The Law Commission

(LAW COM. No. 112)

FAMILY LAW

THE FINANCIAL CONSEQUENCES OF DIVORCE

The response to the Law Commission's Discussion Paper, and recommendations on the policy of the law

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

Ordered by The House of Commons *to be printed*

14th December 1981

LONDON

HER MAJESTY'S STATIONERY OFFICE

Reprinted 1983

£3.15 net

68

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.

The Commissioners are—

The Honourable Mr. Justice Ralph Gibson, *Chairman.*

Mr. Stephen M. Cretney.

Mr. B. J. Davenport, Q.C.

Mr. Stephen Edell.

Dr. Peter North.

The Secretary of the Law Commission is Mr. R. H. Streeten and its offices are at Conquest House, 37–38 John Street, Theobald's Road, London WC1N 2BQ.

THE FINANCIAL CONSEQUENCES OF DIVORCE

CONTENTS

		Paragraphs	*Page*
I.	The background	1–3	1
II.	What reform of the private law can and cannot achieve	4–7	2
III.	The problem of inadequate factual information	8–12	3
IV.	The importance of reform of procedures	13–16	5
V.	The primary objective of the law: the response to the Discussion Paper and our views	17	7
VI.	Reconciling the desire for certainty with the need for flexibility	18–23	7
VII.	The policy objectives	24–30	9
	(i) Priority for the needs of children	24–25	9
	(ii) Greater weight to be given to a divorced wife's earning capacity; and to the desirability of both parties becoming self-sufficient	26–27	10
	(iii) Imposing a "clean break" where practicable and appropriate	28–30	11
VIII.	Occupational pensions	31–33	12
IX.	Harmonisation of the law within the United Kingdom	34–35	12
X.	Two intractable problems	36–43	13
	(i) Conduct	36–39	13
	(ii) The extent to which a second wife's means and resources should be taken into account	40–43	15
XI.	Application of the new principles to existing orders	44–45	16
XII.	Summary of Recommendations	46	17
APPENDIX 1	Sections 23, 24 and 25 of the Matrimonial Causes Act 1973 (as amended)		19
APPENDIX 2	Organisations and professional persons who commented on the Discussion Paper		24

THE LAW COMMISSION

FAMILY LAW

(Item XIX of the Second Programme)

THE FINANCIAL CONSEQUENCES OF DIVORCE

The response to the Law Commission's Discussion Paper, and recommendations on the policy of the law

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

I. The background

1. In July 1980 we delivered to you a Discussion Paper (entitled *The Financial Consequences of Divorce: The Basic Policy*[1]). This was laid before Parliament and published in October 1980. The Discussion Paper contained a review of the policy and evolution of the existing law,[2] an analysis of the main criticisms made of it, and a discussion of some models which had been suggested for a law governing the financial consequences of divorce. For a number of reasons we did not, however, put forward even tentative proposals for reform. In particular, as we explained in the Discussion Paper, we were uncertain if there would be any sufficient consensus on the basic issue of whether or not the policy of the law should continue to be that the wife (or in theory the husband) should, in principle, be entitled after divorce to be kept in the financial position in which she would have been if there had been no breakdown.

2. The Discussion Paper was widely discussed in the press and on radio and television. 468 private individuals, mostly drawing on their own personal experience of the divorce process, wrote to us with their views, and the issues have been extensively discussed in the correspondence columns of *The Times* and other journals. We also thought it desirable to seek comments from those whose professional involvement in the divorce process gave them special experience and expertise; we received 45 memoranda from the persons and organisations listed in Appendix 2 of this Report.[3] Many of the submissions made to us contained lengthy and careful comments on the present law and its operation, and much compassionate and informed discussion both of the general policy of the law, and also of specific problems encountered in practice. The comments of all those who wrote to us have been carefully considered; and a detailed analysis, prepared by our staff, is being made available to your Department.

3. Our object in preparing the Discussion Paper was to promote an informed debate, in the hope that this would enable us to form a clearer picture

[1] (1980) Law Com. No. 103.

[2] The relevant statutory provisions are set out in Appendix 1 to this Report.

[3] In the interests of preserving the confidences entrusted to us by some commentators, we are not listing the names of the private individuals who wrote to us.

both of the different views which are held and of the likelihood of achieving a reasonable degree of consensus on whether the law is in need of reform, and if so in what direction the reform should go. In the result, we now feel able to make recommendations about the policy which we believe the law should follow. Because of the general public concern over this issue, we propose to set out these recommendations in general terms, rather than delay publication of our views until completion of a detailed report with draft legislation annexed. In particular, we are aware that a report by the Scottish Law Commission, containing detailed proposals for reform of the law of Scotland together with draft legislation will shortly be published; and we therefore consider it to be of public interest to have available as soon as possible our own views on the basic policy which we consider should be embodied in the law of England and Wales.[4] Before setting out these views, however, there are a number of important preliminary matters to which we wish to draw attention.

II. What reform of the private law can and cannot achieve

4. The scope of the Discussion Paper was necessarily limited in a number of respects. In particular, the Discussion Paper confined itself to the policy of the law governing the obligation of husbands and wives to one another. This was because we saw no purpose in our seeking to investigate proposals which would involve a major shift from reliance on the enforcement of private law financial obligations against individuals towards a system under which social security benefits would be acknowledged as, and in fact become, the primary method of making proper financial provision for families affected by divorce. Although we explained this limitation on the scope of our enquiry in the Discussion Paper,[5] we nevertheless received a number of cogently argued and well-documented submissions drawing attention to the poverty in which many one-parent families live, and urging that the private law of maintenance, however reformed, could never be adequate to meet the needs of most families after breakdown of marriage. This is because of the simple truth that (in the words of the National Council for One-Parent Families) "most people do not have sufficient income to maintain two families (or, where a second family is not involved, two households)."

