



**SHERIFF APPEAL COURT**

**[2024] SAC (Civ) 37**

Sheriff Principal D C W Pyle  
Sheriff Principal C Dowdalls KC  
Appeal Sheriff P A Hughes

**OPINION OF THE COURT**

delivered by SHERIFF PRINCIPAL C DOWDALLS KC

in the appeal in the cause

PC (AP)

Pursuer and Respondent

against

MS

Defender and Appellant

**Defender and Appellant: M Davidson, Advocate; Franceschi Family Law  
Pursuer and Respondent: Cameron; Cameron Macaulay Solicitors**

7 August 2024

**Introduction**

[1] The parties cohabited from June 2011 until 31 October 2021. During their cohabitation, the parties had one child, to whom we will refer as Emma. Following the breakdown of the parties' relationship, the parties and Emma continued to live in the family home, which they owned jointly, until 31 March 2022. Thereafter, the respondent and Emma moved to a property that had been purchased by the appellant in his sole name ("the appellant's property"). The respondent has lived there with Emma since 31 March 2022.

[2] Following cessation of the parties' cohabitation, the respondent raised this action seeking an order for payment of: a capital sum in terms of section 28(2)(a); and an amount in terms of section 28(2)(b) of the Family Law (Scotland) Act 2006 ("the 2006 Act"). The action proceeded to a diet of proof. Following proof, the sheriff made an award: (i) £36,000 in terms of section 28(2)(a); and (ii) £45,000 in terms of section 28(2)(b). The appellant appeals against both awards.

### **Section 28 of the 2006 Act**

[3] Section 28 of the 2006 Act provides as follows:

**"28 Financial provision where cohabitation ends otherwise than by death**

- (1) Subsection (2) applies where cohabitants cease to cohabit otherwise than by reason of the death of one (or both) of them.
- (2) On the application of a cohabitant (the 'applicant'), the appropriate court may, after having regard to the matters mentioned in subsection (3)—
  - (a) make an order requiring the other cohabitant (the 'defender') to pay a capital sum of an amount specified in the order to the applicant;
  - (b) make an order requiring the defender to pay such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents;
  - (c) make such interim order as it thinks fit.
- (3) Those matters are—
  - (a) whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant; and
  - (b) whether (and, if so, to what extent) the applicant has suffered economic disadvantage in the interests of—
    - (i) the defender; or
    - (ii) any relevant child.

- (4) In considering whether to make an order under subsection (2)(a), the appropriate court shall have regard to the matters mentioned in subsections (5) and (6).
- (5) The first matter is the extent to which any economic advantage derived by the defender from contributions made by the applicant is offset by any economic disadvantage suffered by the defender in the interests of—
- (a) the applicant; or
  - (b) any relevant child.
- (6) The second matter is the extent to which any economic disadvantage suffered by the applicant in the interests of—
- (a) the defender; or
  - (b) any relevant child,
- is offset by any economic advantage the applicant has derived from contributions made by the defender.
- (7) In making an order under paragraph (a) or (b) of subsection (2), the appropriate court may specify that the amount shall be payable—
- (a) on such date as may be specified;
  - (b) in instalments.
- (8) Any application under this section shall be made not later than one year after the day on which the cohabitants cease to cohabit.
- (9) In this section—

*'appropriate court'* means—

- (a) where the cohabitants are a man and a woman, the court which would have jurisdiction to hear an action of divorce in relation to them if they were married to each other;
- (b) where the cohabitants are of the same sex, the court which would have jurisdiction to hear an action for the dissolution of the civil partnership if they were civil partners of each other;

*'child'* means a person under 16 years of age;

*'contributions'* includes indirect and non-financial contributions (and, in particular, any such contribution made by looking after any relevant child or any house in which they cohabited); and

*'economic advantage'* includes gains in—

- (a) capital;
- (b) income; and
- (c) earning capacity;

and *'economic disadvantage'* shall be construed accordingly.

- (10) For the purposes of this section, a child is 'relevant' if the child is—
- (a) a child of whom the cohabitants are the parents;
  - (b) a child who is or was accepted by the cohabitants as a child of the family."

### **The sheriff's judgment**

[4] The sheriff held that in applying the test in section 28(3) of the 2006 Act the approach the court should take is as set out by Baroness Hale in *Gow v Grant* 2013 SC (UKSC) 1 at paragraph [54], namely, to consider the position both parties were in at the beginning and at the end of their cohabitation, before then considering whether the defender had derived a net economic advantage from the contributions of the applicant or the applicant had suffered net economic disadvantage in the interests of the defender or any relevant child.

