



# Family Law (Scotland) Act 1985

## 1985 CHAPTER 37

An Act to make fresh provision in the law of Scotland regarding aliment; regarding financial and other consequences of decrees of divorce and of declarator of nullity of marriage; regarding property rights and legal capacity of married persons; and for connected purposes. [16th July 1985]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

### Commencement Information

II Act not in force at Royal Assent see [s. 29\(2\)](#), Act wholly in force 30.11.1988.

### *Aliment*

#### **1 Obligation of aliment.**

- (1) From the commencement of this Act, an obligation of aliment shall be owed by, and only by—
  - (a) a husband to his wife;
  - (b) a wife to her husband;
  - (c) a father or mother to his or her child;
  - (d) a person to a child (other than a child who has been boarded out with him by a local or other public authority or a voluntary organisation) who has been accepted by him as a child of his family.
- (2) For the purposes of this Act, an obligation of aliment is an obligation to provide such support as is reasonable in the circumstances, having regard to the matters to which a court is required or entitled to have regard under section 4 of this Act in determining the amount of aliment to award in an action for aliment.

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- (3) Any obligation of aliment arising under a decree or by operation of law and subsisting immediately before the commencement of this Act shall, except insofar as consistent with this section, cease to have effect as from the commencement of this Act.
- (4) Nothing in this section shall affect any arrears due under a decree at the date of termination or cessation of an obligation of aliment, nor any rule of law by which a person who is owed an obligation of aliment may claim aliment from the executor of a deceased person or from any person enriched by the succession to the estate of a deceased person.
- (5) In subsection (1) above—
  - “child” means a person—
    - (a) under the age of 18 years; or
    - (b) over that age and under the age of 25 years who is reasonably and appropriately undergoing instruction at an educational establishment, or training for employment or for a trade, profession or vocation;

“husband” and “wife” include the parties to a valid polygamous marriage.

## **2 Actions for aliment.**

- (1) A claim for aliment only (whether or not expenses are also sought) may be made, against any person owing an obligation of aliment, in the Court of Session or the sheriff court.
- (2) Unless the court considers it inappropriate in any particular case, a claim for aliment may also be made, against any person owing an obligation of aliment, in proceedings—
  - (a) for divorce, separation, declarator of marriage or declarator of nullity of marriage;
  - (b) relating to orders for financial provision;
  - (c) concerning rights and obligations in relation to children;
  - (d) concerning parentage or legitimacy;
  - (e) of any other kind, where the court considers it appropriate to include a claim for aliment.
- (3) In this Act “action for aliment” means a claim for aliment in proceedings referred to in subsection (1) or (2) above.
- (4) An action for aliment may be brought—
  - (a) by a person (including a child) to whom the obligation of aliment is owed;
  - (b) by the curator bonis of an incapax or the curator of a minor who is an incapax;
  - (c) on behalf of a child under the age of 18 years, by—
    - (i) the father or mother of the child;
    - (ii) the tutor of a pupil;
    - (iii) a person entitled to, seeking or having custody or care of a child.
- (5) A woman (whether married or not) may bring an action for aliment on behalf of her unborn child as if the child had been born, but no such action shall be heard or disposed of prior to the birth of the child.

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- (6) It shall be competent to bring an action for aliment, notwithstanding that the person for or on behalf of whom aliment is being claimed is living in the same household as the defender.
- (7) It shall be a defence to an action for aliment brought by virtue of subsection (6) above that the defender is fulfilling the obligation of aliment, and intends to continue doing so.
- (8) It shall be a defence to an action for aliment by or on behalf of a person other than a child under the age of 16 years that the defender is making an offer, which it is reasonable to expect the person concerned to accept, to receive that person into his household and to fulfil the obligation of aliment.
- (9) For the purposes of subsection (8) above, in considering whether it is reasonable to expect a person to accept an offer, the court shall have regard among other things to any conduct, decree or other circumstances which appear to the court to be relevant: but the fact that a husband and wife have agreed to live apart shall not of itself be regarded as making it unreasonable to expect a person to accept such an offer.
- (10) A person bringing an action for aliment under subsection (4)(c) above may give a good receipt for aliment paid under the decree in the action.

### **3 Powers of court in action for aliment.**

- (1) The court may, if it thinks fit, grant decree in an action for aliment, and in granting such decree shall have power—
  - (a) to order the making of periodical payments, whether for a definite or an indefinite period or until the happening of a specified event;
  - (b) to order the making of alimentary payments of an occasional or special nature, including payments in respect of inlying, funeral or educational expenses;
  - (c) to backdate an award of aliment under this Act—
    - (i) to the date of the bringing of the action or to such later date as the court thinks fit; or
    - (ii) on special cause shown, to a date prior to the bringing of the action;
  - (d) to award less than the amount claimed even if the claim is undisputed.
- (2) Nothing in subsection (1) above shall empower the court to substitute a lump sum for a periodical payment.

### **4 Amount of aliment.**

- (1) In determining the amount of aliment to award in an action for aliment, the court shall, subject to subsection (3) below, have regard—
  - (a) to the needs and resources of the parties;
  - (b) to the earning capacities of the parties;
  - (c) generally to all the circumstances of the case.
- (2) Where two or more parties owe an obligation of aliment to another person, there shall be no order of liability, but the court, in deciding how much, if any, aliment to award against any of those persons, shall have regard, among the other circumstances of the case, to the obligation of aliment owed by any other person.

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- (3) In having regard under subsection (1)(c) above generally to all the circumstances of the case, the court—
- (a) may, if it thinks fit, take account of any support, financial or otherwise, given by the defender to any person whom he maintains as a dependant in his household, whether or not the defender owes an obligation of aliment to that person; and
  - (b) shall not take account of any conduct of a party unless it would be manifestly inequitable to leave it out of account.