5. We do not think there is any real dispute that the most serious problems faced by the majority of single-parent families are caused by economic factors and that changes in the private law can do little, if anything, to alleviate the hardship and deprivation which they experience. This fact has been forcefully demonstrated in recent years by two official Committees (the Payne Committee on the Enforcement of Judgment Debts, which reported in 1969,[6] and the Finer Committee on One-Parent Families, which reported in 1974.[7]) The Finer Committee made detailed proposals designed to overcome some of the special difficulties encountered by one-parent families, but most of them remain unimplemented. We saw no useful purpose in seeking to go over the same ground once again. There may be differences of opinion as to whether or

[4] We refer further to the relevance to England and Wales of the Scottish Law Commission's proposals in paras. 34–35 below.
[5] Para. 3.
[6] Cmnd. 3909.
[7] Cmnd. 5629.

not it is desirable for the state to divert resources in an attempt to alleviate the hardship and deprivation resulting from marital breakdown; and in any event (as we pointed out in the Discussion Paper) such a shift would have implications for public expenditure.[8] These have now become essentially matters for political decision.

6. Whilst we entirely accept—and would, indeed, wish to reiterate—that reform of the private law can do little, if anything, to deal with the problems of poverty, it is not our view that such reform is irrelevant. The legal system can only command respect if it is seen to be securely founded on principles which are generally thought to be just and equitable. We have received an overwhelming body of evidence that to direct the courts to seek to place the parties in the financial position in which they would have been if the marriage had not broken down is to impose a fundamentally mistaken objective, widely thought to be capable of producing unjust and inequitable results.

7. It should be noted that we have said only that the law is "widely thought to be capable" of producing unjust and inequitable results; we have not said that it in fact does so. It does, however, seem probable that pursuit of the general objective by a court might on occasions produce a result which could properly be regarded by a fair and reasonable person as unjust. However, we have no way of knowing how often unjust results are in fact produced or how grave any injustice may be; and there are those whose well-informed opinion commands respect who believe that such injustice rarely, if ever, occurs. In this view, the wide discretion conferred on the court can be, and indeed by its terms should be, exercised to achieve a result which is always just as between the parties. On this we would comment that it is not an adequate response to claims that the law is unjustly framed that those operating it believe that injustice is in fact avoided. Only if it could be demonstrated that the law is in practice applied so as to achieve uniformly just results could the criticism be refuted. In fact, however, the paucity of reliable and up-to-date information about the working of the present law is such[9] that it is impossible to provide any such convincing demonstration; and the allegations which are so often made cannot be answered in a way which would convince critics.

III. The problem of inadequate factual information

8. One of the most serious difficulties encountered in examining any proposal for law reform in this area is that—notwithstanding a valuable study of the matrimonial jurisdiction of registrars carried out between 1973 and 1975 under the aegis of the Centre for Socio-Legal Studies at Wolfson College, Oxford[10]—very little reliable up-to-date information is in fact available about the operation of the existing law. Even the most basic questions about the extent to which the existing private law imposing financial obligations on

[8] Any change in the private law which reduced or extinguished the mutual obligations of former spouses might result in more persons becoming dependent on supplementary benefit or other welfare benefits, and to that extent might also have implications for public expenditure. We refer to these aspects of the matter at para. 12 below.

[9] See further at paras. 8–12 below.

[10] Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (1977).

spouses does, in reality, provide any significant support for their families cannot be answered. We do not know how much maintenance is in fact ordered to be paid by the courts. Still less do we know in what proportion of cases such payments are actually made, and for what period of time they continue.

9. The lack of such factual information obviously constitutes a formidable handicap to the task of law reform. Moreover, although the response to the Discussion Paper has been helpful in enabling us to form some view of the public feeling about the policy of the law, it has to be accepted that this response is necessarily selective, and to some extent self-interested. We have accordingly started discussions with the Office of Population Censuses and Surveys as to the possibility of their carrying out on our behalf two surveys. The first would be designed to ascertain public opinion on the major policy issues involved; the second, involving an examination of court records and interviews with a representative sample of those affected, would be designed to elicit reliable information about the operation of the law.

10. The results of such surveys[11] would provide a wider and more secure basis upon which recommendations for reform could be made for amendment of the guidelines now contained in section 25 of the Matrimonial Causes Act 1973. We have accordingly considered whether it might not be prudent to defer further consideration of any change. However, it would be several years before the surveys referred to above could be completed; and, in view of the overwhelming nature of the response to the Discussion Paper on the unacceptability of the primary objective now embodied in section 25(1) of the Matrimonial Causes Act 1973, it would be surprising if further research were to produce any different result on this aspect of the matter.

11. For these reasons, we think that further delay in making proposals designed to deal with the main (and, in our view, justified) criticism of the present law would be inappropriate. However, we would emphasise two things. First, that we do not consider that the material currently available to us would justify any radical change in the law, such as might effectively remove the power of the court to order life-long periodical payments for a divorced spouse in those cases in which it is practicable and appropriate to make such an order. Secondly, it is in our view unsatisfactory that law reform should have to proceed on the basis of inadequate information about the operation of the law. We accordingly recommend, in order to avoid any recurrence of this situation, that provision be made for continuous monitoring of the operation of any amending legislation dealing with the financial consequences of divorce. In this context, the provisions of section 105 of the Children Act 1975 (which require the Secretary of State to lay before Parliament every 5 years a report on the operation of that Act,[12] and to institute such research as is necessary to provide information for those reports) constitute an important precedent and one which should be followed.

---

[11] Other research into the financial circumstances of divorced families, jointly supported by the Social Science Research Council and the Equal Opportunities Commission, is being undertaken.

[12] The first report was laid before Parliament in 1979: see 1st Report to Parliament on the Operation of the Children Act 1975, H.C. 268.

