sup>16</sup> See para. 8, above and *Harnett v. Harnett* [1973] Fam. 156, 161 *per* Bagnall J.

<sup>17</sup> *P. v. P. (Financial Provision: Lump Sum)* [1978] 1 W.L.R. 483, 487–8 *per* Ormrod L.J.

<sup>18</sup> *Martin (B.H.) v. Martin (D.)* [1978] Fam. 12, 20 *per* Ormrod L.J.

<sup>19</sup> I.e. under s.25 of the Matrimonial Causes Act 1973, set out in Appendix 2, below.

<sup>20</sup> *Browne (formerly Pritchard) v. Pritchard* [1975] 1 W.L.R. 1366, 1371 *per* Ormrod L.J.

<sup>21</sup> See *O’D. v. O’D.* [1976] Fam. 83, 92 *per* Ormrod L.J.

<sup>22</sup> See *Levermore v. Levermore* [1979] 1 W.L.R. 1277.



## 6. Property in which third parties are interested

15. The effectiveness of a power to order sale of property in support of a capital financial order might depend on the court being able to look to property in which third parties also had a beneficial interest. Take for instance the case where the husband (who has been ordered to pay a lump sum to the wife) owns a house jointly with his brother<sup>23</sup>. There is no reason why the husband's share of the proceeds of sale of the house should not be applied in or towards satisfaction of the financial order; the only question is whether the court should order the execution of the trust for sale against the brother's wishes. Similar considerations might apply if the parents of one of the spouses had an interest in the matrimonial home.<sup>24</sup> In such cases the court would need to give full consideration to those third party interests. The draft clauses therefore expressly require that any interested third parties be given an opportunity to make representations<sup>25</sup> which will be included among the circumstances to which the court is statutorily obliged to have regard<sup>26</sup> in deciding whether and, if so, how to exercise the powers conferred by the new clause. It is true that the decision whether or not to exercise the discretion to order sale in such cases may be a difficult one, but the court is already familiar with such problems in the exercise of its jurisdiction under section 30 of the Law of Property Act 1925.

## 7. Application to settlements

16. The width of the power which we propose should be conferred on the court means that it may occasionally be necessary to consider whether to exercise it in relation to settlements in which the party concerned has only a limited interest. The draft clauses describe the property which may be the subject-matter of an order for sale in such a way that it includes not merely the relevant party's own beneficial interest in settled property but also the settled property itself, and it is, we think, helpful to distinguish between the two cases. In the first case the court will be considering making an order relating to the relevant party's own beneficial interest (as distinct from the trust property in which that interest subsists); in the second the question will be whether to make an order dealing with the property itself.

17. In the first case—as, for example, where the court is minded to order a husband to sell a life or reversionary interest to which he is entitled under a will or settlement and to transfer or settle the proceeds—the court will have to bear in mind in deciding whether or not to order a sale that purchasers tend to regard such limited interests as unattractive assets. A forced sale could thus operate unfairly against the relevant party, and for that reason it would probably not be appropriate to make an order for sale. Nevertheless, the power would be available should circumstances ever justify its exercise.

18. In deciding whether to exercise its power in the second case—that is, to order a sale of assets constituting the fund in which the spouse's limited in-

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<sup>23</sup> As in *Levermore v. Levermore*, above.

<sup>24</sup> As in *Bull v. Bull* [1955] 1 Q.B. 234.

<sup>25</sup> If the property were vested in trustees they would have to be joined so that any order for sale would bind them.

<sup>26</sup> Matrimonial Causes Act 1973, s. 25.

terest subsists—the court would, of course, have to bear in mind that the proceeds of sale could not usually, under the terms of the settlement, be made available to a party with only a limited interest. Nevertheless there are circumstances where it might be expedient to order a sale to achieve the desired financial result. For example, if the fund consists of the former matrimonial home or of a shareholding in a private company it might appropriately be sold if an order extinguishing one spouse's interest in the settlement were made.<sup>27</sup> Even if the settlement is not one which the court has power to vary<sup>28</sup> there might be circumstances in which sale would be appropriate, particularly if the court were minded to order the transfer or settlement of a spouse's beneficial interest. It might, for example, be the case that the fund has, for good reason and in accordance with a power in the settlement, been invested in a wasting asset (such as a leasehold property); if it remained so invested the value of the reversion would be depressed, and the court might therefore order the trustees, after giving them an opportunity to be heard, to sell. Such cases would, of course, be rare.