## **5 Variation or recall of decree of aliment.**

- (1) A decree granted in an action for aliment brought before or after the commencement of this Act may, on an application by or on behalf of either party to the action, be varied or recalled by an order of the court if since the date of the decree there has been a material change of circumstances.
- (2) The provisions of this Act shall apply to applications and orders under subsection (1) above as they apply to actions for aliment and decrees in such actions, subject to any necessary modifications.
- (3) On an application under subsection (1) above, the court may, pending determination of the application, make such interim order as it thinks fit.
- (4) Where the court backdates an order under subsection (1) above, the court may order any sums paid under the decree to be repaid.

## **6 Interim aliment.**

- (1) A claim for interim aliment shall be competent—
  - (a) in an action for aliment, by the party who claims aliment against the other party;
  - (b) in an action for divorce, separation, declarator of marriage or declarator of nullity of marriage, by either party against the other party.on behalf of the claimant and any person on whose behalf he is entitled to act under section 2(4) of this Act.
- (2) Where a claim under subsection (1) above has been made, then, whether or not the claim is disputed, the court may award by way of interim aliment the sum claimed or any lesser sum or may refuse to make such an award.
- (3) An award under subsection (2) above shall consist of an award of periodical payments payable only until the date of the disposal of the action in which the award was made or such earlier date as the court may specify.
- (4) An award under subsection (2) above may be varied or recalled by an order of the court; and the provisions of this section shall apply to an award so varied and the claim therefor as they applied to the original award and the claim therefor.

## **7 Agreements on aliment.**

- (1) Any provision in an agreement which purports to exclude future liability for aliment or to restrict any right to bring an action for aliment shall have no effect unless the

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provision was fair and reasonable in all the circumstances of the agreement at the time it was entered into.

- (2) Where a person who owes an obligation of aliment to another person has entered into an agreement to pay aliment to or for the benefit of the other person, on a material change of circumstances application may be made to the court by or on behalf of either person for variation of the amount payable under the agreement or for termination of the agreement.
- (3) Subsections (8) and (9) of section 2 of this Act (which afford a defence to an action for aliment in certain circumstances) shall apply to an action to enforce such an agreement as is referred to in subsection (2) above as they apply to an action for aliment.
- (4) In subsection (2) above “the court” means the court which would have jurisdiction and competence to entertain an action for aliment between the parties to the agreement to which the application under that subsection relates.
- (5) In this section “agreement” means an agreement entered into before or after the commencement of this Act and includes a unilateral voluntary obligation.

*Financial provision on divorce, etc.*

## 8 Orders for financial provision.

- (1) In an action for divorce, either party to the marriage may apply to the court for one or more of the following orders—
  - (a) an order for the payment of a capital sum . . . <sup>F1</sup>to him by the other party to the marriage;
  - [<sup>F2</sup>(aa) an order for the transfer of property to him by the other party to the marriage;]
  - (b) an order for the making of a periodical allowance to him by the other party to the marriage;
  - (c) an incidental order within the meaning of section 14(2) of this Act.
- (2) Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any, as is—
  - (a) justified by the principles set out in section 9 of this Act; and
  - (b) reasonable having regard to the resources of the parties.
- (3) An order under subsection (2) above is in this Act referred to as an “order for financial provision”.

### Textual Amendments

**F1** Words repealed by Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40, SIF 76:2), s. 74, Sch. 8 para. 34(a), **Sch. 9**

**F2** S. 8(1)(aa) inserted by Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40, SIF 76:2), s. 74, **Sch. 8 para. 34(b)**

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VALID FROM 01/12/2000

**[<sup>F3</sup>8A Pension sharing orders: apportionment of charges.**

If a pension sharing order relates to rights under a pension arrangement, the court may include in the order provision about the apportionment between the parties of any charge under section 41 of the Welfare Reform and Pensions Act 1999 (charges in respect of pension sharing costs) or under corresponding Northern Ireland legislation.]

**Textual Amendments**

**F3** S. 8A inserted (1.12.2000) by 1999 c. 30, s. 84, **Sch. 12 Pt. I para. 7**; S.I. 2000/1047, art. 2(2)(d), **Sch. Pt. IV**

**9 Principles to be applied.**

- (1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that—
- (a) the net value of the matrimonial property should be shared fairly between the parties to the marriage;
  - (b) fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family;
  - (c) any economic burden of caring, after divorce, for a child of the marriage under the age of 16 years should be shared fairly between the parties;
  - (d) a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce;
  - (e) a party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

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

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

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

**10 Sharing of value of matrimonial property.**

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

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- (2) The net value of the matrimonial property shall be the value of the property at the relevant date after deduction of any debts incurred by the parties or either of them—
  - (a) before the marriage so far as they relate to the matrimonial property, and
  - (b) during the marriage,which are outstanding at that date.
- (3) In this section “the relevant date” means whichever is the earlier of—
  - (a) subject to subsection (7) below, the date on which the parties ceased to cohabit;
  - (b) the date of service of the summons in the action for divorce.
- (4) Subject to subsection (5) below, in this section and in section 11 of this Act “the matrimonial property” means all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)—
  - (a) before the marriage for use by them as a family home or as furniture or furnishings for such home; or
  - (b) during the marriage but before the relevant date.
- (5) The proportion of any rights or interests of either party under a life policy or occupational pension scheme or similar arrangement referable to the period to which subsection (4)(b) above refers shall be taken to form part of the matrimonial property.
- (6) In subsection (1) above “special circumstances”, without prejudice to the generality of the words, may include—
  - (a) the terms of any agreement between the parties on the ownership or division of any of the matrimonial property;
  - (b) the source of the funds or assets used to acquire any of the matrimonial property where those funds or assets were not derived from the income or efforts of the parties during the marriage;
  - (c) any destruction, dissipation or alienation of property by either party;
  - (d) the nature of the matrimonial property, the use made of it (including use for business purposes or as a matrimonial home) and the extent to which it is reasonable to expect it to be realised or divided or used as security;
  - (e) the actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce.
- (7) For the purposes of subsection (3) above no account shall be taken of any cessation of cohabitation where the parties thereafter resumed cohabitation, except where the parties ceased to cohabit for a continuous period of 90 days or more before resuming cohabitation for a period or periods of less than 90 days in all.

