**SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH**

**[2018] SC EDIN 51**

F953/17

JUDGMENT OF SHERIFF WENDY A SHEEHAN

in the cause

F

Pursuer

against

R

Defender

**Pursuer: Innes**
**Defender: Speir**

Edinburgh, 29 August 2018

The sheriff, having resumed consideration of the cause, finds in fact;

(1) The parties were married at Edinburgh on 20 July 2013. (5/1 is an extract of the parties' marriage certificate).

(2) Both parties have been habitually resident within the jurisdiction of the court for more than one year prior to the raising of proceedings and are so resident at the date of proof.

(3) The parties separated on 14 May 2017. Since then they have not lived together as husband and wife nor had marital relations. The marriage has broken down irretrievably. There is no prospect of reconciliation between the parties. The defender consents to decree of divorce being pronounced (his form of consent is 33 of process).

(4) There is one child of the marriage, B, born 28 January 2016 (5/2 is an extract of B's birth certificate). B was conceived after several rounds of IVF treatment and is a very much wanted and cherished child.

(5) The parties share B's care. At the date of proof, the care arrangements are as set out in the interlocutors of 19 and 26 February 2018. B resides with the pursuer from Sunday morning until Thursday morning in each week and with the defender from Thursday morning until Sunday morning in each week. The defender also sometimes looks after B on a Tuesday morning when the pursuer is working. Each party has three weeks of holiday time with B in every year and additional holiday periods by agreement between the parties (e.g. over the festive period).

(6) It was anticipated that both parties' working arrangements may change immediately after the diet of proof. The future arrangements for B's care were considered by the court at a child welfare hearing on 10 August 2018 after the diet of proof had concluded. Further submissions were made and updated information was provided to the court (5/14/162, 6/12/77-80 and affidavit 41 of process). The parties largely agreed the arrangements for B's care at that hearing. They also agreed that those arrangements should be recorded in their decree of divorce. B's residence will continue to be shared between the parties. B will reside with the pursuer from Tuesday after nursery until Saturday at 9am in each week and with the defender from Saturday at 9am until Tuesday before nursery in each week. B has been enrolled at a nursery in the south side of Edinburgh where he will have started by the date of issue of this judgment. During one weekend in four, B will stay with his mother until 4pm on Sunday to enable her to socialise with B with her family/friends at weekends. Each party will have three weeks of holiday time (extended up to 9 days to allow for flights and travel bookings). The festive holidays will be shared, with B spending alternate Christmases from

2pm on 24 December until 12pm on 26 December with each parent in alternating years. The specifics of the holiday periods and any other adjustments to the foregoing regime will be by way of agreement between the parties. The parties have agreed to attend mediation with the objective of improving communication between them in respect of matters affecting B's welfare. B is a happy, healthy child who is thriving. The arrangements for his care are operating in his best interests.

(7) The parties met in 1996. At that time, the pursuer was in the first year of an undergraduate BSc degree course and the defender was in the final year of an undergraduate degree course in electrical engineering. The pursuer responded to an advert for a room to rent in a shared flat in which the defender was one of the other tenants. The parties became flatmates and friends. They had a circle of shared university friends.

(8) Following his graduation in 1997, the defender took up employment in Manchester and then in Cork. In 1999 he returned to Edinburgh. In January 2000, having accumulated some savings from his employment and having received a gift of capital from his father, the defender was in a position to purchase a heritable property. He decided to buy a flat with a view to living in it as an owner/occupier and renting rooms out to a number of his friends. The pursuer viewed a flat with the defender. She accompanied him as a friend and as a potential tenant of the house which he was considering purchasing. Ultimately, the defender bought a flat in the Newington area of Edinburgh. The pursuer stayed in the flat as a tenant in the summer of 2000. In 2004/2005 the pursuer also stayed in the flat for a period of approximately 9-10 months. She paid rent as a tenant and had her own room within the flat during both periods. The parties were close friends. They were not in a romantic relationship.

(9) Between 2005-2007 the pursuer worked in Manchester as post-doctoral researcher. During that time she lived with a partner to whom she became engaged. That relationship ended. The pursuer was very distressed by this. She was forced to move out of the home which she had shared with her partner.

(10) In May 2007 the pursuer decided to return to Edinburgh and she secured employment at a Laboratory as a project leader. She contacted the defender and asked if she could stay in the Newington flat. She moved into his flat as a tenant and as a friend. During summer 2007 the parties went on holiday to Tiree with a group of friends. A romantic relationship developed between the parties during the holiday. The relationship was volatile and only lasted three months. The defender terminated the relationship but encouraged the pursuer to continue living in the Newington flat. He hoped that the parties could continue to be close friends. The pursuer wanted to continue the parties' romantic relationship and she struggled to accept the defender's decision. She was distressed. She took time off work and was prescribed medication for anxiety by her general practitioner. The defender ultimately asked the pursuer to move out of his flat in early December 2007, it being apparent that there were difficulties with the parties continuing to share a flat as friends after the defender had ended their relationship as a couple. The pursuer moved out in January 2008.

(11) There was limited contact between the parties between early 2008 and the summer of that year. In summer 2008 the parties and their mutual friends holidayed again as a group in Tiree. The parties' romantic relationship rekindled during that holiday. They became a couple. They began cohabiting as a couple at some point in 2009 and became engaged on Christmas Day of the same year.

(12) In spring 2010 the defender decided to sell his flat in Newington. The parties had decided to buy a home together as a couple in their joint names. They viewed between 25 and 30 properties. The pursuer's parents viewed two of the properties which the parties were most interested in buying. The parties intended to pool their capital resources. They disagreed on the budget for the purchase. The pursuer wanted to buy a property outright. The defender wanted to take out a mortgage in order to buy a larger property with a substantial garden. The parties couldn't agree on a house to purchase.

(13) There were heated arguments between the parties. During some of the arguments there were physical altercations. The defender was upset by this. Difficulties arose in the relationship between the parties. They stopped having sexual relations in April 2010. In late June 2010 the defender terminated the parties' relationship and broke off their engagement.

(14) The defender's Newington flat was sold on 1 July 2010. The parties had signed a joint lease for a property in Liberton, Edinburgh. The parties agreed that the defender would move into that property by himself. The pursuer was concerned that she had a liability for the rent in terms of the lease. The defender paid the pursuer the sum of £8,600 which represented the rent for the entire period of the lease and a small sum in recognition of DIY work undertaken by the pursuer on the defender's Newington flat prior to the sale.

(15) The pursuer moved into a rented property in Morningside, Edinburgh in early July 2010. Initially she lived there alone. Her younger brother shared the flat with her for a period from late 2010 onwards.

(16) The parties attended relationship counselling between 6 July and 17 August 2010. The pursuer wanted to reconcile with the defender. She organised the counselling via her employers. Her employers provided six free sessions of counselling. The pursuer was distressed about the breakdown of the parties' relationship. She made repeated uninvited

visits to the defender's home. She phoned him regularly. The defender was worried about the pursuer's mental health. She was distressed and emotionally fragile. He attended counselling in order to give the pursuer insight into why the relationship had broken down. He considered the relationship to be an abusive one. The parties had very different perspectives as to why their relationship had broken down. Counselling was not fruitful. The counsellor expressed the view to the parties that they were incompatible and that the difficulties in their relationship could not be resolved. The parties decided not to continue with counselling after the fifth of the initial six sessions.

(17) The parties were not a couple from late June 2010 onwards.