19. To complete this section of our report we wish to add a further argument in favour of making the power to order a sale of property as wide as possible. The terms of financial provision (and the method of providing it) are very often matters of agreement between the parties and are subsequently, by agreement, incorporated in a court order after approval by the court. It is obviously desirable that this course should be adopted whenever possible but it is questionable whether a court order can incorporate terms which the court itself has no jurisdiction to impose. A power of the type now recommended would overcome that problem.

## 8. Related matters

20. The draft clauses attached to this report expressly provide that the court should have power to suspend any order for sale, and to make conditional orders. It will thus, for example, be possible if the court thinks fit to make an order for sale to take effect at the end of a specified period only if a party ordered to pay a lump sum (or perhaps to settle or transfer property)<sup>29</sup> has failed to do so within that period. It might be said that since a power to order sale would by implication contain power to postpone the date when an order takes effect, an express power to suspend is unnecessary. But we feel that an express power to suspend an order for a finite period would be helpful in directing the court's mind to this possibility.

21. It will be necessary for the rule-making body to lay down a procedure to govern the way in which orders for sale are to be carried out. The Rules will no doubt deal with such matters as the appointment of the person who is to conduct the sale, the manner of sale, and so on. We note that there are detailed rules governing sales in the Chancery Division.<sup>30</sup>

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<sup>27</sup> Under s.24(1)(d) of the Matrimonial Causes Act 1973.

<sup>28</sup> Because it is not an ante-nuptial or post-nuptial settlement made on the parties to the marriage.

<sup>29</sup> Where it is sought to execute an order to settle or transfer property, a simpler means of implementing the order where the party neglects or refuses to do so is to nominate a person to execute the relevant document on the defaulter's behalf: Supreme Court of Judicature (Consolidation) Act 1925, s. 47.

<sup>30</sup> See R.S.C. 0.31, r.2.

22. Finally, it will be observed that we annex to this report draft clauses rather than the customary draft Bill. This is no reflection on the importance to be attached to this reform of the law; we merely doubt whether a separate Bill is necessary. We feel that clauses may more easily find a place in a suitable legislative vehicle.

#### SUMMARY OF RECOMMENDATIONS

23. (1) There should be an express power to order sale of property when the court makes an order for financial relief (except for unsecured periodical payments) in divorce, nullity and judicial separation proceedings. (paragraph 6)

(2) The power to order sale should be exercised according to the guidelines set out in section 25 of the Matrimonial Causes Act 1973.<sup>31</sup> (paragraph 13)

(3) The power should be available in cases where a third party has an interest in the property, subject to any representations by that third party. (paragraph 15)

(4) The court should have express power to make suspended or conditional orders for sale. (paragraph 20)

(Signed) MICHAEL KERR, *Chairman.*

STEPHEN M. CRETNEY.

STEPHEN EDELL.

W. A. B. FORBES.

PETER M. NORTH.

J. C. R. FIELDSEND, *Secretary*

14th December, 1979.

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<sup>31</sup> Sect. 25 is set out in Appendix 2, below.

## **APPENDICES**

APPENDIX 1  
DRAFT CLAUSES

Powers of court to order sale of property in matrimonial proceedings.

A. After section 24 of the Matrimonial Causes Act 1973 there shall be inserted the following section—

“Orders for sale of property.

24A.—(1) Where the court makes under section 23 or 24 of this Act a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order, then, on making that order or at any time thereafter, the court may make a further order for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale of which either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion.

(2) Any order made under subsection (1) above may contain such consequential or supplementary provisions as the court thinks fit and, without prejudice to the generality of the foregoing provision, may include—

- (a) provision requiring the making of a payment out of the proceeds of sale of the property to which the order relates, and
- (b) provision requiring any such property to be offered for sale to a person, or class of persons, specified in the order.

(3) Where an order is made under subsection (1) above on or after the grant of a decree of divorce or nullity of marriage, the order shall not take effect unless the decree has been made absolute.