## **11 Factors to be taken into account.**

- (1) In applying the principles set out in section 9 of this Act, the following provisions of this section shall have effect.
- (2) For the purposes of section 9(1)(b) of this Act, the court shall have regard to the extent to which—
  - (a) the economic advantages or disadvantages sustained by either party have been balanced by the economic advantages or disadvantages sustained by the other party, and

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- (b) any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property or otherwise.
- (3) For the purposes of section 9(1)(c) of this Act, the court shall have regard to—
- (a) any decree or arrangement for aliment for the child;
  - (b) any expenditure or loss of earning capacity caused by the need to care for the child;
  - (c) the need to provide suitable accommodation for the child;
  - (d) the age and health of the child;
  - (e) the educational, financial and other circumstances of the child;
  - (f) the availability and cost of suitable child-care facilities or services;
  - (g) the needs and resources of the parties; and
  - (h) all the other circumstances of the case.
- (4) For the purposes of section 9(1)(d) of this Act, the court shall have regard to—
- (a) the age, health and earning capacity of the party who is claiming the financial provision;
  - (b) the duration and extent of the dependence of that party prior to divorce;
  - (c) any intention of that party to undertake a course of education or training;
  - (d) the needs and resources of the parties; and
  - (e) all the other circumstances of the case.
- (5) For the purposes of section 9(1)(e) of this Act, the court shall have regard to—
- (a) the age, health and earning capacity of the party who is claiming the financial provision;
  - (b) the duration of the marriage;
  - (c) the standard of living of the parties during the marriage;
  - (d) the needs and resources of the parties; and
  - (e) all the other circumstances of the case.
- (6) In having regard under subsections (3) to (5) above to all the other circumstances of the case, the court may, if it thinks fit, take account of any support, financial or otherwise, given by the party who is to make the financial provision to any person whom he maintains as a dependant in his household whether or not he owes an obligation of aliment to that person.
- (7) In applying the principles set out in section 9 of this Act, the court shall not take account of the conduct of either party unless—
- (a) the conduct has adversely affected the financial resources which are relevant to the decision of the court on a claim for financial provision; or
  - (b) in relation to section 9(1)(d) or (e), it would be manifestly inequitable to leave the conduct out of account.

## **12 Orders for payment of capital sum or transfer of property.**

- (1) An order under section 8(2) of this Act for payment of a capital sum or transfer of property may be made—
- (a) on granting decree of divorce; or
  - (b) within such period as the court on granting decree of divorce may specify.



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- (2) The court, on making an order referred to in subsection (1) above, may stipulate that it shall come into effect at a specified future date.
- (3) The court, on making an order under section 8(2) of this Act for payment of a capital sum, may order that the capital sum shall be payable by instalments.
- (4) Where an order referred to in subsection (1) above has been made, the court may, on an application by either party to the marriage on a material change of circumstances, vary the date or method of payment of the capital sum or the date of transfer of property.

VALID FROM 15/07/1996

#### **[<sup>F4</sup>12A Orders for payment of capital sum: pensions lump sums.**

- (1) This section applies where the court makes an order under section 8(2) of this Act for payment of a capital sum (a “capital sum order”) by a party to the marriage (“the liable party”) in circumstances where—
  - (a) the matrimonial property within the meaning of section 10 of this Act includes any rights or interests in benefits under a pension scheme which the liable party has or may have (whether such benefits are payable to him or in respect of his death); and
  - (b) those benefits include a lump sum payable to him or in respect of his death.
- (2) Where the benefits referred to in subsection (1) above include a lump sum payable to the liable party, the court, on making the capital sum order, may make an order requiring the trustees or managers of the pension scheme in question to pay the whole or part of that sum, when it becomes due, to the other party to the marriage (“the other party”).
- (3) Where the benefits referred to in subsection (1) above include a lump sum payable in respect of the death of the liable party, the court, on making the capital sum order, may make an order—
  - (a) if the trustees or managers of the pension scheme in question have power to determine the person to whom the sum, or any part of it, is to be paid, requiring them to pay the whole or part of that sum, when it becomes due, to the other party;
  - (b) if the liable party has power to nominate the person to whom the sum, or any part of it, is to be paid, requiring the liable party to nominate the other party in respect of the whole or part of that sum;
  - (c) in any other case, requiring the trustees or managers of the pension scheme in question to pay the whole or part of that sum, when it becomes due, to the other party instead of to the person to whom, apart from the order, it would be paid.
- (4) Any payment by the trustees or managers under an order under subsection (2) or (3) above—
  - (a) shall discharge so much of the trustees’ or managers’ liability to or in respect of the liable party as corresponds to the amount of the payment; and
  - (b) shall be treated for all purposes as a payment made by the liable party in or towards the discharge of his liability under the capital sum order.

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- (5) Where the liability of the liable party under the capital sum order has been discharged in whole or in part, other than by a payment by the trustees or managers under an order under subsection (2) or (3) above, the court may, on an application by any person having an interest, recall any order under either of those subsections or vary the amount specified in such an order, as appears to the court appropriate in the circumstances.
- (6) Where—
- (a) an order under subsection (2) or (3) above imposes any requirement on the trustees or managers of a pension scheme (“the first scheme”) and the liable party acquires transfer credits under another scheme (“the new scheme”) which are derived (directly or indirectly) from a transfer from the first scheme of all his accrued rights under that scheme; and
  - (b) the trustees or managers of the new scheme have been given notice in accordance with regulations under subsection (8) below,
- the order shall have effect as if it had been made instead in respect of the trustees or managers of the new scheme; and in this subsection “transfer credits” has the same meaning as in the Pension Schemes Act 1993.
- (7) Without prejudice to subsection (6) above, the court may, on an application by any person having an interest, vary an order under subsection (2) or (3) above by substituting for the trustees or managers specified in the order the trustees or managers of any other pension scheme under which any lump sum referred to in subsection (1) above is payable to the liable party or in respect of his death.
- (8) The Secretary of State may by regulations—
- (a) require notices to be given in respect of changes of circumstances relevant to orders under subsection (2) or (3) above;
  - (b) make provision for the recovery of the administrative expenses of complying with such orders from the liable party or the other party.
- (9) Regulations under subsection (8) above shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.
- (10) Subsection (10) (other than the definition of “benefits under a pension scheme”) and subsection (11) of section 10 of this Act shall apply for the purposes of this section as those subsections apply for the purposes of that section.]