(18) In January 2011 the parties' romantic relationship rekindled to some extent. They began to date each other and had sexual relations on an occasional basis. The relationship was not an exclusive one at that juncture. The pursuer dated another man who she had met at her running club in early 2011. The parties attended a mutual friend's wedding together in late April 2011. From August 2011 they grew closer and gradually their relationship developed into that of a committed couple later that year.

(19) The parties cohabited as a couple from February 2012 onwards and were married on 28 July 2013.

(20) The defender continued to view heritable properties with the intention to purchase a suitable home from July 2010 onwards. He did so alone. He looked at properties based on his own criteria with a bigger budget than those previously viewed with the pursuer. He focussed on properties with a substantial garden as he is a keen gardener. He identified a property which he was interested in buying in the south side of Edinburgh ("the property"). He invited the pursuer to attend the second viewing with him on 2 September 2010.

(21) The pursuer was surprised by the invitation to view the property. She was unaware that the defender had continued to view properties. The pursuer wanted to resume a romantic relationship with the defender. The defender intended to purchase a property as an owner/occupier and envisaged the pursuer being a tenant in the property. He regarded the pursuer as a friend and potential tenant at that juncture.

(22) On 3 September 2010 the defender emailed his solicitor expressing a keen interest in the house and providing information regarding his resources/budget. In that email he referred to having viewed the house with the pursuer stating "we are still very interested in the house but F has raised issues". A number of questions follow in the email all of which are framed using the subjective pronoun, "we" and the possessive pronoun "our".

(23) An offer to purchase the house was made on 6 September 2010 in the defender's sole name. On the same date the parties exchanged emails regarding title to the house and any security of tenure which the pursuer would have should she stay there. Having required to leave two properties in the past at the request of the owner occupiers, this was an issue which caused the pursuer some concern. She researched matters online and read information regarding English law. She identified that if the mortgage over the house was held in the defender's sole name then the title would also be in his sole name. She proposed various options to provide her with security of tenure including possible joint ownership of the property. The defender's responses to her emails suggested that the parties considered "some sort of agreement" and that they took legal advice from a solicitor.

(24) The defender's offer to purchase the house was accepted (after some adjustment to the price and date of entry) on 7 September 2010. The defender sent the pursuer an email that day referring to "F and R's new pad" stating "let's make this work for both of us".

(25) On 9 September 2010, having taken legal advice, the defender emailed the pursuer advising her that his solicitor recommended an agreement between the parties regarding any potential financial investment which the pursuer made to the house and providing her with a right to occupy the property. He was not prepared to consider taking the title jointly.

(26) The pursuer sent an email to the defender on 28 September 2010 in which she acknowledged her understanding that the house was being purchased in the defender's sole name and that she would have no financial claim on the property. She raised the issue of a cohabitation agreement or prenuptial agreement. The defender considered neither to be appropriate as he did not regard the parties to be either a cohabiting couple or as being likely to marry at that juncture.

(27) The defender instructed his solicitor to conclude missives and to take the title to the house in his sole name. No agreement was entered into between the parties. No capital contribution was made by the pursuer towards the purchase of the property.

(28) During the few days prior to the conclusion of the sale, the defender encountered some cash flow issues in accessing capital from his investments in time for the date of entry. The parties exchanged emails from which it is clear that the pursuer did not regard this to be a shared problem.

(29) Missives were concluded on the date of entry – 30 September 2010. The defender purchased the house for £884,500. The mortgage over the house was £308,225. The balance of the purchase price, legal fees and stamp duty was paid from the defender's savings much of which derived from funds which he had inherited from his parents.

(30) On 30 September 2010, when the defender acquired the property, the parties were not sharing a family life, were not in a romantic relationship and were not contemplating

marriage. The house was not acquired by the defender for use by the parties as a family home. The property is not matrimonial property.

(31) On 4 October 2010 the pursuer responded to an email sent to both parties from a mutual friend inviting them (and others) to a ceilidh saying "I'm up for it, can you get me a ticket …? dunno about R .. he might be busy with his mansion".

(32) The defender moved into the house on 7 November 2010.

(33) The defender carried out a substantial amount of renovation work to the house as detailed in the schedule 6/97 of process. The total cost of the work was £90,903. This added £80,000 to the value of the property. The relevant work was carried out when the defender was the sole occupant of the house and was funded solely by him.

(34) The pursuer was involved in helping the defender choose décor and furnishings for the house. She stayed overnight there on an occasional basis between early 2011 and August 2011. She stayed there more regularly thereafter. She did not live there until February 2012. Her family did not visit the house until after February 2012.

(35) The mortgage over the house was an interest only mortgage. Accordingly the parties did not reduce the outstanding borrowing with the monthly payments made from their respective incomes. The balance on the mortgage was reduced from £308,225 at that date of purchase of the house to £177,425 at the relevant date. This was achieved by the defender applying further capital sums from his pre-marital assets.

(36) The relevant date for the purposes of section 10(3) of the Family Law (Scotland) Act 1985 (hereinafter "the 1985 Act") is 14 May 2017.

(37) At the relevant date the parties had the following matrimonial assets and liabilities;

| | | **Pursuer** | **Defender** |
|---|---|---|---|
| Nationwide joint current account | | | 30,200 |
| Nationwide joint savings account | | | 20,982 |
| HSBC account | | | 7,482 |
| Lloyds Standard Saver account | | | 101 |
| Friends Life pension | | | 27,954 |
| Legal & General pension | | | 3,922 |
| Scottish Widows pension | | 3,383 | |
| NHS pension | | 14,731 | |
| USS pension | | 10,964 | |
| First Direct account | | 8,717 | |
| Halifax Instant Saver | | 3,157 | |
| Santander 123 Current | | 18,822 | |
| NS&I ISA | | 1,632 | |
| RBS current account | | 1,232 | |
| Fidelity Investment account | | 10,448 | |
| Fidelity ISA | | 68,459 | |
| Lloyds Standard Saver | | 101 | |
| BA American Express | | | (757) |
| Platinum American Express | | | (744) |
| Income tax due by the defender | | | (5,827) |
| | | **141,646** | **83,313** |
| Net value of the matrimonial property | **224,959** | | |

(38) One half thereof was £112,479.50. In order to effect an equal sharing of the net matrimonial property at the relevant date, the pursuer would require to pay the defender £29,166.50.

(39) The defender's Fidelity investment portfolio was held by him at the date of the marriage and at that juncture was valued at £202,804. At the relevant date it was valued at £154,947. The defender did not invest either income or capital in the said fund during the marriage. The value in it did not derive from the income or efforts of the parties during the marriage. There was some trading of the underlying equities held under the wrapper of the portfolio by the defender's investment manager who had the authority to make discretionary investment decisions on behalf of the defender. There was no change in the

underlying nature of the asset during the marriage. The said investment portfolio is not matrimonial property and is not reflected in the foregoing schedule.

(40) The parties made no contributions to the certain pensions during the marriage. The undernoted apportioned pension values reflect purely the investment growth in the parties' pre-marital pensions during the marriage:

- Scottish Widows pension (pursuer) apportioned value - £3,383
- USS pension (pursuer) apportioned value - £10,964
- Friends Life pension (defender) apportioned value - £27,954
- Legal & General pension (defender) apportioned value - £3,992

These sums did not derive from the income or efforts of parties during the marriage. If these pensions are removed from the foregoing schedule of matrimonial property then the adjusted net value of the parties' matrimonial property at the relevant date is £178,736. One half thereof is £89,368. In order to achieve and equal sharing of the adjusted net matrimonial property the pursuer would require to pay the defender a capital sum of £37,931.