(4) Where an order is made under subsection (1) above, the court may direct that the order, or such provision thereof as the court may specify, shall not take effect until the occurrence of an event specified by the court or the expiration of a period so specified; and where the court has directed that the order or any provision thereof shall not take effect until the expiration of a specified period, the court may, at any time before the expiration of that period, direct that the order, or that provision thereof, shall not take effect until the expiration of such further period as the court may specify.

(5) Where an order under subsection (1) above contains a provision requiring the proceeds of sale of the property to which the order relates to be used to secure periodical payments to a party to the marriage, the order shall cease to have effect on the death or remarriage of that person.”

## EXPLANATORY NOTE

### *Clause A*

1. This clause inserts into the Matrimonial Causes Act 1973 a new section 24A. It implements the recommendation in paragraph 6 of the Report that there should be an express power to order sale of property where an order for financial relief, other than unsecured periodical payments, is made in divorce, nullity or judicial separation proceedings.

2. Section 24A(1) provides that a sale of property may be ordered when an order for secured periodical payments, lump sum or property adjustment is made; it extends to reversionary interests as well as interests in possession: see further paragraphs 16–18 of the Report.

3. Section 24A(2) provides for supplementary provisions to be made in orders for sale, in particular that an order may be made for sale to a specified purchaser or class of purchaser as recommended in paragraph 9 of the Report.

4. Section 24A(3) is a consequential subsection which postpones the coming into effect of orders for sale made in divorce and nullity cases until decree absolute, thus bringing such orders into line with other relevant orders for financial relief: see sections 23(5) and 24(3) of the Matrimonial Causes Act 1973.

5. Section 24A(4) provides for conditional and suspended orders for sale and allows for successive postponements of the implementation of an order, thus giving effect to the recommendation in paragraph 20 of the Report.

6. Section 24A(5) is a consequential subsection which provides that the order for sale in cases where the proceeds of sale are required to secure periodical payments ceases to have effect on the death or remarriage of the payee, as does the secured periodical payments order itself under section 28(1) of the 1973 Act.

B.—(1) In section 25 of the Matrimonial Causes Act 1973 (which specifies the matters to which the court is to have regard in deciding how to exercise its powers under sections 23 and 24) in subsections (1), (2) and (3) for the words “or 24” there shall be substituted the words “24 or 24A,” and at the end of that section there shall be added the following subsection—

“(4) Where a party to a marriage has a beneficial interest in property in which or in the proceeds of sale of which some other person who is not a party to the marriage also has a beneficial interest, then, before deciding whether to make an order under section 24A above in relation to that property, it shall be the duty of the court to give that other person an opportunity to make representations with respect to the order; and any representations made by that other person shall be included among the circumstances to which the court is required to have regard under this section.”

(2) In section 31 of the said Act of 1973 (which provides for the variation and discharge of certain orders for financial relief)—

(a) at the end of subsection (2) there shall be inserted the following paragraph—

“(f) any order made under section 24A above for the sale of property”;

(b) in subsection (6) for the words “may be made by the person entitled to payments under the order” there shall be substituted the words “(and to any order made under section 24A above which requires the proceeds of sale of property to be used for securing those payments) may be made by the person entitled to payments under the periodical payments order”.

(3) In paragraph 11 of Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973 (which relates to the effect on an order for periodical payments of the stay of proceedings for divorce, judicial separation or nullity of marriage) after sub-paragraph (3) there shall be inserted the following sub-paragraph—

“(3A) Where any such order as is mentioned in paragraph (e) of section 23(1) of the Matrimonial Causes Act 1973, being an order made under section 23(1) or (2)(a) of that Act, ceases to have effect by virtue of sub-paragraph (2) or (3) above, any order made under section 24A of that Act which requires the proceeds of sale of property to be used for securing periodical payments under the first mentioned order shall also cease to have effect.”

## EXPLANATORY NOTE

### *Clause B*

1. This clause makes amendments to sections 25 and 31 of the Matrimonial Causes Act 1973 and to Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973; these amendments are consequential on clause A.

2. Subsection (1) requires the court to apply the guidelines under section 25 of the Act as to whether and how it should exercise the power to order sale in the same way that it is required to do in relation to orders for financial relief under sections 23 and 24. This gives effect to the recommendation in paragraph 13 of the Report.