#### Textual Amendments

- F4** S. 12A inserted (15.7.1996 for certain purposes only and 19.8.1996 otherwise) by 1995 c. 26, s. 167(3); S.I. 1996/1843, art. 3 (with art. 4)

### 13 Orders for periodical allowance.

- (1) An order under section 8(2) of this Act for a periodical allowance may be made—
- (a) on granting decree of divorce;
  - (b) within such period as the court on granting decree of divorce may specify; or
  - (c) after decree of divorce where—
    - (i) no such order has been made previously;

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- (ii) application for the order has been made after the date of decree; and
  - (iii) since the date of decree there has been a change of circumstances.
- (2) The court shall not make an order for a periodical allowance under section 8(2) of this Act unless—
  - (a) the order is justified by a principle set out in paragraph (c), (d) or (e) of section 9(1) of this Act; and
  - (b) it is satisfied that an order for payment of a capital sum or for transfer of property under that section would be inappropriate or insufficient to satisfy the requirements of the said section 8(2).
- (3) An order under section 8(2) of this Act for a periodical allowance may be for a definite or an indefinite period or until the happening of a specified event.
- (4) Where an order for a periodical allowance has been made under section 8(2) of this Act, and since the date of the order there has been a material change of circumstances, the court shall, on an application by or on behalf of either party to the marriage or his executor, have power by subsequent order—
  - (a) to vary or recall the order for a periodical allowance;
  - (b) to backdate such variation or recall to the date of the application therefor or, on cause shown, to an earlier date;
  - (c) to convert the order into an order for payment of a capital sum or for a transfer of property.
- (5) The provisions of this Act shall apply to applications and orders under subsection (4) above as they apply to applications for periodical allowance and orders on such applications.
- (6) Where the court backdates an order under subsection (4)(b) above, the court may order any sums paid by way of periodical allowance to be repaid.
- (7) An order for a periodical allowance made under section 8(2) of this Act—
  - (a) shall, if subsisting at the death of the party making the payment, continue to operate against that party's estate, but without prejudice to the making of an order under subsection (4) above;
  - (b) shall cease to have effect on the remarriage or death of the party receiving payment, except in relation to any arrears due under it.

## **14 Incidental orders.**

- (1) Subject to subsection (3) below, an incidental order may be made under section 8(2) of this Act before, on or after the granting or refusal of decree of divorce.
- (2) In this Act, "an incidental order" means one or more of the following orders—
  - (a) an order for the sale of property;
  - (b) an order for the valuation of property;
  - (c) an order determining any dispute between the parties to the marriage as to their respective property rights by means of a declarator thereof or otherwise;
  - (d) an order regulating the occupation of the matrimonial home or the use of furniture and plenishings therein or excluding either party to the marriage from such occupation;
  - (e) an order regulating liability, as between the parties, for outgoings in respect of the matrimonial home or furniture or plenishings therein;

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- (f) an order that security shall be given for any financial provision;
  - (g) an order that payments shall be made or property transferred to any curator bonis or trustee or other person for the benefit of the party to the marriage by whom or on whose behalf application has been made under section 8(1) of this Act for an incidental order;
  - (h) an order setting aside or varying any term in an antenuptial or postnuptial marriage settlement;
  - (j) an order as to the date from which any interest on any amount awarded shall run;
  - (k) any ancillary order which is expedient to give effect to the principles set out in section 9 of this Act or to any order made under section 8(2) of this Act.
- (3) An incidental order referred to in subsection (2)(d) or (e) above may be made only on or after the granting of decree of divorce.
- (4) An incidental order may be varied or recalled by subsequent order on cause shown.
- (5) So long as an incidental order granting a party to a marriage the right to occupy a matrimonial home or the right to use furniture and plenishings therein remains in force then—
- (a) section 2(1), (2), (5)(a) and (9) of the <sup>M1</sup>Matrimonial Homes (Family Protection) (Scotland) Act 1981 (which confer certain general powers of management on a spouse in relation to a matrimonial home), and
  - (b) subject to section 15 (3) of this Act, section 12 of the said Act of 1981 and [<sup>F5</sup>section 41 of the Bankruptcy (Scotland) Act 1985] (which protect the occupancy rights of a spouse against arrangements intended to defeat them),
- shall, except to the extent that the order otherwise provides, apply in relation to the order—
- (i) as if that party were a non-entitled spouse and the other party were an entitled spouse within the meaning of section 1(1) or 6(2) of the said Act of 1981 as the case may require;
  - (ii) as if the right to occupy a matrimonial home under that order were “occupancy rights” with the meaning of the said Act of 1981; and
  - (iii) with any other necessary modifications; and
- subject to section 15(3) of this Act, section 11 of the said Act of 1981 (protection of spouse in relation to furniture and plenishings) shall apply in relation to the order as if that party were a spouse within the meaning of the said section 11 and the order were an order under section 3(3) or (4) of the said Act of 1981.
- (6) In subsection (2)(h) above, “settlement” includes a settlement by way of a policy of assurance to which section 2 of the <sup>M2</sup>Married Women’s Policies of Assurance (Scotland) Act 1880 relates.
- (7) Notwithstanding subsection (1) above, the Court of Session may by Act of Sederunt make rules restricting the categories of incidental order which may be made under section 8(2) of this Act before the granting of decree of divorce.