12. There is one further important matter relating to the need for factual information to which we wish to draw attention. This is concerned with the impact of any reform of the law on the public purse. It seems to us to be at least possible that any change in the private law intended to meet the complaints repeatedly made about the harshness of the existing law to husbands and their second spouses would necessarily result in some women who now derive at least a certain level of support from periodical payments becoming dependent on supplementary benefit (or family income supplement) because they are unable to find adequately paid work. It can also be argued that some women now partially dependent on state benefits would become so to a greater extent. However, it may perhaps be the case that any additional cost would be small or possibly insignificant, and we are aware that it is sometimes claimed that the extra cost involved might be compensated for, or perhaps outweighed, by increased tax revenue, or even by savings in legal aid expenditure. (These arguments are, of course, also used by those who believe that the cost of provision of enhanced state support for one-parent families is much exaggerated.) There should be available to Government an assessment of the *overall* cost to the public purse of the operation of the present system. In the light of this it would no doubt be possible for a realistic assessment to be made of the impact of any change in the private law of financial provision. We would stress that we believe exclusive concentration on the cost of social security provision as a measure of the financial implications of divorce for public expenditure to be misleading. As we noted in the Discussion Paper,[13] the tax system (and particularly the treatment of periodical payments made after divorce) often provides a significant measure of relief to some families affected by divorce. Indeed, there are even cases where the means of the family taken as a whole are in the result substantially greater after the breakdown than before. It seems to us profoundly unsatisfactory that data on the overall cost of the system (and in particular the consequences of tax relief) should be a matter for speculation. However, a costing exercise of this kind could (it seems to us) only be carried out within the machinery of Government; and we recommend that urgent consideration be given to the carrying out of such an exercise.

IV. The importance of reform of procedures

13. There is a final preliminary matter to which we wish to draw attention. We have already stated our view that reform of the private law governing the financial consequences of divorce would, by itself, do little or nothing to eradicate the poverty suffered by single-parent families; but we believe that such reform should at least help to reduce any justification for the widespread sense of injustice manifest in the response to the Discussion Paper. Many of those who wrote to us clearly felt (sometimes many years after the divorce) considerable bitterness; and they often attributed their feelings to the unfairness of the financial orders which the court had made. Many of these commentators made strong pleas for a reform of what they regarded as an unfair and unjust law. Although we believe that change in the law might have a beneficial effect in some cases, we consider that the likely impact of any change in the substantive law by itself should not be exaggerated. The breakdown of a

[13] See n. 11, p. 2.

marriage is almost inevitably a profoundly disturbing experience, and so long as the legal system remains available (as in our view it must) to provide a forum for the resolution of disputes about the rights and obligations of husband and wife, it will almost inevitably be the case that such litigation will serve as the focus for the parties' deep-seated feelings of rejection, hurt, and distress. We believe that everything possible should be done to ensure that only those cases which necessarily require adjudication come before the courts for trial of contested issues; and that the legal system should be so structured as to encourage the parties to reach an informed agreement about the financial and other consequences of the breakdown of their marriage, and to dispel the illusion that recourse to hostile litigation can produce magical solutions to intractable problems. In this connection, we would draw attention to the view[14] of the Lay Observer[15] that in so many cases the inevitable unhappiness associated with most matrimonial proceedings has apparently been considerably magnified by the adversarial nature of the court proceedings and of the preliminaries thereto. This view is widely held; and indeed might seem to be supported by the tenor of much of the response to the Discussion Paper from those who had themselves been involved in litigation.

14. You will be aware of the attempts made (often with encouraging results) by a number of precariously funded conciliation schemes (notably in Bristol) and of the research which has been carried out into their working. It may well be that further investigation of the potential for such procedures and of the proper relationship between conciliation[16] and adjudication requires to be undertaken. It is also clearly the case that the extent to which such services should be provided by the state (as proposed by the Finer Committee) or by voluntary initiative (as with the schemes now in operation) is a matter for governmental decision, as is the question of how any such schemes might be funded. Nevertheless on the evidence available to us it seems that schemes of this kind have considerable potential, and we would urge that these matters be further investigated.

15. Such schemes may well best operate outside the legal system, and we have to accept that in present circumstances it may be some time before any decision can be reached on their long term future. There are, however, a number of respects in which it is clear that the procedures of the courts are confusing and unsatisfactory, and not well adapted to serve the policy of the modern law. A number of suggestions for improvements have been made (for example, that there should be a single consolidated trial of the contested issues instead of fragmented proceedings, and that greater use could be made of the summons for directions or other procedures as a means of clarifying issues and promoting settlements). We consider it important that these matters be examined by a suitable body, such as a Working Party whose membership could include judges, registrars, representatives of the professions, and

[14] See his 5th Annual Report (1980) H.C. 507.

[15] Appointed under the provisions of the Solicitors Act 1974, s. 45.

[16] That is to say the process of "engendering common sense, reasonableness and agreement in dealing with the consequences" of marital breakdown with the minimum possible anxiety and harm to the parties or their children, as distinct from "reconciliation" which means "re-uniting persons who are estranged" (Report of the Committee on One-Parent Families (1974) Cmnd. 5629, para. 4.305).

officials. It would be for consideration whether the terms of reference of such a body should not extend to include a review of the distribution of business, between the High Court and County Court, which at present fails to reflect the shift which has taken place since the enactment of the Matrimonial Causes Act 1967 in the relative importance of the grant of the decree and the resolution of so-called ancillary matters.

16. We are conscious that we have dealt with these preliminary matters at some length, but this reflects the importance that we attach to them. In particular, we must once again record our view that, although we believe reform of the rules governing the exercise of the court's discretion (now contained in section 25(1) of the Matrimonial Causes Act 1973) to be necessary and desirable, such reform could have only a minor impact. This is because the extent of any reform which, on the information available to us, we are able to recommend is necessarily limited, and the number of cases in which such reform is likely to have significant effect will thus be comparatively small. Moreover, as we have pointed out, no reform of the private law can provide more resources to relieve the poverty of single-parent families. It would accordingly be quite wrong to encourage exaggerated expectations about the likely effect of reform.