3. The subsection further provides that before making an order for the sale of property in which a third party has an interest, that third party must be given an opportunity to make representations which the court will take into account in deciding whether to exercise the power. This gives effect to the recommendation in paragraph 15 of the Report.

4. Subsection (2) provides that orders for sale may be varied or discharged like other orders for financial relief, and makes consequential amendments to cover cases where a person liable to make secured periodical payments has died.

5. Subsection (3) provides that where an order for secured periodical payments for a child ceases to have effect, because proceedings have been stayed under the Domicile and Matrimonial Proceedings Act 1973, any order for sale which requires the proceeds to be used to secure those periodical payments shall also cease to have effect.



APPENDIX 2

SECTIONS 23, 24 AND 25 OF THE MATRIMONIAL CAUSES  
ACT 1973

23.—(1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say—

- (a) an order that either party to the marriage shall make to the other such periodical payments, for such term, as may be specified in the order;
- (b) an order that either party to the marriage shall secure to the other to the satisfaction of the court such periodical payments, for such term, as may be so specified;
- (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified;
- (d) an order that a party to the marriage shall make to such person as may be specified in the order for the benefit of a child of the family, or to such a child, such periodical payments, for such term, as may be so specified;
- (e) an order that a party to the marriage shall secure to such person as may be so specified for the benefit of such a child, or to such a child, to the satisfaction of the court, such periodical payments, for such term, as may be so specified;
- (f) an order that a party to the marriage shall pay to such person as may be so specified for the benefit of such a child, or to such a child, such lump sum as may be so specified;

subject, however, in the case of an order under paragraph (d), (e) or (f) above, to the restrictions imposed by section 29(1) and (3) below on the making of financial provision orders in favour of children who have attained the age of eighteen.

(2) The court may also, subject to those restrictions, make any one or more of the orders mentioned in subsection (1)(d), (e) and (f) above—

- (a) in any proceedings for divorce, nullity of marriage or judicial separation, before granting a decree; and
- (b) where any such proceedings are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal.

(3) Without prejudice to the generality of subsection (1)(c) or (f) above—

- (a) an order under this section that a party to a marriage shall pay a lump sum to the other party may be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or

herself or any child of the family before making an application for an order under this section in his or her favour;

- (b) an order under this section for the payment of a lump sum to or for the benefit of a child of the family may be made for the purpose of enabling any liabilities or expenses reasonably incurred by or for the benefit of that child before the making of an application for an order under this section in his favour to be met; and
- (c) an order under this section for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court.

(4) The power of the court under subsection (1) or (2)(a) above to make an order in favour of a child of the family shall be exercisable from time to time; and where the court makes an order in favour of a child under subsection (2)(b) above, it may from time to time, subject to the restrictions mentioned in subsection (1) above, make a further order in his favour of any of the kinds mentioned in subsection (1)(d), (e) or (f) above.

(5) Without prejudice to the power to give a direction under section 30 below for the settlement of an instrument by conveyancing counsel, where an order is made under subsection (1)(a), (b) or (c) above on or after granting a decree of divorce or nullity of marriage, neither the order nor any settlement made in pursuance of the order shall take effect unless the decree has been made absolute.

**24.—(1)** On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say—

- (a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;
- (b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;
- (c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage;
- (d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement;

subject, however, in the case of an order under paragraph (a) above, to the restrictions imposed by section 29(1) and (3) below on the making of orders for a transfer of property in favour of children who have attained the age of eighteen.

(2) The court may make an order under subsection (1)(c) above notwithstanding that there are no children of the family.

(3) Without prejudice to the power to give a direction under section 30 below for the settlement of an instrument by conveyancing counsel, where an order is made under this section on or after granting a decree of divorce or nullity of marriage, neither the order nor any settlement made in pursuance of the order shall take effect unless the decree has been made absolute.

25.—(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23(1)(a), (b) or (c) or 24 above in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say—

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
- (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

(2) Without prejudice to subsection (3) below, it shall be the duty of the court in deciding whether to exercise its powers under section 23(1)(d), (e) or (f), (2) or (4) or 24 above in relation to a child of the family and, if so, in

what manner, to have regard to all the circumstances of the case including the following matters, that is to say—

- (a) the financial needs of the child;
- (b) the income, earning capacity (if any), property and other financial resources of the child;
- (c) any physical or mental disability of the child;
- (d) the standard of living enjoyed by the family before the breakdown of the marriage;
- (e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;

and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraph (a) and (b) of subsection (1) above, just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him.