#### Textual Amendments

**F5** Words substituted by [Bankruptcy \(Scotland\) Act 1985 \(c. 66, SIF 66\)](#), ss. 75(1)(5)(6), [Sch. 7 para. 23](#)

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**Changes to legislation:** There are currently no known outstanding effects for the Family Law (Scotland) Act 1985. (See end of Document for details)

#### Marginal Citations

M1 1981 c. 59.

M2 1880 c. 26.

### 15 Rights of third parties.

- (1) The court shall not make an order under section 8(2) of this Act for the transfer of property if the consent of a third party which is necessary under any obligation, enactment or rule of law has not been obtained.
- (2) The court shall not make an order under section 8(2) of this Act for the transfer of property subject to security without the consent of the creditor unless he has been given an opportunity of being heard by the court.
- (3) Neither an incidental order, nor any rights conferred by such an order, shall prejudice any rights of any third party insofar as those rights existed immediately before the making of the order.

### 16 Agreements on financial provision.

- (1) Where the parties to a marriage have entered into an agreement as to financial provision to be made on divorce, the court may make an order setting aside or varying—
  - (a) any term of the agreement relating to a periodical allowance where the agreement expressly provides for the subsequent setting aside or variation by the court of that term; or
  - (b) the agreement or any term of it where the agreement was not fair and reasonable at the time it was entered into.
- (2) The court may make an order—
  - (a) under subsection (1)(a) above at any time after granting decree of divorce; and
  - (b) under subsection (1)(b) above on granting decree of divorce or within such time thereafter as the court may specify on granting decree of divorce.
- (3) Without prejudice to subsections (1) and (2) above, where the parties to a marriage have entered into an agreement as to financial provision to be made on divorce and—
  - (a) the estate of the party by whom any periodical allowance is payable under the agreement has, since the date when the agreement was entered into, been sequestrated, the award of sequestration has not been recalled and the party has not been discharged;
  - (b) an analogous remedy within the meaning of section 10(5) of the Bankruptcy (Scotland) Act 1985 has, since that date, come into force and remains in force in respect of that party's estate; or
  - (c) that party's estate is being administered by a trustee acting under a voluntary trust deed granted since that date by the party for the benefit of his creditors generally or is subject to an analogous arrangement,the court may, on or at any time after granting decree of divorce, make an order setting aside or varying any term of the agreement relating to the periodical allowance.
- (4) Any term of an agreement purporting to exclude the right to apply for an order under subsection (1)(b) or (3) above shall be void.

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

## **17 Financial provision on declarator of nullity of marriage.**

- (1) Subject to the following provisions of this section, the provisions of this Act shall apply to actions for declarator of nullity of marriage as they apply to actions for divorce; and in this Act, unless the context otherwise requires, “action for divorce” includes an action for declarator of nullity of marriage and, in relation to such an action, “decree” and “divorce” shall be construed accordingly.
- (2) In an action for declarator of nullity of marriage, it shall be competent for either party to claim interim aliment under section 6(1) of this Act notwithstanding that he denies the existence of the marriage.
- (3) Any rule of law by virtue of which either party to an action for declarator of nullity of marriage may require restitution of property upon the granting of such declarator shall cease to have effect.

### *Supplemental*

## **18 Orders relating to avoidance transactions.**

- (1) Where a claim has been made (whether before or after the commencement of this Act), being—
- (a) an action for aliment,
  - (b) a claim for an order for financial provision, or
  - (c) an application for variation or recall of a decree in such an action or of an order for financial provision,
- the party making the claim may, not later than one year from the date of the disposal of the claim, apply to the court for an order—
- (i) setting aside or varying any transfer of, or transaction involving, property effected by the other party not more than 5 years before the date of the making of the claim; or
  - (ii) interdicting the other party from effecting any such transfer or transaction.
- (2) Subject to subsection (3) below, on an application under subsection (1) above for an order the court may, if it is satisfied that the transfer or transaction had the effect of, or is likely to have the effect of, defeating in whole or in part any claim referred to in subsection (1) above, make the order applied for or such other order as it thinks fit.
- (3) An order under subsection (2) above shall not prejudice any rights of a third party in or to the property where that third party—
- (a) has in good faith acquired the property or any of it or any rights in relation to it for value; or
  - (b) derives title to such property or rights from any person who has done so.
- (4) Where the court makes an order under subsection (2) above, it may include in the order such terms and conditions as it thinks fit and may make any ancillary order which it considers expedient to ensure that the order is effective.

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## **19 Inhibition and arrestment.**

(1) Where a claim has been made, being—

- (a) an action for aliment, or
- (b) a claim for an order for financial provision,

the court shall have power, on cause shown, to grant warrant for inhibition or warrant for arrestment on the dependence of the action in which the claim is made and, if it thinks fit, to limit the inhibition to any particular property or to limit the arrestment to any particular property or to funds not exceeding a specified value.

(2) In subsection (1) above, “the court” means the Court of Session in relation to a warrant for inhibition and the Court of Session or the sheriff, as the case may require, in relation to a warrant for arrestment on the dependence.

(3) This section is without prejudice to section 1 of the <sup>M3</sup>Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (wages, pensions, etc, to be exempt from arrestment on the dependence of an action).

### **Marginal Citations**

**M3** 1966 c. 19.

## **20 Provision of details of resources.**

In an action—

- (a) for aliment;
- (b) which includes a claim for an order for financial provision; or
- (c) which includes a claim for interim aliment,

the court may order either party to provide details of his resources or those relating to a child or incapax on whose behalf he is acting.

## **21 Award of aliment or custody where divorce or separation refused.**

A court which refuses a decree of divorce or separation shall not, by virtue of such refusal, be prevented from making an order for aliment or an order regulating custody or education of, or access to, a child or an incidental order determining any dispute between the parties as to their respective property rights.