(41) Of the sums held in the parties' joint Nationwide account at the relevant date, £10,397 derived from the defender's non-matrimonial property. The pursuer has been economically advantaged by this sum being paid into the parties' joint account and comprising part of the matrimonial property.

(42) Of the sums held in the pursuer's Fidelity account at the relevant date £6,244 derived from a gift from the defender from his premarital investments. Of the sums held in the pursuer's Fidelity ISA at the relevant date £33,880 derived from a gift from the defender from his premarital investments.

(43) The pursuer's savings/investments at the date of the marriage were worth £50,687. They were worth £139,683 at the relevant date. The increase in value was as a result of said

gifted sums, the return on the invested funds and as a result of the fact that the pursuer was able to save from her income during the marriage while she was being supported by the defender.

(44) The pursuer has a history of fragile mental health. She suffered from severe post-natal depression following B's birth in January 2016. She was treated as an in-patient in St John's hospital between 10 June 2016 and 31 July 2016. Following her discharge from hospital she was monitored in the community by a CPN and she attended regular out-patient appointments. She was prescribed medication (which she still takes albeit at a lower dose). B's health visitor made a referral to the social work department who also provided support and monitoring and a place at a children's centre two mornings a week between August 2016 and January 2018. The pursuer was discharged from psychiatric services in March 2017. Her capacity to parent B is not in any way impaired at the date of proof. Her mental health is much improved.

(45) The pursuer took maternity leave for a year following B's birth. The defender worked full time during this period. The defender has always been a very hands-on father and took sole responsibility for B's care for substantial periods of time during the first year of his life (insofar as his working hours permitted). The pursuer returned to work part time, 16 hours per week in early 2017.

(46) The pursuer is employed by the NHS. She works 20 hours a week (predominantly on a Monday and Tuesday each week). She has a reduced earning capacity as a result of the need for her to care for the parties' son B permitted. Her gross salary is £15,484. Had she worked full time in this role then she would have earned £29,034. She will accrue a lower level of occupational pension as a result of working reduced hours. She receives tax credits which mitigate this only to some extent. B is two years old and may not start primary school

until 2021. It is not realistic for the pursuer to return to full time work during the next 3 years. She will only be able to work full time thereafter if B is enrolled in some form of after-school care.

(47) The defender is a software consultant. He works as a contractor for one corporate client at a time. He is likely to return to full time work in September 2018. It is in B's best interests for the pursuer to work part time.

(48) The defender's contract with his previous employers came to an end in August 2017. He was effectively made redundant along with a number of colleagues at that time. He has not sought an alternative contract in the last year. This was in large part due to his wish to have shared care of B. He is unlikely to encounter difficulty in finding a suitable alternative contract at a similar level of remuneration. He has an earning capacity of approximately £80,000 gross per annum.

(49) The defender has undertaken to pay B's nursery fees. He is also likely to pay child support for B in the region of £93 per week. He will share in the future economic burden of caring for B.

(50) Both parties require suitable accommodation for B. The defender has remained in the former matrimonial home which provides an ideal environment for B. The pursuer requires suitable two-bedroomed accommodation which is in reasonable proximity to the defender's home (given that the parties share B's care), is in the catchment area for a good primary school and is within a reasonable distance of her place of employment.

(51) The monthly rent for such a property is in the region of £1,200 per month.

(52) The purchase price of such a property is in the region of £280,000. The pursuer has capital of approximately £50,000 which she could use as a deposit and a mortgage

borrowing capacity of approximately £50,000 leaving a shortfall in the region of £180,000. She has no other resources from which to meet a shortfall of £180,000.

(53) The pursuer's income and outgoings are as set out in 5/82 of process. They are unlikely to materially alter in the next three years.

(54) The defender has not paid interim aliment or child support to the pursuer since the relevant date. The pursuer has required to use her capital to meet the monthly shortfall in her expenditure, to meet the costs of a deposit, rent and equipping a suitable home for B and to purchase a family car.

(55) The pursuer was financially dependent on the defender during the marriage, particularly after B's birth. She requires financial provision to adjust to the separation and to meet her reasonable outgoings during the three year period before B starts school when her earning capacity is most restricted.

(56) The defender has realisable resources of approximately £205,000. He requires to pay substantial legal fees from this sum. At the date of proof he owned a house with equity of at least £950,000.

FINDS IN FACT AND LAW

[1] The marriage of the parties having broken down irretrievably as established by the parties' non-cohabitation for a period in excess of 12 months and the defender having consented to decree of divorce, the pursuer is entitled to decree of divorce.

[2] An application having been made for financial provision and being justified by the principles in the Family Law (Scotland) Act 1985 and reasonable with regard to the resources of the parties, orders therefor should be made.

**Note**

**Introduction**

[1] This case proceeded to proof over 6 days in June 2018. I am very grateful to counsel for their detailed written submissions (numbers 38, 39 and 40 of process). I do not intend to repeat those submissions in full but will refer to them at the relevant points in this note.

[2] This is an action of divorce in which the principal issue is the financial provision sought by the pursuer.

[3] The parties were married on 20 July 2013.

[4] There is one child of the marriage, B, born 28 January 2016. The parties share B's care as set out in findings in fact (5) and (6). The arrangements for B's care are operating in his best interests and did not require to be considered at proof. The circumstances relating to his care are relevant to aspects of financial provision on divorce.

[5] The parties separated on 14 May 2017. The evidence of the parties and the pursuer's sister was that since that date they have neither lived together nor had marital relations. There is no prospect of a reconciliation between them. The defender consents to divorce and a form of consent is lodged in process. There is no issue with granting decree of divorce.

[6] 14 May 2017 is agreed to be the relevant date for the purposes of section 10(3) of the Family Law (Scotland) Act 1985 (hereinafter "the 1985 Act").

**What is the value of the net matrimonial property?**

[7] The parties entered into four joint minutes of admission (19, 34, 36 and 37 of process). The net matrimonial property is set out at finding in fact (37). The valuations of those assets

and liabilities are agreed. There are two issues of contention between the parties as regards the extent of the matrimonial property:

**i. Does the defender's fidelity investment portfolio constitute matrimonial property?**

(a) At paragraph 7 of the joint minute of admissions, 19 of process, the parties agreed that the defender's fidelity investment portfolio was an asset held by him in his sole name at the date of the marriage with a value of £202,804. At the relevant date the portfolio was valued at £154,947. There were no contributions made to the portfolio from either income or capital during the marriage. At paragraph 23 of her written submission, Ms Innes refers to a production (6/3/46). She contends that as underlying shares/units held in the portfolio have been substantially traded during the period of the marriage, the bulk of the portfolio was in fact acquired during the marriage and should fall to be regarded as matrimonial property. Mr Speir deals with this issue at paragraph 6.5 of his initial written submission document and paragraph (2) of his supplementary submissions. He submitted that the production referred to by Ms Innes was not put to the defender in evidence. There was neither evidence nor agreement as to the extent of trading which had taken place. Some of the investments have very similar names and it may be inaccurate to identify them as "new" investments without exploring the position in evidence. I accept this submission. There was no evidence as regards the extent of trading within the portfolio. The defender's evidence was simply that his IFA had complete discretion to make investment decisions on his behalf and that there had been an element of trading within the wrapper of the portfolio during the marriage. There was no

change in the underlying nature of the asset. I refer to the case of *Whittome* v *Whittome* (no 1) (OH) 1994 SLT 114 in this regard.