[5] The sheriff analysed the position of parties at the outset and at the end of the cohabitation period. At the start of the cohabitation both parties had careers and together owned a flat, albeit the title was split in proportions of 65% and 35% in the appellant's favour. The appellant also had savings and owned two properties which he let. During the cohabitation, the parties moved out of their flat into the family home; however, the ownership percentages that prevailed in respect of the flat were not carried over to the

family home. Instead, while the family home was owned in equal proportions, the distribution of the proceeds of any eventual sale was set out in a Minute of Agreement which provided that, on sale, the appellant would receive an initial sum of £179,500 and the respondent £56,000; any remaining balance would be divided equally between them.

[6] At the end of the cohabitation the parties initially continued to live in the family home. In March 2022, the respondent moved with Emma to live in the appellant's property. She has lived there since, rent-free, but has no security of tenure. She had an unrealised share in the family home. She had almost full-time care of Emma and had no career. The position of the appellant was that he also had an unrealised share of the family home, in which he lived. He retained his two rental properties and had sole title to the flat the respondent and Emma lived in. He had been able to develop his career as he had wished and continued to operate his business from the family home.

[7] In determining whether: (i) the appellant had derived an economic advantage; and/or (ii) the respondent had incurred an economic disadvantage, the sheriff considered he had to have regard to the Minute of Agreement (ie the parties' respective shares in the family home).

[8] The sheriff thereafter proceeded to determine the financial contributions made by each party during the period of cohabitation. He concluded that the total monetary contribution for: (i) the appellant was £304,761; and (ii) the respondent was £122,300. If the family home were to be sold, then, standing the terms of the Minute of Agreement, the respondent would receive a higher sum than her total monetary contribution made during the period of cohabitation. By contrast, the appellant would receive a lower sum than his total contribution made during the period of cohabitation.

[9] The sheriff then considered the non-monetary contributions of each party. He took into account a number of different factors including: (i) the respondent's loss of earnings and career development due to her care and nurture of Emma; (ii) the respondent's almost full time care of Emma; and (iii) the respondent's lack of a secure tenancy at the end of the cohabitation.

[10] Having considered all of those factors and the financial contributions of each party, the sheriff determined that the appellant had enjoyed a net economic advantage and that the respondent had suffered a net economic disadvantage at the end of the cohabitation.

[11] The sheriff also considered to what extent the appellant's economic advantage should be offset. He referred back to the relevant factors he had considered in relation to the non-monetary contributions of each party. In particular, the appellant's economic advantage was offset by his provision of the alternative property to the respondent rent free; however, he found after the offsetting exercise that this did not fairly account for the economic disadvantage suffered by the respondent.

[12] The sheriff awarded the respondent £36,000 under section 28(2)(a) of the 2006 Act. Had she returned to work after her maternity leave for Emma the respondent would have had the potential to earn up to around four years' salary prior to termination of the cohabitation, including a potential period of sick pay. The sheriff considered the figure of £36,000 was a fair reflection of the non-economic contribution given by the respondent to the household and was offset against the various economic advantages she had received as a result of the various contributions made by the appellant during the period of cohabitation.

[13] The sheriff also awarded the respondent £45,000 under section 28(2)(b) of the 2006 Act. At proof, evidence was led from the respondent that she spent on average between £500 and £700 per month on Emma's care. That equated to between £6,000

and £8,400 per annum. The sheriff decided to use the figure of £8,400 per annum. The sheriff noted the respondent received around £1,000 per annum from the appellant for child maintenance. Deducting that from £8,400 left a shortfall of £7,400 per annum. Calculating that up to Emma's 16<sup>th</sup> birthday meant that the respondent would face a shortfall in the cost of caring for Emma of £66,600 (ie over a period of 9 years). The sheriff acknowledged, however, that the respondent would not have to care for Emma all of the time. To take account of that, the sheriff considered that instead of £66,600 a figure of £45,000 was a fair and appropriate amount to award the respondent.