## **22 Expenses of action.**

The expenses incurred by a party to a marriage in pursuing or defending—

- (a) an action for aliment brought by either party to the marriage on his own behalf against the other party;
- (b) an action for divorce, separation, declarator of marriage or declarator of nullity of marriage;
- (c) an application made after the commencement of this Act for variation or recall of a decree of aliment or an order for financial provision in an action brought before or after the commencement of this Act,

shall not be regarded as necessities for which the other party to the marriage is liable.

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*Changes to legislation: There are currently no known outstanding effects for the Family Law (Scotland) Act 1985. (See end of Document for details)*

## 23 Actions for aliment of small amounts.

For section 3 of the <sup>M4</sup>Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963 there shall be substituted the following section—

### “3 Actions for aliment of small amounts.

- (1) An action under section 2 of the Family Law (Scotland) Act 1985 for aliment only (whether or not expenses are also sought) may be brought before the sheriff as a summary cause if the aliment claimed in the action does not exceed—
  - (a) in respect of a child under the age of 18 years, the sum of £35 per week; and
  - (b) in any other case, the sum of £70 per week;
 and any provision in any enactment limiting the jurisdiction of the sheriff in a summary cause by reference to any amount, or limiting the period for which a decree granted by him shall have effect, shall not apply in relation to such an action.
- (2) Without prejudice to any other enactment, the sheriff shall have jurisdiction in an action for aliment brought as a summary cause by virtue of subsection (1) above if—
  - (a) the pursuer resides within the jurisdiction of the sheriff, and
  - (b) the action could, by virtue of section 6 of the principal Act (which relates to jurisdiction), have been brought in the sheriff court of another sheriffdom.
- (3) The Lord Advocate may by order vary the amounts prescribed in paragraphs (a) and (b) of subsection (1) above.
- (4) The power to make an order under subsection (3) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament and shall include power to vary or revoke any order made thereunder.”

#### Marginal Citations

M4 1963 c. 22.

*Matrimonial property, etc.*

## 24 Marriage not to affect property rights or legal capacity.

- (1) Subject to the provisions of any enactment (including this Act), marriage shall not of itself affect—
  - (a) the respective rights of the parties to the marriage in relation to their property;
  - (b) the legal capacity of the parties to the marriage.
- (2) Nothing in subsection (1) above affects the law of succession.



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*Changes to legislation: There are currently no known outstanding effects for the Family Law (Scotland) Act 1985. (See end of Document for details)*

## **25 Presumption of equal shares in household goods.**

- (1) If any question arises (whether during or after a marriage) as to the respective rights of ownership of the parties to a marriage in any household goods obtained in prospect of or during the marriage other than by gift or succession from a third party, it shall be presumed, unless the contrary is proved, that each has a right to an equal share in the goods in question.
- (2) For the purposes of subsection (1) above, the contrary shall not be treated as proved by reason only that while the parties were married and living together the goods in question were purchased from a third party by either party alone or by both in unequal shares.
- (3) In this section “household goods” means any goods (including decorative or ornamental goods) kept or used at any time during the marriage in any matrimonial home for the joint domestic purposes of the parties to the marriage, other than—
  - (a) money or securities;
  - (b) any motor car, caravan or other road vehicle;
  - (c) any domestic animal.

## **26 Presumption of equal shares in money and property derived from housekeeping allowance.**

If any question arises (whether during or after a marriage) as to the right of a party to a marriage to money derived from any allowance made by either party for their joint household expenses or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to each party in equal shares.

### *General*

## **27 Interpretation.**

- (1) In this Act, unless the context otherwise requires—
  - “action” means an action brought after the commencement of this Act;
  - “action for aliment” has the meaning assigned to it by section 2(3) of this Act;
  - “aliment” does not include aliment *pendente lite* or interim aliment under section 6 of this Act;
  - “caravan” means a caravan which is mobile or affixed to the land;
  - “child” includes [<sup>F6</sup>a child whether or not his parents have ever been married to one another], and any reference to the child of a marriage (whether or not subsisting) includes a child (other than a child who has been boarded out with the parties, or one of them, by a local or other public authority or a voluntary organisation) who has been accepted by the parties as a child of the family;
  - “the court” means the Court of Session or the sheriff, as the case may require;
  - “decree” in an action for aliment includes an order of the court awarding aliment;
  - “family” includes a one-parent family;

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“incidental order” has the meaning assigned to it by section 14(2) of this Act;

“marriage”, in relation to an action for declarator of nullity of marriage, means purported marriage;

“matrimonial home” has the meaning assigned to it by section 22 of the <sup>M5</sup>Matrimonial Homes (Family Protection) (Scotland) Act 1981 [<sup>F7</sup>as amended by section 13(10) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985];

“needs” means present and foreseeable needs;

“obligation of aliment” shall be construed in accordance with section 1(2) of this Act;

“order for financial provision” means an order under section 8(2) of this Act and, in sections 18(1) and 22(c) of this Act, also includes an order under section 5(2) of the <sup>M6</sup>Divorce (Scotland) Act 1976;

“party to a marriage” and “party to the marriage” include a party to a marriage which has been terminated or annulled;

“property” in sections 8, 12, 13 and 15 of this Act does not include a tenancy transferable under section 13 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981;

“resources” means present and foreseeable resources;

“voluntary organisation” means a body, other than a local or other public authority, the activities of which are not carried on for profit.

- (2) For the purposes of this Act, the parties to a marriage shall be held to cohabit with one another only when they are in fact living together as man and wife.