V. The primary objective of the law:[17] the response to the Discussion Paper and our views

17. In the Discussion Paper[18] we pointed out that the duty imposed on the court "so to exercise [its] powers as to place the parties . . . in the financial position in which they would have been if the marriage had not broken down . . ." seemed to make it the primary objective of the law that the financial position of the parties be so far as possible unaffected by their divorce. As we have already said, the vast majority of those who commented on the Discussion Paper took the view that this policy was no longer appropriate. Not only did it impose on the courts a task which was rarely possible of attainment; but it was, in the great majority of cases, undesirable that it should be attained. We were impressed by the fact that these views were expressed not only by the overwhelming majority of the private individuals who wrote to us from their own experience, but also by those professionally concerned with the administration of the law. We have come to the conclusion that the duty now imposed by statute to seek to place the parties in the financial position in which they would have been if the marriage had not broken down is not a suitable general criterion; and in our view it should be removed from the law. We now go on to discuss the extent and scope of the reforms that we envisage in the statutory provisions governing the exercise of the court's discretion.

VI. Reconciling the desire for certainty with the need for flexibility

18. We pointed out in the Discussion Paper[19] that the simplest solution to the criticisms of the present law would be for Parliament to repeal the specific

[17] The relevant provisions of the Matrimonial Causes Act 1973 are set out in Appendix 1; an account of the development of the law can be found in the Discussion Paper, Part II.

[18] Para. 22.

[19] Paras. 66–69.

direction at the end of section 25(1), but otherwise to leave the section intact. This would enable the courts to adopt a flexible approach, taking into account the individual circumstances of the parties, changing economic factors, and changing attitudes to the proper purpose of financial provision; it would also reflect the current practice of the appellate courts, which seems primarily concerned to achieve a result which is "just in all the circumstances"; and it would remove from the court the necessity to pursue an objective which (because of the insufficiency of one income to support two households) it is usually impossible to attain. However (we said[20]) that there would be serious disadvantages in such an approach, which might be said to—

> involve an abdication of responsibility by Parliament in favour of the judiciary. Individual judges would be left to achieve whatever they subjectively regarded as "just" without any guidance as to the principles by which the justice of the case should be determined. It is arguable that such an uncontrolled (and perhaps uncontrollable) discretion would inevitably exacerbate the divergence of practices between different tribunals, as well as leaving individual judges and registrars with no real guidance about the important issues of policy involved.

19. We believe the formulation of policy in this and indeed other areas of the law involves the resolution of two objectives, each intrinsically desirable, but perhaps mutually inconsistent. The first is that the law should be certain and predictable in its results. This objective is not only consistent with the popular concept of justice; it also means that it is easier for lawyers to advise their clients on the likely outcome of a dispute, so promoting the conclusion of reasonable settlements and minimising recourse to contested trials. The second objective is that the law should achieve justice and fairness between the parties; and it is said that this necessarily involves considerable flexibility of approach by reason of the widely varying facts of each case.

20. In this context, we refer to the contrast between the views of the Family Division judges and the views put forward by the Association of County Court and District Registrars (whose members are, in practice, responsible for the routine administration of this area of the law). The judges considered that any satisfactory solution to the problem necessarily involved the court retaining a wide discretion so as to be able to take account of the factual circumstances which present themselves. The registrars, on the other hand, pointed out that it was difficult to find a just solution if there were no guiding principle, and urged that "to remove the guiding light is to allow flexibility to go mad". They were one of the few supporters of the retention of the present statutory guidelines.

21. We do not think it possible altogether to reconcile these two objectives of certainty and flexibility. Nevertheless, we are clearly of the view that it would, for the reasons given in paragraph 18 above, be undesirable to limit any reform to a removal of the specific direction at the end of section 25(1); and we believe that a reasonable balance between the two objectives can be attained by adjustment of the other provisions of the section, as indicated below.

---

[20] See para. 69.

22. It is, of course, of the essence of a discretionary jurisdiction that the court should be able to take account of changing social attitudes; and it seems to us important that those exercising the financial provision and property adjustment jurisdiction should be given every opportunity for mutual discussion of the practical operation of the law. We doubt whether exclusive reliance for guidance on a necessarily limited number of reported appellate cases is a wholly satisfactory procedure[21] given the large number of cases now coming before the courts; and we think that attention might be given to enabling registrars more frequently to have the advantage of corporate discussion.

23. The reponse to the Discussion Paper indicated a substantial consensus that what was required was a change of attitude or emphasis in the law rather than a radical restructuring involving a wholly novel statutory framework. In this view (which we accept) a change in the law would be evolutionary rather than revolutionary.[22] The change would best be carried into effect by retaining the direction to the court to "have regard to all the circumstances of the case" (including certain specified matters), but adding certain provisions designed to give a clear indication of how the discretion—which, as we have said, we believe should be retained as a central feature of the law—should be applied to the facts of individual cases. We now turn to the matters on which there was a substantial consensus in favour of a change of emphasis in the law; and to which the legislation should, we believe, give special prominence.

VII. The policy objectives

(i) *Priority for the needs of children*

24. The first matter on which there was a wide measure of agreement was that the law should seek to emphasise as a priority the necessity to make such financial provision as would safeguard the maintenance and welfare of the children. It is true that the existing law directs the court to exercise its powers to make financial orders for the benefit of a child of the family so as to place the child, so far as it is practicable and (having regard to the spouses' means and obligations) just to do so in the financial position in which he would have been had the marriage not broken down, and each spouse had properly discharged his or her financial obligations and responsibilities towards that child. Moreover, there is evidence[23] that in practice some registrars will allocate a larger proportion of the available monies to the children, and a smaller proportion to the wife. Nevertheless, the impression that the making of provision for the children is regarded as a matter of secondary importance to

[21] It has been said that the width of the discretion now conferred on the courts means that "decisions [of the Court of Appeal] can never be better than guidelines. They are not precedents in the strict sense of the word": *Martin (B.H.)* v. *Martin (D.)* [1978] Fam. 12, 20, *per* Ormrod L.J.; see also *Sharpe* v. *Sharpe, The Times*, 17 February 1981.

[22] Cf. the changes now embodied in the Matrimonial Causes Act 1973 s. 25(1), which "drastically reformed the law": *Griffiths* v. *Griffiths* [1974] 1 W.L.R. 1350, 1359, *per* Roskill L.J., and were thus interpreted as having revolutionised the law: *Trippas* v. *Trippas* [1973] Fam. 134, 140, *per* Lord Denning M.R.