(b) Even if it were possible to make accurate findings in fact as to the extent of trading which had been undertaken by the defender's IFA and even if I were to have been persuaded that this trading amounted to the acquisition of a new element of matrimonial property, I am of the view that the defender's portfolio should be left out of account regardless. The portfolio derived from funds held by the defender prior to the marriage, those funds having been inherited from his parents. Trading decisions were made by the defender's IFA. In no sense did any element of this investment derive from the income or efforts of the parties to the marriage. In this context I refer to section 10(6)(d) of the 1985 Act and to the case of *EP* or *G* v *GG* 2016 Fam LR 30 at page 87. Accordingly *esto* an element of the portfolio should properly fall to be regarded as matrimonial property there are very compelling circumstances to depart from an equal sharing of this asset and I would have exercised my discretion to leave it out of account entirely when calculating a fair sharing of the matrimonial property.

**ii. Does the house constitute matrimonial property?**

(a) The heritable property in Edinburgh ("the house") was acquired by the defender in his sole name on 30 September 2010. The parties were married on 20 June 2013. Section 10(4) of the 1985 Act provides that "the matrimonial property" is defined as "all the house 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 plenishings for such home; or b) during the marriage but before the relevant date".

At paragraph 24.025 in the 4th edition of his book "The Law of Husband and Wife in Scotland" Dr Clive comments:

> "The broad idea behind this provision is that such property is so closely associated with the parties' joint family life that it should be regarded as matrimonial property even though acquired before the marriage".

This issue is touched on in the Sheriff Appeal Court case of *Grant* v *Gran*t [2018] SAC (Civ) 4. Sheriff Principal Turnbull who delivered the judgment of the court said at paragraph (15)…:

> "It is clear from the Scottish Law Commission Report No 86 "Report on Matrimonial Property" and Clive: "The Law of Husband and Wife in Scotland" 4th Edition paragraphs 24.05-24.026 that Parliament has provided a limited category of what may be described as a pre-marriage property which may be capable of constituting matrimonial property. The paradigm case is the purchase by a couple intending to marry of a home in which to live. The facts of this case do not fit easily into that paradigm. Whether the terms of section 10(4)(b) are satisfied requires factual enquiry which includes evidence of the parties intentions".

In this case the defender acquired the house in his sole name on 30 September 2010. The parties did not cohabit until February 2012 some 18 months later. They did not marry until 20 July 2013. The facts of this case do not fit into "the paradigm case".

(b) The issue which the court requires to determine is whether on 30 September 2010 the defender intended to acquire the house for use by the parties as a family home. In the case of *MacLellan* v *MacLellan* 1988 SCLR 399, it was made clear that it is the purchaser's intention at the time of acquisition that matters. This case was cited with approval by the Second Division in *Mitchell* v *Mitchell* 1994 SC 601. Counsel were at one in terms of the correct legal approach to this issue (as summarised above

and in this context I refer to paragraphs (2)-(12) of Ms Innes's submissions and paragraphs 5.1-5.4 of Mr Speir's submissions).

(c) At paragraphs (19)-(21) of her submissions Ms Innes submitted that given that the correct approach is to examine the defender's intention at the date of acquisition of the house, evidence regarding any matters occurring thereafter are irrelevant and ought to be excluded from consideration when determining the issue. I do not accept this approach. In order to determine the defender's intention on 30 September 2010, I require to closely examine the evidence of whether the parties had a shared family life and were planning to acquire a home in which to live together. The evidence of the surrounding circumstances of the parties' relationship is germane to this issue. It is also of assistance in determining matters of reliability and credibility. In this case there are sharp issues of reliability and credibility of the parties' evidence. There is very limited supporting evidence from other witnesses. The pursuer's sister Jennifer Lagan provided an affidavit (30 of process) and was cross examined at proof. She lived in Surrey at the pertinent time and had a young family. Her evidence was brief and vague on this aspect of the case. However, her overall impression was that the house was bought as a family home for the parties. The defender's friend Lucy Downey provided an affidavit (28 of process). She was able to confirm that the parties' relationship came to an end in summer 2010. She visited the defender when he lived alone in rented accommodation at that time. Her clear impression was that he bought the house himself. She visited him alone after he had moved in. She had a baby in May 2010 and again her evidence was brief and she did not know the details of the parties' relationship and the arrangements surrounding the purchase of the house.

(d) I have carefully considered the evidence and counsel's submissions on this aspect of the case at paragraphs (13)-(21) of Ms Innes's submissions and paragraph 5.5 of Mr Speir's initial submission document and paragraph (1) of his supplementary submissions.

(e) The pursuer presented a picture of the parties being in a committed relationship from summer 2007 until the relevant date. She glossed over the reality of the period between summer 2007 and September 2010. She referred to the parties having only "a brief split in 2008". In fact, the evidence set out in findings in fact 10 and 11 was clear (and was ultimately conceded by the pursuer in cross examination). The parties shared a flat as friends and flatmates between May 2007 and January 2008. During that nine month period they were in a romantic relationship for only three months. That relationship was volatile and was ended by the defender. However, he hoped that the parties (who had been close friends for more than a decade at that point and had been flatmates several times) could continue to share a flat and remain friends. The pursuer moved out in January 2008 and had little contact with the defender for six months. The parties' relationship rekindled during a holiday with mutual friends in July 2008. It was clear from the evidence that throughout that period the pursuer had wanted to be in a relationship with the defender. The pursuer presented a picture of an ongoing romantic relationship from May 2007 until July 2008. That evidence given in chief did not stand up to scrutiny under cross examination. The pursuer conceded that the defender's account of the parties' relationship in 2007-2008 was in fact, correct. This passage of evidence was relevant to my overall assessment of the parties' reliability and credibility. The defender's evidence was that he valued the pursuer, above all, as a close friend and

flatmate and that he wanted to sustain that relationship even when their romantic relationship faltered. He gave detailed evidence about that referring to telephone calls at various points in time with the pursuer's father where this was acknowledged and discussed. The defender gave sincere evidence that one of the saddest things about the divorce was losing one of his closest friends.

(f) Between July 2008 and June 2010 the parties were a couple. They became engaged on 25 December 2009. In spring 2010 the defender decided to sell his flat and the parties decided to acquire a family home. Things did not go smoothly. The relevant findings in fact are (12) and (13). Those factual findings are not controversial.

(g) By 1 July 2010 the parties were no longer engaged and were no longer a couple. The defender had broken off their relationship in June. He moved into a rented property by himself. Matters had broken down to such an extent that the pursuer did not trust the defender to meet their joint obligations on the lease over Liberton flat and insisted that he paid her a sum to cover the entire obligation for deposit and rent in terms of the lease (finding in fact (14)). The pursuer moved into a rental property of her own in her own name in Morningside (finding in fact (15)). Again, those findings in fact are not controversial.