#### Textual Amendments

**F6** Words substituted by Law Reform (Parent and Child) (Scotland) Act 1986 (c. 9, SIF 49:8), ss. 10(1), 11(4), **Sch. 1 para. 21**

**F7** Words added by Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73, SIF 76:2), ss. 23, 59, 60(6), **Sch 2 para. 31**

#### Marginal Citations

**M5** 1981 c. 59.

**M6** 1976 c. 39.

## 28 Amendments, repeals and savings.

- (1) The enactments specified in Schedule 1 to this Act shall have effect subject to the amendments set out therein.
- (2) The enactments specified in columns 1 and 2 of Schedule 2 to this Act are repealed to the extent specified in column 3 of that Schedule.
- (3) Nothing in subsection (2) above shall affect the operation of section 5 (orders for financial provision) of the <sup>M7</sup>Divorce (Scotland) Act 1976 in relation to an action for divorce brought before the commencement of this Act; but in the continued operation of that section the powers of the court—
  - (a) to make an order for payment of periodical allowance under subsection (2) thereof; and

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(b) to vary such an order under subsection (4) thereof, shall include power to make such an order for a definite or an indefinite period or until the happening of a specified event.

**Extent Information**

**E1** Sch. 1: so much of s. 28 and Sch. 1 as affects the operation of 1950 c. 37 and 1972 c. 18 extends to England, Wales, Scotland and Northern Ireland, see s. 29(4)

**Marginal Citations**

**M7** 1976 c. 39.

**29 Citation, commencement and extent.**

- (1) This Act may be cited as the Family Law (Scotland) Act 1985.
- (2) This Act shall come into operation on such day as the Secretary of State may appoint by order made by statutory instrument, and different days may be appointed for different purposes.
- (3) An order under subsection (2) above may contain such transitional provisions and savings as appear to the Secretary of State necessary or expedient in connection with the provisions brought into force (whether wholly or partly) by the order.
- (4) So much of section 28 of, and Schedule 1 to, this Act as affects the operation of the <sup>M8</sup>Maintenance Orders Act 1950 and the <sup>M9</sup>Maintenance Orders (Reciprocal Enforcement) Act 1972 shall extend to England and Wales and to Northern Ireland as well as to Scotland, but save as aforesaid this Act shall extend to Scotland only.

**Modifications etc. (not altering text)**

**C1** S. 29(2): power of appointment conferred by s. 29(2) wholly exercised: S.I. 1986/1237, 1988/1887

**Marginal Citations**

**M8** 1950 c. 37.

**M9** 1972 c. 18.

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## SCHEDULES

### SCHEDULE 1

Section 28(1).

#### MINOR AND CONSEQUENTIAL AMENDMENTS

##### **Extent Information**

- E2** Sch. 1: so much of s. 28 and Sch. 1 as affects the operation of 1950 c. 37 and 1972 c. 18 extends to England, Wales, Scotland and Northern Ireland, see s. 29(4)

##### *The Sheriff Courts (Scotland) Act 1907 (c. 51)*

- 1 In section 5 of the Sheriff Courts (Scotland) Act 1907 (jurisdiction), for subsection (2) there shall be substituted the following subsection—

“(2) Actions for aliment or separation (other than any action mentioned in subsection (2A) below) and actions for regulating the custody of children:”.

##### *The Guardianship of Infants Act 1925 (c. 45)*

- 2 In section 3(3) of the Guardianship of Infants Act 1925 (orders for custody and access not enforceable while parents living together), for the words from the beginning to the word “accrue” there shall be substituted the words “No such order for custody or education shall be enforceable”.

##### *The Maintenance Orders Act 1950 (c. 37)*

- 3 In section 16(2)(b)(i) of the Maintenance Orders Act 1950 (enforcement of maintenance orders in other parts of the United Kingdom), at the end there shall be added the words “or an order for financial provision in the form of a monetary payment under section 8 of the Family Law (Scotland) Act 1985”.

##### *The Succession (Scotland) Act 1964 (c. 41)*

- 4 In section 33(2) of the Succession (Scotland) Act 1964 (construction of references to legal rights in marriage contracts), at the end there shall be added the words “or section 8 of the Family Law (Scotland) Act 1985”.

##### *The Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (c. 19)*

- 5 In section 8(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (variation and recall of certain orders regarding custody and maintenance), at the end of paragraph (c) there shall be added the words “or section 8 of the Family Law (Scotland) Act 1985”.

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*The Maintenance Orders (Reciprocal Enforcement) Act 1972 (c. 18)*

6 In section 31 of the Maintenance Orders (Reciprocal Enforcement) Act 1972 (application by person in convention country for recovery of maintenance in Scotland—

(a) for subsection (1A) there shall be substituted the following subsections—

“(1A) Proceedings arising out of an application under subsection (1) above shall be treated as an action for aliment within the meaning of the Family Law (Scotland) Act 1985 and, subject to subsections (1B) to (1D) below, the provisions of that Act relating to aliment shall apply in relation to claims for maintenance in such proceedings and decrees therein.

(1B) Without prejudice to subsection (2) below, any proceedings mentioned in subsection (1A) above shall be brought in the sheriff court.

(1C) In its application to proceedings mentioned in subsection (1A) above, section 5 of the said Act of 1985 (power to vary or recall decree of aliment) shall be subject to section 34(1) of this Act.

(1D) Where an application under subsection (1) above is for the recovery of maintenance from a person who is a former spouse of the applicant—

(a) then, for the purposes of the said Act of 1985, there shall be assumed to be an obligation of aliment within the meaning of that Act owed by the former spouse to the applicant;

(b) section 2(7) and (8) of that Act shall not apply; and

(c) an order for payment of maintenance in proceedings arising out of the application—

(i) shall, if subsisting at the death of the party making the payment, continue to operate against that party’s estate, but without prejudice to the power of the court to vary or recall the order; and

(ii) shall cease to have effect on the re-marriage or death of the party receiving payment, except in relation to any arrears due under it”;

(b) after subsection (4) there shall be inserted the following new subsection—

“(4A) In subsection (4)(i) above the reference to the dissolution of a marriage by divorce shall be construed as including a reference to the annulment of a purported marriage and any reference to a marriage, a divorce, a divorced person, a former spouse or divorce proceedings shall be construed accordingly.”; and

(c) subsection (5) shall cease to have effect.

7 In section 39 of that Act, in the definition of “maintenance”, for the words “as a periodical allowance” there shall be substituted the words “by one former spouse for the support of the other”.