[23] See Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (1977) para. 3.6.

the making of provision for the former spouse is widespread; and we think there would be important advantages if the legislation were clearly to embody the principle that the interests of the children should be seen as a matter of overriding importance. Of course we accept that such a provision cannot increase the amount of money available for the custodial parent and child. We also accept that the financial position of the custodial parent and the children is inextricably interlinked;[24] and that provision will necessarily be made for the wife to enable her properly to minister to the children's needs. The court would be directed to take account of the interests of the children in deciding what support would be appropriate for the custodial parent. For example, the court might well decide that it would be inappropriate to make an order which would require the wife to work full-time while the children were still at school. The advantages which we consider would flow from making the children's position avowedly a priority would, we think, be two. First, adequate recognition would be given to the value of the custodial parent's role, whilst discouraging the belief that such payments may be regarded as an automatic life-time provision intended for the benefit of the custodial parent (usually, of course, the wife) perhaps for many years after the children have ceased to live with her. Secondly, it is (we understand) often the case that the allocation of a larger proportion of the overall maintenance provision for the children's benefit makes the maintenance obligations more acceptable to the payer (usually, of course, the father).

25. In this connection, we think it is important that the courts should have available adequate data about the actual costs of providing for the needs of children. The best way of providing such data as an administrative measure is, we think, a matter for discussion. It was suggested to us that the figures based on information drawn from the family expenditure survey and other sources, produced by the National Foster Care Association, and (we understand) accepted by many local authorities as a basis upon which to calculate fostering allowances, might be used for this purpose; but it would, we think, perhaps be preferable for the guidance to be more specifically directed to the special circumstances of children living in a one-parent family.

(ii) *Greater weight to be given to a divorced wife's earning capacity; and to the desirability of both parties becoming self-sufficient*

26. The existing law requires the court to consider the income and earning capacity of both husband and wife, and (as reported cases indicate) the courts do take account of a wife's earning potential. There was, however, a widespread feeling amongst those who commented on the Discussion Paper that greater weight should be given to the importance of each party doing everything possible to become self-sufficient, so far as this is consistent with the interests of the children; and we believe that the statutory provisions should contain a positive assertion of this principle.

[24] *Northrop* v. *Northrop* [1968] P. 74; *Milliken-Smith* v. *Milliken-Smith* [1970] 1 W.L.R. 973; and see *Robinson* v. *Robinson* (1973) 2 F.L.R. 1, 16, 17, *per* Scarman L.J. Cf. *Ackerman* v. *Ackerman* [1972] Fam. 225, 233, *per* Phillimore L.J.

27. The court has, under the existing law, power to make orders for a limited term,[25] and this power is sometimes exercised when it is felt that a spouse (usually the wife) needs some time to readjust to her new situation but could not or should not expect to rely on continuing support from her husband.[26] We think that it would be desirable to require the court specifically to consider whether an order for a limited term would not be appropriate in all the circumstances of the case, given the increased weight which we believe should be attached to the desirability of the parties becoming self-sufficient.

(iii) *Imposing a "clean break" where practicable and appropriate*

28. It is true, as Ormrod L.J. has pointed out,[27] that the expression "a clean break" is in danger of being indiscriminately used to express different and sometimes contradictory ideas. Moreover, it must be accepted that the occasions on which it is possible for the parties to arrive at a final, once for all settlement, on the occasion of their divorce will be comparatively few, and almost non-existent where there are young children. To seek to attain a "clean break" in many—perhaps the majority of cases—would simply be to drive divorced wives onto supplementary benefit. That (it has been said[28]) is not the policy of the present legislation; nor (in our view) should it become the policy of the reformed legislation which we now envisage. Nevertheless, the response to the Discussion Paper showed strong support for the view (with which we agree) that such finality should be achieved wherever possible, as for example where there is a childless marriage of comparatively short duration between a husband and a wife who has income, or an earning capacity, or in cases of a longer marriage, where there is an adequate measure of capital available for division.

29. At the moment, there is a technical difficulty in imposing such a "clean break", even in those cases where the court would wish to do so because the Court of Appeal has held[29] that the court has no jurisdiction to dismiss a wife's claim for periodical payments without her agreement. We believe (and in this we are supported by the judges of the Family Division) that the court should have such a power available for use in those, perhaps rare, cases where to use it would be appropriate. It is in our view desirable that this fetter on the court's power should be removed; and that this should be done whether or not any other change in the substance of the law is made in the near future.

30. The reponse to the Discussion Paper indicated wide support for the view that the courts should be more clearly directed to the desirability of promoting a severance of financial obligations between the parties at the time of divorce; and to give greater weight to the view that in the appropriate case any periodical financial provision ordered in favour of one spouse (usually the wife) for her own benefit—as distinct from periodical payments made to her to enable her to care for the children—should be primarily directed to secure

[25] The term to be specified in a periodical payments order is "such term as the court thinks fit", subject to certain limitations: Matrimonial Causes Act 1973, s. 28(1).

[26] Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (1977), para. 3.4; see also *Khan* v. *Khan* [1980] 1 *W.L.R.* 355.

[27] *Pearce* v. *Pearce* (1979) 1 F.L.R. 261, 266.

[28] *Moore* v. *Moore* (1980) 11 Fam. Law 109 *per* Ormrod L.J.

[29] *Dipper* v. *Dipper* [1981] Fam. 31.

wherever possible a smooth transition from marriage to the status of independence. We believe that this general objective should be embodied in the legislation.

VIII. Occupational pensions

31. There is one other technical matter on which we believe action should be taken when an appropriate opportunity presents itself. In the Discussion Paper we pointed out that under most pension schemes, in the event of the pensioner's death, entitlement to a widow's pension is restricted to the person to whom the deceased was married at the time of his death. The effect is thus to exclude divorced wives from any entitlement. In consequence, in order to put the wife in the financial position in which she would have been had the marriage not broken down, the husband may have to make alternative arrangements, perhaps at very heavy cost.