(h) The parties' evidence regarding the nature of their relationship between 1 July 2010 and 30 September 2010 diverged. It is clear that the pursuer wanted to reconcile with the defender at that point in time. The evidence was that she was distressed, that she came to the defender's house uninvited, phoned him and tried to persuade him to reconcile. The defender was resolute. At one point in his evidence he referred to this as harassment. It is to the parties' credit that the merits of this

action proceed on the basis of their separation and consent to divorce. In the context of this chapter of evidence the defender gave somewhat hesitant evidence regarding the difficulties in the parties' relationship and the pursuer's behaviour. He perceived the relationship to be an abusive one. He referred to heated arguments with the pursuer which had "become physical". On occasions he had left home and stayed overnight in a hotel. At the same time he wanted to salvage his friendship with the pursuer. He also worried about her mental health. She was emotionally fragile and struggling to come to terms with his decision to end their relationship. The pursuer's employers had an employee benefit which provided six hours of free relationship counselling. The pursuer persuaded the defender to attend (finding in fact (16)). I have no doubt that the pursuer hoped that the parties would resolve their difficulties and reconcile. The defender attended counselling in order to give the pursuer insight into his decision to break off their relationship. Counselling was due to end on 24 August 2010. The last session was cancelled. Both parties gave evidence that counselling had not been fruitful and that the counsellor viewed their difficulties to be irreconcilable.

(i) The parties were quite clearly not a couple, were not having a sexual relationship and were not contemplating a shared family life at that point in time. On 17 August 2010 the pursuer emailed the defender (6/73):

> "Well I checked my phone and it seems that I have been ringing you more than I thought, every 2-4 days which I guess is not much for people in a relationship but too much for people outwith. I am pretty unhappy too but cheer up when I speak to you".

(j) Unbeknown to the pursuer, the defender had continued to view properties. He looked at properties in a different budget and with different criteria to those

applied by the parties when they house hunted together. In particular he looked at properties with substantial gardens as he is a keen gardener. On 2 September 2010 he invited the pursuer to attend a second viewing of the property. I have set out the history of the parties' relationship prior to this point as the context is crucial in order to understand the defender's evidence. While this may have been somewhat naïve on his part, his evidence was that the default setting for the parties' relationship over the preceding 12 years had been as close friends and flatmates. He had few close friends and the pursuer had been his only serious girlfriend. He genuinely believed that if the pursuer understood his reasons for ending the relationship, she could accept this and revert to being his close friend and flatmate. I believed his evidence. The pursuer desperately wanted to reconcile with the defender and interpreted his invitation to view the house as cause for hope that they might move in that direction. However, her evidence unravelled when she tried to present the picture of an ongoing romantic relationship between the parties throughout this period "with some ups and downs". The evidence quite simply did not bear this out. The fact that the pursuer wanted a shared family life with the defender in September 2010 did not make it so.

(k) I did not believe the pursuer's evidence that the defender repeatedly asked the pursuer during the viewing of the house if she could see herself living there or that he said he would not make an offer for the house if she hadn't liked it.

(l) The next chapter of evidence involved the parties respective interpretations of various emails sent between them between 3 and 30 September 2010. I have set out my conclusions in respect of this evidence at findings in fact (22)-(30). The email correspondence is ambiguous but it must be looked at carefully and in context.

Having considered all of the detailed evidence on this aspect of the case I have concluded that at the date of acquisition of the house the defender intended to acquire the house himself. He hoped that the pursuer would live there as a tenant and as a friend (as she had done previously in his Newington flat). It is the defender's intention that is key, as he was the one acquiring the property. The evidence was that the pursuer wanted to be in a romantic relationship with the defender and that she wanted to buy the house jointly in the hope of them having a future family life together. However, that was not the parties' joint intention. The defender gave clear and unequivocal instructions to his solicitor to acquire the house in his sole name before missives were concluded.

(m) The emails between the parties during the month of September 2010 bear this out. It is clear that both parties envisaged the pursuer living in the house after the offer was accepted. The pursuer undertook some online research. She was worried about the fact that she would have no security of tenure in her home. She had previous experience of being asked to leave properties on a relationship breakdown.. Her concern was an understandable one. There was a vague discussion about her investing capital in the property. She was concerned that she would be vulnerable should she live there and invest in a property owned solely by the defender. The defender suggested that the parties took legal advice. Having done so, he suggested that the parties entered into an agreement to provide the pursuer with a right to occupy the house (and if appropriate to record any capital investment she made). He was very clear that he would not contemplate taking the title in joint names. He ultimately refused to consider the defender investing any capital in the property. When his solicitor mentioned a cohabitation agreement or a prenuptial agreement,

his response was that neither were appropriate as the parties were neither cohabiting nor contemplating a marriage. The defender's instructions to his solicitors at this juncture were crystal clear.

(n) The pursuer clearly understood the position. She acknowledged this in her email of 28 September 2018 (6/113):

> "… I don't think it is fair that if I spend time feathering what is your nest that I would not have any entitlement to any recognition of that. It is simply not fair on me… It is all very well saying that I should be working to make it feel like my own but the stark reality is that it is not".

(o) That evidence is supported by what happened after the date of acquisition. Four days after the date of entry the pursuer sent the email referred to in finding in fact (31). Not only did the parties reply separately to a social invitation sent to both of them but the pursuer accepted the invitation and referred to the defender being "busy with **his** mansion". The defender undertook a substantial amount of renovation work to the house (finding in fact (33)). After the worst of the building work was done he moved into the house on 7 November 2010. At points over that winter he lived in the house without heating. The pursuer was renting accommodation only a mile away. The defender did not stay at her home despite the very challenging living conditions during the early stage of the renovations of the house. In email correspondence between the parties at the time the pursuer referred to not being "closer to the action". The evidence was clear *viz.* that the defender lived in the house, project managed the work and paid for it. While the pursuer was in regular contact with him and expressed an opinion on some of the décor *etc.* it was not her home. The pursuer chose to extend the lease over her own flat in Morningside. The parties were not in a sexual relationship during the latter part of

2010 or early 2011. They did not stay overnight with each other. The pursuer attempted to paint a picture of the parties being in a relationship and jointly renovating their home whilst she remained in her own rented flat due to the extent of the work being undertaken at the house and because she was at the time sharing a flat with her younger brother (and subsidising him to some extent). This evidence did not stand up to scrutiny. When the schedule of works to the house (6/97 of process) was put to her in cross examination, she accepted that by early 2011 the timing, nature and extent of the work being undertaken was not a barrier to her moving in. Her brother, in fact, had moved into the house with the parties when she finally moved in in February 2012. Her family visited her in 2011 and at no time did they visit the house.

(p) In the early part of 2011, the pursuer was leading her own life. She lived in her own home, pursued her own interests and was dating a man she had met through her running club. She participated in two races, one at Loch Leven and one in Aberdeen (where the defender is from). He wanted to come and support her as other friends were doing so. The pursuer refused to let him come. I accepted the defender's evidence that the pursuer was pursuing another relationship and that the parties were not in any form of a committed relationship at that point in time. This was borne out by the evidence of the defender's close friend L who married at the end of April 2011. Her evidence was that before issuing a wedding invitation to the defender she contacted him to ask if he wanted to bring anyone with him to the wedding as a partner.

(q) By early 2011 the parties were occasionally sleeping together. In the pursuer's own words, at this point in time she was "enjoying the best of both

worlds". By August 2011 they had formed a more settled relationship as a couple. In February 2012 the pursuer moved into the house. It was at this point that for the first time, she moved in her belongings, that there was some element of pooling of resources and a family life was being shared between the parties.

(r) It was also clear from the evidence that the pursuer understood the house was not matrimonial property. At points during the parties' marriage she raised this issue with the defender and asked him to reconsider the title position. The marriage was fragile and unhappy from an early stage. The defender was not prepared to take any steps that might result in the house being regarded as matrimonial property. Instead he "placated" the pursuer by transferring some of his investments into her name.