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*The Matrimonial Proceedings (Polygamous Marriages) Act 1972 (c. 38)*

- 8 In section 2(2) of the Matrimonial Proceedings (Polygamous Marriages) Act 1972 (decrees in respect of polygamous marriages)—
- (a) for paragraphs (d) and (e) there shall be substituted the following paragraphs—
- “(d) a decree of separation;  
 (e) a decree of aliment;” and
- (b) after the word “ancillary” there shall be inserted the words “or incidental”.

*The Domicile and Matrimonial Proceedings Act 1973 (c. 45)*

- 9 In Schedule 2 to the Domicile and Matrimonial Proceedings Act 1973 (ancillary and collateral orders)—
- (a) before paragraph 3, there shall be inserted the following paragraph—
- “2A Any enactment or rule of law empowering a court to make an order for payment of aliment (including interim aliment).”; and
- (b) after paragraph 12A, there shall be inserted the following paragraph—
- “12B Section 8 (orders for financial provision on divorce), section 17(1) (financial provision on declarator of nullity of marriage) and section 18 (orders relating to avoidance transactions) of the Family Law (Scotland) Act 1985.”

*The Land Registration (Scotland) Act 1979 (c. 33)*

- 10 In section 12(3)(b) of the Land Registration (Scotland) Act 1979 (circumstances in which there is no entitlement to indemnity for loss), at the end there shall be added the words “or has been set aside or varied by an order under section 18(2) (orders relating to avoidance transactions) of the Family Law (Scotland) Act 1985”.

*The Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c. 59)*

- 11 For section 13(2) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (transfer of tenancy) there shall be substituted the following subsection—
- “(2) In an action—
- (a) for divorce, the Court of Session or a sheriff;  
 (b) for nullity of marriage, the Court of Session,
- may, on granting decree or within such period as the court may specify on granting decree, make an order granting an application under subsection (1) above.”

*The Matrimonial and Family Proceedings Act 1984 (c. 42)*

- 12 After section 29 of the Matrimonial and Family Proceedings Act 1984 there shall be inserted the following new section—

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### “29A Application of Part IV to annulled marriages.

This Part of this Act shall apply to an annulment, of whatever nature, of a purported marriage, as it applies to a divorce, and references to marriage and divorce shall be construed accordingly.”

- 13 In section 30(1) of that Act (interpretation of Part IV), in the definition of “order for financial provision”, for the words from “paragraphs (a)” to “1976” there shall be substituted the words “section 8(1) of the Family Law (Scotland) Act 1985”.

## SCHEDULE 2

Section 28(2).

### REPEALS

Chapter	Short title	Extent of repeal
24 & 25 Vict. c. 86.	The Conjugal Rights (Scotland) Amendment Act 1861.	In section 6, the words from “be held and considered” to “as if she were unmarried, and”; the words “the same shall”; and the words from “provided that if any such wife” to the end of the section.  In section 9, the word “maintenance”.  Sections 15 and 16.
44 & 45 Vict. c. 21.	The Married Women’s Property (Scotland) Act 1881.	Sections 1 to 5. Section 8. The Schedule.
10 & 11 Geo. 5. c. 54.	The Married Women’s Property (Scotland) Act 1920.	The whole Act.
15 & 16 Geo. 5. c. 45.	The Guardianship of Infants Act 1925.	Section 3(2).  In section 5(4), the words from “and may further order” to the end of the subsection.  Section 8.
20 & 21 Geo. 5. c. 33.	The Illegitimate Children (Scotland) Act 1930.	Section 1.  In section 2, in subsection (1), the words “or in any action for aliment for an illegitimate child”, and subsection (2).

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		Section 3.
		Section 5.
22 & 23 Geo. 5. c. 47.	The Children and Young Persons (Scotland) Act 1932.	Section 73(1)(b) and (3).
2 & 3 Geo. 6. c. 4.	The Custody of Children (Scotland) Act 1939.	In section 1, in subsection (1) the word “maintenance” and subsection (2).
14 Geo. 6. c. 37.	The Maintenance Orders Act 1950.	Section 6(2). In section 7, the words from “whether” to “maintenance of the pupil child”.
15 & 16 Geo. 6 & 1 Eliz. 2. c. 41.	The Affiliation Orders Act 1952.	The whole Act.
6 & 7 Eliz. 2. c. 40.	The Matrimonial Proceedings (Children) Act 1958.	In section 7, in subsection (1), the word “maintenance”, and subsection (2). In section 9(1), the word “maintenance”.
1964 c. 19.	The Married Women’s Property Act 1964.	The whole Act.
1972 c. 18.	The Maintenance Orders (Reciprocal Enforcement) Act 1972.	Section 31(5).
1973 c. 45.	The Domicile and Matrimonial Proceedings Act 1973.	In Schedule 2, paragraphs 1 and 2.
1976 c. 39.	The Divorce (Scotland) Act 1976.	Sections 5 to 8.
1978 c. 22.	The Domestic Proceedings and Magistrates’ Courts Act 1978.	Section 60(1)(a). In Schedule 2, paragraph 1(a).
1981 c. 59.	The Matrimonial Homes (Family Protection) (Scotland) Act 1981.	Section 7(5).
1982 c. 27.	The Civil Jurisdiction and Judgments Act 1982.	In paragraph 1 of Schedule 9, the words “for adherence and aliment or”.
1983 c. 12.	The Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983.	In Schedule 1, paragraphs 21 and 23.



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**Changes to legislation:** There are currently no known outstanding effects for the Family Law (Scotland) Act 1985. (See end of Document for details)

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1984 c. 15.

The Law Reform (Husband and Wife) (Scotland) Act 1984.

In Schedule 1, paragraphs 3, 4 and 6.

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**Status:**

Point in time view as at 02/02/1991. This version of this Act contains provisions that are not valid for this point in time.

**Changes to legislation:**

There are currently no known outstanding effects for the Family Law (Scotland) Act 1985.