32. We then took the view that there might well be a case for giving the court power to direct the wife's contingent pension expectations be preserved, on the lines suggested in Chapter 13 of the Report of the Occupational Pensions Board entitled "Equal Status for Married Women in Occupational Pension Schemes".[30] However, we thought that whether or not this would be desirable must inevitably be influenced by the approach which the law adopted to the whole question of obligations between husband and wife.

33. We would anticipate that, as a result of the evolution which we expect to see away from the concept of life-long support for divorced wives, the circumstances in which it would be thought desirable to exercise any such power to preserve the wife's contingent pension expectations might be less common than in the past. Nevertheless, there could well still be some cases—particularly where there has been a long marriage, and the parties are near pensionable age—in which it might be appropriate for the courts to be able to have recourse to what may well be an exceedingly valuable asset; and indeed the parties may both wish them to do so. Sometimes, of course, the wife's position could be dealt with by making other provision for her; but this will not always be possible. We therefore recommend that early consideration be given to the introduction of legislation empowering the courts to deal with the problem of occupational pensions. We do not think it necessary that the reforms which we propose should, however, be delayed in the meantime.

IX. Harmonisation of the law within the United Kingdom

34. The law governing the circumstances in which a divorce may be obtained is now virtually identical in Scotland and England and Wales. The law of Scotland governing the financial consequences of divorce was not, however, remodelled (as was English law) contemporaneously with the change in the law governing the ground for divorce. The courts in Scotland do not at present enjoy the wide powers over both income and capital contained in section 25 of the Matrimonial Causes Act 1973, nor are there set out in the Scottish

[30] (1976) Cmnd. 6599.

legislation any detailed guidelines such as those contained in that section to govern the exercise of their discretion. The Scottish Law Commission have recently delivered to the Lord Advocate a final Report on this matter, containing detailed proposals for the reform of the law of Scotland, together with draft legislation; and we have been furnished with a draft.

35. It is, in our view, clearly desirable that the laws of these two parts of the United Kingdom should be based on similar principles; but we do not think that it necessarily follows that the English and Scottish laws governing the financial consequences of divorce should be couched in identical terms. The courts in England and Wales have in the ten years since the implementation of the reformed code of financial provision and property adjustment now contained in the Matrimonial Causes Act 1973 developed a great deal of experience in the application of the guidelines contained in section 25 to the widely varying facts of divorced parties, and a considerable body of case law has been built up on those aspects of the law in respect of which we do not envisage change. Moreover, as we have said, we believe that the best way of adapting the law of England and Wales to contemporary needs would be by way of an evolutionary change of emphasis, rather than starting afresh—as the Scottish Law Commission have necessarily had to do—with a completely new statutory framework.

X. Two intractable problems

(i) *Conduct*

36. There are two matters on which we received a considerable body of conflicting comment. The first relates to the extent to which conduct should be taken into account by the courts in determining financial provision. We said in the Discussion Paper[31] that it "would impose an impossible burden on the courts to require them to apportion blame for the breakdown of the marriage in each individual case." Nevertheless, the response to the Discussion Paper showed quite clearly that many of the individuals who had themselves been involved in divorce proceedings felt a considerable sense of injustice because the court had not been prepared to take account of the other spouse's behaviour, especially as this was for the parties the most important single factor in assessing financial provision.

37. We think that two separate, if related and perhaps often confused, issues are involved here. The first relates to what the legal system can and cannot reasonably expect to achieve. We adhere to the view expressed by us in the Discussion Paper[32] that the courts as now constituted cannot reasonably be expected to apportion responsibility for breakdown in any save exceptional cases. This is because (in the words of Ormrod J.[33])—

> "the forensic process is reasonably well adapted to determining in broad terms the share of responsibility of each party for an accident on the road

[31] Para. 89.
[32] *Ibid.*
[33] *Wachtel* v. *Wachtel* [1973] Fam. 72, 79.

or at work because the issues are relatively confined in scope, but it is much too clumsy a tool for dissecting the complex inter-actions which go on all the time in a family. Shares in responsibility for breakdown cannot be properly assessed without a meticulous examination and understanding of the characters and personalities of the spouses concerned, and the more thorough the investigation the more the shares will, in most cases, approach equality."

It seems to us (and our view was endorsed by the majority of professional and academic commentators on the Discussion Paper) that it would be quite wrong to require the court to hear the parties' mutual recriminations[34] at enormous expense to the individuals involved (or, if they have legal aid, to the taxpayer) in those cases where such findings as the court could make would have little effect on the order made. Nor do we think that to expose the parties to this kind of remorseless investigation into the, sometimes distant, past would be helpful in encouraging them to come to terms with their new situation. Indeed, one of the uses to which conciliation[35] might most helpfully be put is, we think, to encourage the parties to come to terms with their, often deep-seated, feelings of resentment and anger, rather than to seek an unattainable catharsis in a judicial forum.

38. The second issue relates to the question of identifying those exceptional cases in which the court can not only identify responsibility for the breakdown of the marriage, but should also allow that assessment to influence the financial orders that are to be made. We drew attention in the Discussion Paper[36] to the different emphasis sometimes to be detected in defining such cases; and there was a feeling amongst some commentators that uncritical and indiscriminate use of the expression "obvious and gross" conduct had served, not only to fetter the exercise of the court's discretion in some cases, but to influence professional advisers in adopting too narrow a view of the law. We believe that the courts are now well aware of the dangers of treating the phrase "obvious and gross" as if it were a statutory formula; and that it is increasingly being realised that the court needs to examine sufficient of the matrimonial history to enable the judge to "get a feel of the case",[37] and thus be in a position to carry out its duty to take account of conduct in those cases where to do otherwise would offend a reasonable person's sense of justice.[38]

39. We would accordingly propose to preserve a reference to the conduct of the parties as one of the specified list of circumstances to which the court should have regard in those cases where it would be inequitable to do otherwise. Any further elaboration can, in our view, best be left to case law development.