(s) When the whole picture is considered, it is quite clear that the parties were not a couple and that the defender was not contemplating any form of family life on 30 September 2010 when he acquired the house and furthermore that the pursuer understood that. The evidence of the history of the parties' relationship bears out the defender's position on this issue. Accordingly I have concluded that the heritable property does not constitute matrimonial property. As Professor Meston says in his article in 1993 SLT 62:

> "A separately owned house does not convert itself automatically into matrimonial property because spouses live in it, otherwise the special rules in section 10 would have no purpose".

**[8] Special circumstances which might result in a departure from an equal division of the matrimonial property**

a. Section 10 of the 1985 Act provides:

> "(1) In applying the principles set out in section 9(1)(a) of this Act, the net value of the matrimonial property or partnership property shall be taken to be shared fairly between the parties when it is shared equally or in such other portions as are justified by special circumstances…
>
> (6) In subsection (1) above "special circumstances" without prejudice to the generality of the words, may include "… (b) The source of funds or assets used to acquire any of the matrimonial property".

The existence of special circumstances may or may not justify a departure from equal sharing – that is a matter for the discretion of the court – *Jacque*s v *Jacque*s 1997 SC (HL) 20 per Lord Clyde paragraphs 20-25. I have considered paragraphs (24)-(26) of Ms Innes' written submissions and paragraph 9 of Mr Speir's submissions under this heading.

b. I have concluded that the house does not fall to be considered as matrimonial property. If I am wrong in reaching this conclusion, then the provisions of section 10(6) would fall to be considered. There is no dispute between the parties that the whole of the acquisition costs of the house came from the defender's non-matrimonial assets supplemented by a mortgage. The purchase price of the house was £884,500. The defender took out an interest only mortgage of £308,225. The balance of the purchase price, legal fees and stamp duty were paid by him from his savings and investments. The bulk of his savings and investments derived from an inheritance from his parents. The mortgage was reduced to £177,425 by the relevant date. This was achieved by the defender applying further capital sums from his pre-marital assets. The mortgage balance was reduced during the period of the ownership of the house (much of which fell outwith the period of the marriage – the house having been acquired on 30 September 2010 and the parties marrying on 14 July 2013). The pursuer made no capital contribution to the mortgage. The evidence was that in February 2012 when the parties

began cohabiting, they discussed their respective income and outgoings. The pursuer paid approximately £400 per month to the defender and he paid all of the household bills including the interest payment on the mortgage. The parties contributed roughly pro rata 4-1 this equating to their income differential at the time. £400 per month was also the sum which the pursuer had paid for her previous rental property. Her contributions became more *ad hoc* and then ceased after B was born when she was on maternity leave. The mortgage was interest only and did not reduce in any way as a result of the pursuer's contributions. She was supported by the defender to a substantial degree during the marriage. The defender also spent £90,903 on renovating the house adding £80,000 to its value (finding in fact 33). The pursuer made no contribution to this. The parties were married for only four years.

c. I consider the title position to be relevant. The defender very deliberately acquired the house in his sole name after discussion and advice from his solicitor. The pursuer was well aware of that. At points in the marriage she attempted to persuade the defender to accept a capital contribution from her and to place the house in their joint names (effectively converting it to matrimonial property). He refused. Instead he gifted her sums of money from his investments ("to placate her").

d. Accordingly, *esto* the house should properly fall to be regarded as matrimonial property, it would be fair and reasonable to take into account the source of funding of the purchase price, mortgage payments and renovations to the property, the circumstances of the parties' short marriage, the lack of any financial contribution to the house by the pursuer and the considered position regarding the title which was fully understood by both parties. In such circumstances I would have considered Mr Speir's submissions (at paragraph 9.3-9.7 and 7.5 of his written note) to be well founded. I have not set out the

precise calculations in this note as I have concluded that the house does not constitute matrimonial property.

**Pensions**

a. The parties agreed the valuation of certain pension interests held by each of them and also agreed the dates upon which each of the parties had joined the relevant schemes, made contributions and ceased making contributions. Paragraphs 4(d)(i)(iii)(iv) and (v) of the joint minute of admissions 19 of process are in the following terms:

> "i. The pursuer's pension interest with Scottish Widows of which the proportion of the cash equivalent transfer value applicable to the period of the marriage is £3,382.67. The said pension had a start date of 1 June 2008. Contributions were made towards the said pension until 28 October 2009, after which no contributions were made to the said pension.
>
> …
>
> iii. The pursuer's pension interest with the Universities superannuation scheme of which the proportion of the cash equivalent transfer value applicable to the period of the marriage is £10,964. The pursuer's pensionable service commenced on 5 January 2010 and ended on 17 June 2012.
>
> iv. The defenders pension with Friends Life of which the proportion of the cash equivalent transfer value application attributable the period of the marriage is £27,953.55. The defender's pensionable service commenced on 19 August 2003 and ended on 15 January 2010.
>
> v. The defender's pension with Legal & General of which the proportion of the cash equivalent transfer value applicable to the period of the marriage was £3,921.90. The defender's pensionable service began on 19 August 1996 and ceased on 31 October 1998".

b. Regulation 3 of the Divorce etc (Pensions) (Scotland) Regulations 2000 SSI 2000/1112 ("the 2000 regulations") provides for the method by which the value of benefits under pension arrangements must be calculated for the purposes of section 10 of the 1995 Act.

The figures set out in the foregoing paragraph were calculated in accordance with the provisions of regulation 3.

c. Regulation 4 concerns the apportionment of the value of the benefits for the purposes of section 10(5) of the 1985 Act and provides that the value of the proportion of any rights or interests which a party has or may have had in any benefits under a pension arrangement at the relevant date and which forms part of the matrimonial property, shall be calculated in accordance with the formula A x B and divided by C, where A is the value of the rights or interests in any benefits under the pension as at the relevant date, C is the period of membership in the pension arrangement before the relevant date and B is the period of C which falls within the period of the parties' marriage before the relevant date (and if there is no such period, the amount shall be zero). The relevant figures were calculated in accordance with the provisions of regulation 4.

d. *McDonald* v *McDonald* 2017 SC (UKSC) 142 is authority for the proposition that the period of a person's membership (in the context of regulation 4 of the 2000 regulations) refers to the period of membership of the pension scheme, whether or not contributions were being made and that to interpret the regulation otherwise would be to add words to it which were not there; but that this interpretation does not mean that the value of an interest in a pension arrangement must be shared equally as "there were safeguards in the 1985 Act which tempered its prescriptiveness" (*viz.* section 10 (6)).

e. In so far as the parties' pensions set out in the foregoing paragraphs are concerned, neither party made any contributions to them during the marriage. Mrs Innes referred me to paragraph 18 of *McDonald supra.*

> "if Parliament had intended that the proportion of the rights or interests be determined by the ratio of the part of the fund created by contributions to the arrangement during the marriage until the relevant date, it could have said so".