(3) It shall be the duty of the court in deciding whether to exercise its powers under section 23(1)(d), (e) or (f), (2) or (4) or 24 above against a party to a marriage in favour of a child of the family who is not the child of that party and, if so, in what manner, to have regard (among the circumstances of the case)—

- (a) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;
- (b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;
- (c) to the liability of any other person to maintain the child.

APPENDIX 3

INDIVIDUALS AND ORGANISATIONS  
WHO COMMENTED ON OUR CONSULTATIVE PAPER

The Rt. Hon. Lord Justice Ormrod

The Rt. Hon. Sir George Baker, O.B.E.

The Rt. Hon. Sir John Arnold  
(President of the Family Division)

The Hon. Mr. Justice Balcombe

The Hon. Mr. Justice Dunn, M.C.

} Joint  
Memorandum

The Council of Her Majesty's Circuit Judges

The Association of County Court and District Registrars

The Family Law Bar Association

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# The Law Commission

(LAW COM. No. 98)

## RESERVE FORCES BILL

REPORT ON THE CONSOLIDATION OF CERTAIN ENACTMENTS  
RELATING TO THE RESERVE AND AUXILIARY FORCES

*Presented to Parliament by the Lord High Chancellor  
by Command of Her Majesty  
November 1979*

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Mr. Stephen Edell.

Mr. W. A. B. Forbes, Q.C.

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**THE LAW COMMISSION**

**RESERVE FORCES BILL**

**REPORT ON THE CONSOLIDATION OF CERTAIN ENACTMENTS  
RELATING TO THE RESERVE AND AUXILIARY FORCES**

*To the Right Honourable the Lord Hailsham of Saint Marylebone, C.H.,  
Lord High Chancellor of Great Britain.*

The Reserve Forces Bill which is the subject of this Report seeks to consolidate the numerous enactments relating to the reserve and auxiliary forces. In order to produce a satisfactory consolidation it is necessary to make the amendment as to their application to the Isle of Man recommended in the Appendix to this Report.

The Isle of Man Authorities agree to the recommendation.

**MICHAEL KERR**

*Chairman of the Law Commission.*

*November 1979.*

APPENDIX  
RECOMMENDATION

In the enactments proposed to be consolidated by the Reserve Forces Bill no express provision is made with respect to application to the Isle of Man in any enactment prior to the Auxiliary Forces Act 1953. Nevertheless, from the nature of their subject matter, there is a necessary implication that these earlier enactments must apply to the Isle of Man so far as they are capable of doing so. Section 49(2) of the Auxiliary Forces Act 1953 (which relates to the Territorial Army and the Royal Auxiliary Air Force) applies that Act expressly to the Isle of Man, subject to certain specified modifications. Further, section 25(3) of the Reserve Forces Act 1966 (which relates to all the reserve and auxiliary forces) confers power, exercisable by Order in Council, to apply all or any of the provisions of that Act to the Isle of Man subject to any modifications specified in the Order.

The present position is therefore that some of the legislation to be consolidated applies to the Isle of Man by necessary implication only (and therefore without modifications); some applies by virtue of express statutory provision coupled with express statutory modifications; and some applies by virtue of, and subject to modifications in, an Order in Council, namely, the Reserve Forces Act 1966 (Isle of Man) Order 1968 (S.I. 1968 No. 1652). It would hardly be possible to preserve these differences in the proposed consolidation even if there were any point in doing so. We therefore recommend that the power in section 25(3) of the Reserve Forces Act 1966 be extended so that all the provisions in the proposed consolidation may be applied to the Isle of Man by Order in Council, subject to any modifications specified in the Order. This would be in accordance with modern legislative practice as to the Isle of Man.

In consequence of the recommendation the specific application to the Isle of Man contained in section 49(2) of the Auxiliary Forces Act 1953, together with the modifications contained in that section, would not be reproduced in the proposed consolidation, but would be left for inclusion in the applying Order in Council.

Effect is given to the recommendation in clause 158(3) of and Part II of Schedule 10 to the Bill.