---

[34] *Ibid.*, at p. 89, *per* Lord Denning M.R.
[35] See para. 14 above.
[36] Para. 40.
[37] *Evans* v. *Evans* (1981) 2 F.L.R. 33, 37, *per* Wood J.
[38] *Robinson* v. *Robinson* (1973) 2 F.L.R. 1; *Armstrong* v. *Armstrong* (1974) 118 S.J. 579; *Kokosinski* v. *Kokosinski* [1980] Fam. 72; *Evans* v. *Evans* (1981) 2 F.L.R. 33; and see the cases cited in n. 139 of the Discussion Paper.

(ii) *The extent to which a second wife's means and resources should be taken into account*

40. In the Discussion Paper we noted[39] that particular resentment about the present law seemed often to be felt by men who had remarried after a divorce, and by their second wives[40]—

> In such cases the impoverishment caused by the first wife's continuing claim upon her husband may well fall on all the members of his new family, and we have even been told of cases where husbands have had themselves sterilised because they feel that their continuing financial commitments to a former wife make it impossible for them to afford children in their second marriage. In particular the effect on a man's second wife is a frequent source of comment. It is claimed that she is invariably forced to accept a reduced standard of living by reason of the fact that part of her husband's income is being diverted to support his first wife; it is also claimed that a second wife may be forced, notwithstanding family commitments to work, even although her husband's first wife, who possibly has no family commitments, chooses not to do so. Indeed some second wives have told us that they feel that they are being required personally to support their husband's first wife because the courts take a second wife's resources into account when assessing a husband's financial circumstances and his capacity to make periodical payments to a former spouse.

41. The response to the Discussion Paper confirmed that such feelings are indeed widespread. To some extent, however, they are based on a misunderstanding of the law. The court has no power to make orders against the second wife; and it is never appropriate to make orders against the husband which effectively have to be paid out of his new partner's income (or capital).[41] However, the fact that the partner has income or capital of her own *may* sometimes be relevant in assessing the amount of the order against the husband, because (it has been said) the availability of those means releases resources for the upkeep of his family.[42] In effect, the husband is *not* allowed in such a case to say that he needs to retain all or most of his income in order to provide for the needs of his new family.[43]

42. We can well see that the layman may find such an approach oversubtle; and it has to be admitted that the practical effect will sometimes be that a husband is ordered to pay more by way of periodical payments for his first wife if his second wife has financial resources of her own than he would if she did not. Nevertheless it seems to us to be not only logical but just that, *if* the order in favour of the first wife (and her children) is of an appropriate amount, the husband should not be allowed to escape from that obligation by pleading that he needs to keep all his income for the necessary support of his second family,

---

[39] Para. 26.

[40] Similar considerations apply where the husband is cohabiting with a new partner.

[41] *Brown* v. *Brown*; *Macey* v. *Macey*, *The Times*, 14 July 1981.

[42] *Wilkinson* v. *Wilkinson* (1979) 10 Fam. Law 48, 49 per Booth, J.

[43] In a case where the second wife has no means or relevant earning capacity the courts would normally fix the periodical payments order against the husband at a level which would leave him with at least sufficient income to support the second wife and the children living with them: *Barnes* v. *Barnes* [1972] 1 W.L.R. 1381.

when this is not in fact the case. What would be involved in abandoning the present practice would often be a transfer of the husband's proper obligation in respect of his first wife to the state. We do not think that would be acceptable.

43. It seems to us, therefore, that the question remains essentially that of fixing an appropriate level of support for the first wife; and it would only be by reducing the amount which the court regards it as appropriate for a man to pay by way of periodical payments for his first wife that any change in the second wife's position could be achieved. If the proposals which we have made in this Report for giving priority to the needs of any children, for giving greater emphasis to the first wife's earning potential, and to the desirability of securing a smooth transition to independence in appropriate cases, were to be adopted, the determination of what is the appropriate amount for the husband to pay to the first wife by way of periodical payments would, we believe, be based on more generally acceptable criteria. This might well indirectly reduce some of the sense of injustice which is now caused by the operation of the present law; and we do not think it would be appropriate to recommend any other change in the law directly affecting the extent to which a second wife's resources may be taken into account in fixing her husband's liabilities to his former partner.

XI. Application of the new principles to existing orders

44. The present legislation empowers[44] the court to vary or discharge periodical payment orders; and it is provided[45] that in exercising those powers the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates. This provision was extended to govern applications to vary orders made under the old law;[46] and it follows that the court in entertaining such applications must consider any change in any of the matters effectively mentioned in section 25 of the 1973 Act,[47] notwithstanding the fact that the approach thus involved is in some respects markedly different from that applied by the courts under the old legislation which governed the making of the original order.[48] Moreover, the court was empowered to make lump sum or property adjustment orders in cases where there was no such power when the original decree was granted.[49] The legislation was thus to some extent retroactive in effect;[50] but the court will, in exercising its discretion take into account the importance of bearing in mind that the parties may have made their financial arrangements in the belief that obligations arising from the divorce had been settled.[51]

45. If the provisions of section 25 are amended to give effect to the policies which we have recommended, it will be necessary to decide whether appli-

---

[44] Matrimonial Causes Act 1973, s. 31.
[45] Matrimonial Causes Act 1973, s. 31(7).
[46] Matrimonial Causes Act 1973, Sched. 1, para. 17.
[47] *Lewis* v. *Lewis* [1977] 1 W.L.R. 409, 412, *per* Ormrod L.J.
[48] *Chaterjee* v. *Chaterjee* [1976] Fam. 199, 205, *per* Ormrod L.J.
[49] Leave of the court to make such an application is, however, required: Matrimonial Causes Rules 1977, r. 68.
[50] *Williams* v. *Williams* [1971] P. 271, 280–281.
[51] See the cases cited by Ormrod L.J. in *Chaterjee* v. *Chaterjee* [1976] Fam. 199, 206–208.