I accept that submission insofar as the correct approach to valuation of the parties' pension interests as an element of matrimonial property is concerned. However, this does not mean that an argument cannot be made in relation to unequal division of those pension assets to take account of special circumstances as set out above. Mr Speir deals with this issue at paragraph 7 of his written submissions.

f. No contributions were made by either party to these pensions during the marriage. The contributions to one of the schemes ceased 15 years prior to the date of the marriage. The increase in the value of these pensions was only by virtue of membership of the schemes during the marriage and was not as a result of either the income or efforts of the parties during the marriage. If the parties had held their retirement investments in savings or shares rather than pensions, then any element of the augmentation of the assets by virtue of the fund being held during the marriage would not fall to be taken into account. I refer to *Whittome* v *Whittome* 1994 SLT 144 at page 125 K-L in this regard. The ethos of the 1995 Act is to fairly share property acquired during the marriage and to take account of property which does not derive from the income or efforts of the parties during the marriage when calculating a fair sharing of the matrimonial property. I have concluded that it is appropriate to exercise my discretion to give full account of the fact that in the context of a short marriage, these pension values did not derive from the income or efforts of the parties. There are special circumstances in terms of section 10(6)(b) of the 1985 Act. It is not appropriate that there is a windfall to either party as a result of these apportioned values being shared equally.

g. In substance, both parties have the same arguments. It is appropriate that the effects should be given *mutatis mutandis*, with effect that all of the specified pensions are left out

of account. Following that through to the calculation as set out in finding in fact (40), the net value of the matrimonial property results in the following revised calculation:

| | |
|---|---|
| Revised total net value of matrimonial property equals | £178,736 |
| Whereof one half thereof | £89,368 |
| Pursuer already holds assets worth | £127,299 |
| Balancing payment due by the pursuer to the defender to result in an equal sharing of the adjusted matrimonial property | £37,931 |

The defender has no crave for payment of a capital sum. It was submitted that I should take account of the fact that there has effectively already been a departure from equal sharing of the matrimonial property in favour of the pursuer when considering the remaining submissions in this case in relation to financial provision. That departure amounts to £37,931 in favour of the pursuer (by virtue of the fact that the defender has not insisted on payment of that sum to achieve a 50/50 split of the net matrimonial property. I accept this submission.

**[9] Section 9(1)(b) of the 1985 Act**

> "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 person in the interests of the other person or of the family".

a. When considering section 9(1)(b) reference must also be made to section 11(2) of the 1985 Act. I have carefully considered counsel's written submissions under this heading. I do not intend to repeat them in full. Ms Innes's submissions are made at paragraphs 37-40 of her note. Mr Speir's submissions are at paragraphs 8.1-8.2 of his note.

b. Ms Innes submitted that the pursuer would have invested in the house market had she not been married to the defender and living in the house. Mr Speir submitted that the evidence did not support this proposition. The pursuer owned a property in Glasgow

between 2001 and 2002. However, she was working full time between 2002 and 2013 and she had not chosen to buy a property during that time. She is risk adverse. The evidence was that she had been so concerned about the parties having a joint liability under the lease for the Liberton flat in 2010 that she had insisted the defender paid a sum equivalent to the deposit and full rent for six months to her. The pursuer had wanted to buy a property with the defender only if mortgage free. The evidence was that she worried about the house market being a bubble that may burst and that she watched TV documentaries about that. I have difficulty in accepting the submission that the pursuer would have bought a heritable property in her own name had she not been married to the defender.

c. The pursuer did not make any capital contribution to the house. She paid approximately £400 per month towards household bills (including the interest only mortgage). This sum equated to the rent she had paid on her own flat pre-marriage. She was able to accumulate savings from her income. She also increased her savings and investments as a result of capital gifted to her by the defender (findings in fact 42 & 43). Overall, I cannot conclude that the pursuer suffered any economic disadvantage to her capital position as a result of the parties' marriage.

d. The pursuer is employed by the NHS in Edinburgh. She works 20 hours per week earning a salary of £15,484 gross per annum (£29,034 pro rata). Prior to B's birth she worked as a senior trials co-ordinator for the NHS. The evidence was that at the highest point her gross salary was approximately £36,000. The defender's evidence was that the pursuer was capable of finding more remunerative employment and that she could work more than 20 hours a week. He currently shares B's care. He intends to continue to do so. He has also undertaken to pay nursery fees. B will be entitled to free nursery

care for 30 hours per week from March 2019. The defender intends to return to work full time in September 2018. The evidence was that his role is less suited to a part-time contract. B is two years old. The pursuer has chosen not to work to enable her to care for B for some of the week when the defender is working. She does not want B to go into full time nursery from 9.00am until 5.00pm every day at this tender age. It is in B's best interests and in the interests of the family as a whole that the pursuer is able to work part-time and to care for B for part of the week. This advantages the defender by enabling him to work full time. There was limited evidence that the pursuer had a reduced earning capacity as a result of working part time. Her *cv* was produced and spoken to by the parties in evidence. She is less committed to work at this juncture and she has fewer roles open to her given her restricted availability to work. Her earning capacity as a result of working part-time and the contributions to her occupational pension are diminished. The full-time equivalent of her salary is less than she has earned previously in other roles. Motherhood has impacted on her career progression.

e. The parties struggled to conceive a child. They went through several rounds of IVF treatment. The pursuer suffered severe postnatal depression and has a history of fragile mental health (as set out in finding in fact 43). It is not reasonable nor in the best interests of the parties' child for her to return to work full time at this juncture. Realistically, the pursuer is likely to return to work only when B starts school. This may not be until 2021 and, even then, would be dependent on there being appropriate after-school care for B at that juncture. While there is an overlap between this principle and that set out in section 9(1)(c) of the 1985 Act under this heading, it is relevant for the court to take these submissions into account in the context of concluding that the pursuer has suffered an economic disadvantage in the interests of the family in the form

of reduced earning capacity, a period during which her career may stagnate to a degree and a diminution in the value in her occupational pension as a result of her part-time working.

**[10] Section 9(1)(c) of the 1985 Act.**

a. "(c) any economic burden of caring, after divorce, (i) for a child of the marriage under the age of 16 years should be shared fairly between the persons."

When considering section 9(1)(c) reference must also be made to section 11(3) of the 1985 Act:

> "For the purposes of section 9(1)(c) of this Act, the court shall have regard to –
> (a) any degree or arrangement for aliment for the child;
> (b) any arrangement for 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 childcare facilities or services;
> (g) the needs and resources of the persons;
> (h) all the other circumstances of the case."

b. Ms Innes's submissions under this heading are set out at paragraphs 41 and 42 of her written submissions document. Mr Speir's submissions are at paragraph 8.1 to 8.7 of his written submissions.

c. The defender has not worked since August 2017 having lost his contract as a software consultant at that point in time. The evidence was that he intended to return to work in September 2018 and that he is unlikely to encounter a difficulty in finding a suitable alternative contract with a similar level of remuneration (*viz.* £80,000 gross per annum.) On that basis it is likely he will be assessed as requiring to pay child support of approximately £93 per week. He has not paid aliment for the pursuer or B since the parties' separation as he has had no income during that time. Allowing for a period for

him to return to employment and to make arrangements for maintenance to be put in place, the pursuer will effectively have received no interim aliment or support for B for approximately 18 months following the parties' separation. She has a shortfall between her expenditure and her income during that time of approximately £1,000 per month. I have set out at paragraph 9(d) of this note the position in respect of the pursuer's employment and her loss of earning capacity caused by the need to care for B. B will be entitled to 30 hours of free nursery care from March 2019. The defender has also undertaken to pay nursery fees prior to March 2019 (and for additional hours required over and above the 30 thereafter). B is only two years old. There is a period of approximately 13 ½ years for the court to take into account when considering this principle. The economic burden of B's care is shared between the parties by dint of the fact that there is a shared care arrangement in place, that the defender will pay maintenance for B and that he has offered to pay B's nursery costs. Insofar as this principle is concerned there are two pertinent issues. The first overlaps substantially with the preceding principle, section 9(1)(b), and concerns the loss of earning capacity on the part of the pursuer as a result of the fact she requires to work on a part-time basis for at least the next three years and potentially thereafter depending on the afterschool care being available.