cations to vary orders made under the present law should be affected by the new guidelines, or whether the old law should continue to govern them. We believe that the new law should apply, for a number of reasons. Of these, the most important is that the proposals we have made are intended to be merely evolutionary; we do not contemplate any abrupt change in the way in which the law is administered, and we would not therefore expect there to be any flood of successful variation applications. Moreover, we must bear in mind that in considering variation applications under the existing law the courts now look at the matter afresh, and seek to make whatever order is reasonable in the circumstances of the case as they are at that time, untrammelled by the existence of the previous order.[52] We think that it would be wholly artificial to require the court to exclude from consideration changes in legislative attitudes to such matters as the wife's earning potential. On the other hand, it seems to us that the court should take into account the circumstances in which and the basis on which the order was originally made. In particular, we consider it should give weight to the circumstances in which the order was made (for example, that the wife was given a large maintenance award and a small lump sum). It will be necessary to consider whether these matters should be left to the exercise of the court's discretion; or whether a statutory guideline is required.[53]

XII. Summary of Recommendations

46. We conclude by summarising our recommendations as follows:

(1) Any future legislation dealing with the financial consequences of divorce should be subject to continuous monitoring and periodical reports to Parliament.

(2) The Government should consider making an investigation into the overall cost of supporting those affected by divorce by means of welfare benefit payments and tax relief, so that the cost of any changes in the private law of financial obligations could properly be estimated.

(3) The availability and scope of conciliation and similar services should be systematically investigated; everything possible should be done to encourage recourse to conciliation rather than litigation.

(4) The procedures of the courts handling matrimonial cases should be systematically considered with a view to reform.

(5) The provisions of section 25 of the Matrimonial Causes Act 1973 should be amended in the following respects:

(i) To seek to place the parties in the financial position in which they would have been had the marriage not broken down should no longer be the statutory objective.

[52] *Lewis* v. *Lewis* [1977] 1 W.L.R. 409.

[53] It will also be necessary to consider whether the restriction on the court's powers to vary certain property adjustment orders, and its inability to make property adjustment orders on applications to vary periodical payment orders should not be relaxed in some respects so as to facilitate the imposition of a "clean break" in those circumstances where it has become practicable and appropriate to do so.

(ii) The guidelines contained in section 25(1) of the Matrimonial Causes Act 1973 should be revised, to give greater emphasis to the following matters:

(*a*) the provision of adequate financial support for children should be an overriding priority. (Administrative steps should also be taken to ensure that the courts have adequate and reliable information about the current cost of maintaining children);

(*b*) the importance of each party doing everything possible to become self-sufficient should be formulated in terms of a positive principle; and weight should be given to the view that, in appropriate cases, periodical financial provision should be primarily concerned to secure a smooth transition from the status of marriage to the status of independence.

(6) Whether or not legislation is introduced to give effect to the policy set out above, the court should be given power in appropriate cases to dismiss a wife's claim for periodical payments without her consent.

(7) Fresh consideration should be given to empowering the court to make orders reallocating the rights of former spouses under an occupational pension scheme.

(*Signed*) RALPH GIBSON, *Chairman*
STEPHEN M. CRETNEY
BRIAN DAVENPORT
STEPHEN EDELL
PETER NORTH

R. H. STREETEN, *Secretary*
26 *October* 1981

APPENDIX 1

MATRIMONIAL CAUSES ACT 1973

Sections 23, 24 and 25, as amended by the Matrimonial Homes and Property Act 1981

Financial provision orders in connection with divorce proceedings, etc.

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.

Property adjustment orders in connection with divorce proceedings, etc.

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.

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.

(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 re-marriage of that person.

Matters to which court is to have regard in deciding how to exercise its powers under sections 23 and 24.

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*), 24 or 24A, 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)24 or 24A 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), 24 or 24A, 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.

(4) Where a party to a marriage has a beneficial interest in any property, or in the proceeds of sale thereof, and some other person who is not a party to the marriage also has a beneficial interest in that property or in the proceeds of sale thereof, 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.

APPENDIX 2

Organisations and professional persons who commented on the Discussion Paper

The Association of County Court and District Registrars
T. Arnold, M.P.
Ms. R. Bailey
F. Bennion, Esq.
Bristol Courts Family Conciliation Service
Bristol County Court Registrars
Campaign for Justice in Divorce
Church of England Board for Social Responsibility
Dr. Eric Clive
Mrs. R. Deech
Divorce Counselling and Advisory Service
Dr. J. Dominian (United Kingdom Marriage Research Centre)
The Rt. Hon. Lord Justice Dunn
Equal Opportunities Commission
Fair Family Division
Family Division Judges
Family Welfare Association
Ms. A. Finlay
Gingerbread
Ms. D. Groves
W. Harper, Esq.
Association of Justices' Clerks
The Law Society, Family Law Sub-Committee
The Lay Observer
Married Women's Association
Methodist Division of Social Responsibility
The Mothers' Union
National Association of Probation Officers
National Association of Townswomen's Guilds
National Board of Catholic Women
National Council for the Divorced and Separated
The National Council of Women of Great Britain
National Federation of Women's Institutes
The National Marriage Guidance Council
Ms. K. O'Donovan
One Parent Families
The Rt. Hon. Lord Justice Ormrod
A. Perlman, Esq.
Mr. Registrar Price
Rights of Women
The Rt. Hon. Lord Scarman
The Senate of the Inns of Court and the Bar
The Society of Conservative Lawyers
The Society of Labour Lawyers
Women's National Commission

Printed in the UK for Her Majesty's Stationery Office
PS 3350526 Dd.0200268 C3 11/83 CCP

HER MAJESTY'S STATIONERY OFFICE

Government Bookshops

49 High Holborn, London WC1V 6HB
13a Castle Street, Edinburgh EH2 3AR
Brazennose Street, Manchester M60 8AS
Southey House, Wine Street, Bristol BS1 2BQ
258 Broad Street, Birmingham B1 2HE
80 Chichester Street, Belfast BT1 4JY

Government publications are also available through booksellers

ISBN 0 10 206882 8