However, the second and more pertinent issue in relation to this principle concerns the need to provide suitable accommodation for B. The pursuer requires a suitable two-bedroomed accommodation in reasonable proximity to the defender's home (given that the parties share B's care and will continue to do so), in the catchment area for a good primary school and within a reasonable distance of her place of employment. The monthly rent for such a property is in the region of £1,200 per month. The pursuer's

income and outgoings are calculated fairly modestly and are as set out at 5/82/1 of process. There is a shortfall in the region of £1,000 per month. Some of the items of expenditure on her schedule relate to costs for B which will be covered by maintenance payments. Nevertheless, the pursuer's total income is in the region of £1,500 per month. Her rent is £1,200 per month. It is self-evident that this is not affordable on her current income and that she has demonstrated the need for financial provision to take into account the costs of providing suitable accommodation for B. As a single person in 2011, the pursuer had an outgoing for a rent of approximately £400 per month. She now needs to find an additional £800 per month to provide suitable accommodation for B and in the intervening period her salary has substantially reduced as a result of the requirement to care for him. She also requires to live in particular areas of the city for the aforementioned reasons.

d. Ms Innes submitted that the pursuer needs to provide accommodation for B and that it is not reasonable for her to be expected to continue to rent a property. It was submitted that this does not make financial sense and it is entirely reasonable for the pursuer to purchase a property. Various property schedules were lodged in process and spoken to by the parties in evidence. In broad terms, the price of a suitable property is approximately £280,000. The pursuer has capital of approximately £50,000 which she could use for the deposit for a property. She has the earning capacity to take on a mortgage borrowing of approximately a further £50,000. She is seeking a capital sum of £180,000 from the defender under this principle to enable her to purchase a property. While there was some dispute as to the budget for a suitable property and Mr Speir submitted that some caution required to be applied to the pursuer's evidence about her finances as her figures were given on a fairly broad brush basis and may not stand up to

closer scrutiny, the evidence about the budget required to purchase a property and the pursuer's resources was not particularly contentious. The real issue was Mr Speir's submission made with reference to *MacLachlan* v *MacLachlan* 1998 SLT 693, that the court should be slow to make a capital provision for what is essentially a revenue expense and the requirement for the pursuer to provide a home for B does not make it axiomatic that there requires to be the purchase of a property. Mr Speir submitted that the 1985 Act cannot properly be read as requiring such an outcome and that for many people home ownership is simply not an option. Indeed the evidence is that thus far the pursuer has chosen not to invest in heritable property (even at points in her life where she has been in a position to do so). Finally it was submitted that the level of capital sum (£180,000) sought by the pursuer under this principle is not reasonable in the overall circumstances of the case.

e. Ms Innes referred to the cases of *B* v *B* 2011 Fam LR 91, *JA* & *WA* 2017 Fam LR 94 and *R* v *R* 2000 Fam LR 43 as instances where the principle of acquisition of a property under this principle was considered by the court. I was also referred to *Little* v *Little* 1990 SLT 785; "despite all the detail, the matter is essentially one of discretion aimed at achieving a fair and practicable result in accordance with commonsense. The court is awarded a large margin of discretion as the facts and circumstances of each case differ." The financial provision awards made in the aforementioned cases take into account a number of arguments under the 1985 Act in respect of special circumstances, an amalgam of principles under section 9, the length of the parties' marriage, the arrangements for the care of their children following their separation together with issues concerning the parties' resources. Each case turns on its own facts and circumstances. In this case the parties were married for only four years, share the care of

their son and the economic burden of his future care will be shared between them by way of the payment of maintenance and nursery fees. While I have concluded that an element of financial provision is justified by reference to the pursuer's need to provide suitable accommodation for B, in the facts and circumstances of this case it is not reasonable to conclude that this justifies making an order for a capital sum of £180,000 to enable her to purchase a property. In my view it is more appropriate to consider an appropriate sum which takes into account the actual cost of two-bedroomed rental accommodation in a suitable area and the extent to which that would differ from any accommodation which the pursuer would require to have funded had she been a single person. It is not possible to carry out a precise calculation of this outlay. The pursuer last rented accommodation as a single person in Morningside in 2011. Her rent was in the region of £400 per month, however rental figures will have changed in the intervening seven years and her brother was contributing to the rent for the latter period of her occupation of this property. Furthermore an element of the child support which will be paid by the defender may be viewed as a contribution under this heading.

**[11] Level of capital sum**

When quantifying the level of an appropriate capital sum in this case, I must start by acknowledging that as set out in paragraph 8(g) of this note, that there has already effectively been a departure from equal sharing of the net matrimonial property by virtue of the fact that the defender is not craving payment of a capital sum from the pursuer of the £37,931 which would have been be necessary to achieve an equal division of the parties' assets. The issue then becomes the quantification of a fair and practicable additional capital sum under sections 9(1)(b) and (c) of the 1985 Act. B may not start primary school for three

years and during that three year period the pursuer's earning capacity is roughly half what it would have been if she had been able to work full time. She will also have a diminution in the value of her occupational pension. In the circumstances of this case, I think that it is reasonable to assume that she may return to full time work when B starts school. She will receive tax credits and maintenance over the next three years which will mitigate this to an extent. The pursuer has incurred expenditure/reduced her savings in the 18 month period following the parties' separation during which no maintenance was paid. She has higher housing costs which will subsist throughout B's childhood (and are relevant in this context until he reaches the age of 16 years). The pursuer has always lived fairly frugally and she shared rental accommodation before marrying. The type of home she now requires is considerably more expensive. The defender purchased his home as a single man and has no need to incur additional expenditure in order to provide a home for B. Given all of the elements and variables involved, it is not possible to undertake a precise calculation and an element of broad brush is inevitably required. Rounding up the figure which the pursuer has already effectively received by virtue of the defender not insisting on an equal sharing of the matrimonial property to £38,000, I have concluded that the pursuer should be awarded an additional capital sum of £82,000 under these principles.

**[12] Section 9(1)(d)**

> "A person who has been dependent to a substantial degree on the financial support of the other person should be awarded such financial provision as is reasonable to enable her to adjust, over a period of not more than three years, from the date of decree of divorce, to that loss of support on divorce".

a. Miss Innes covered this at paragraphs 43-45 of her written submissions. Mr Speir refers to this at paragraph 8.8 of his written submissions. The pursuer is in employment but

her earning capacity at this juncture is approximately a fifth of the defender's. The defender supported the pursuer to a substantial degree during the parties' cohabitation and marriage. While she is not dependent on interim aliment at this juncture, this is purely because the defender has not been in employment since the relevant date and therefore he has not paid it. As a result the pursuer required to eat into her capital at the rate of least £1,000 per month demonstrating her need for support. Her deficit is approximately £1,000 per month. Child maintenance will be payable in probability, at the rate of approximately £400 per month once the defender returns to full time employment in September 2018. Accordingly, I have concluded that it is reasonable that the pursuer be awarded periodical allowance at the rate of £600 per month for a period of three years from 1 October 2018. As this element of financial provision is designed to meet a revenue expense I do not consider it appropriate that this is capitalized as part of the overall package of financial division on divorce.

[13] Given the level of financial provision which I propose to award, no issues arise in relation to the reasonableness of financial provision with regard to the parties' respective resources.