### **Submissions for the appellant**

#### *Award made under section 28(2)(a)*

[14] Three grounds of appeal were advanced with respect to the sheriff's award under section 28(2)(a). First, that the sheriff failed properly to apply the test in section 28. The sheriff proceeded by conducting a comparison of the position of the parties at the beginning and at the end of their cohabitation, under reference to Baroness Hale's speech at paragraph [54] of *Gow*. The appellant submitted that this amounted to an error in law. The approach discussed by Baroness Hale at paragraph [54] was not a replacement of the statutory test at section 28, but rather a cross-check or alternative means of confirming whether there is a net economic advantage/disadvantage after the steps set out in section 28 have been carried out. It was accepted that a sheriff is entitled to conduct an assessment of the parties' respective positions at the beginning and end of cohabitation as this may provide confirmation as to whether there is an economic imbalance "requiring correction": *Duthie v Findlay* 2020 Fam LR 141 at paragraph [5]. However, use of that assessment could not excuse a failure to apply the test within section 28.

[15] The sheriff ought to have identified:

- a) whether the respondent had suffered an economic disadvantage in the interests of the appellant or Emma and, if so, to consider whether this was offset by any economic advantage the respondent has derived from contributions made by the appellant; and/or
- b) whether the appellant had derived economic advantage from contributions made by the respondent and, if so, whether this was offset by any economic disadvantage suffered by the appellant in the interests of the respondent or Emma.

[16] Instead, the sheriff conflated the issue of identifying whether there was an economic advantage/disadvantage with the second step of offsetting.

[17] Secondly, the sheriff erred in his treatment of the main asset purchased by the parties during their cohabitation – the family home. When the family home is sold, it will be sold subject to the terms of the Minute of Agreement. Upon any sale, both parties will receive a return of capital; however, the respondent will receive a significant return as compared to the capital that she initially invested. By contrast, the appellant, who contributed more in financial terms to its purchase, will receive significantly less of a return. The appellant contends that, had the sheriff correctly applied the test in section 28, he ought to have taken into account that the respondent will derive an economic advantage from the future sale of the family home. That should have been taken account of in offsetting. Had that been done, the offset would have been such that the respondent would have had no net economic advantage/disadvantage which “required to be corrected” by the sheriff. As such, no award under section 28(2)(a) was due.



[18] Thirdly, even if the sheriff was correct, he had miscalculated both parties' financial contributions. In particular:

- a) The sheriff calculated the initial expenditure towards living costs at the parties' original flat as being for a period of 48 months rather than 42 months of payments. This would reduce the respondent's contributions by £10,200 and the appellant's by £3,600;
- b) The sheriff proceeded with his calculation on the basis that, as the respondent's contributions decreased, the appellant's increased to cover the shortfall and make the payments up to £2,300 per month; however, the sheriff failed to attribute said higher contributions to the appellant during the period when the respondent was receiving half-pay when off sick. A calculation based on increased payments by the appellant to cover this shortfall would provide a £5,100 increase in the appellant's contributions.
- c) The sheriff made finding in fact (lxi) that the respondent received statutory maternity pay for a period of 6 months; however, the sheriff assessed this amount as being equal to her full salary pay for a period of 12 months. The respondent would have received £8,535 by way of statutory maternity pay. This is £12,015 lower than what was attributed to the respondent in the sheriff's calculation.
- d) £10,000 given by the appellant's father to the parties was regarded as a joint gift to parties, but in order for the figures to be properly assessed in terms of what parties have contributed/invested the parties should be regarded as having each contributed an additional £5,000; and

- e) The cost of the renovation works undertaken at the parties' original flat and paid for by the appellant should increase his contributions by £20,000.

*Award made under section 28(2)(b)*

[19] The sheriff erred in making an award of a capital sum in respect of the future child care costs for Emma. Future child care costs are not an economic disadvantage which the respondent has suffered. While section 28(2)(b) provides that the court may make an order requiring the appellant to pay in respect of any economic burden of caring, after the end of the cohabitation, for a relevant child, such an order can only be made after having regard to the economic advantage which has been derived or economic disadvantage suffered. Thus, an order relating to future child care costs can be made only if economic advantage/disadvantage has been established as set out in section 28(3): *G v F* 2011 SLT (Sh Ct) 161 at paragraph [36].

[20] The sheriff erred by failing properly to apply the statutory test and appeared to have failed to identify what the relevant economic advantage/disadvantage was that had to be corrected by way of making an order under section 28(2)(b).

[21] Future child care costs are relevant in considering whether to make an order in terms of section 28(2)(b), and, if so, the amount of such an order and how it is to be paid. Future child care costs are not in themselves a freestanding ground on which an order for financial provision in terms of section 28 can be made: *G v F (supra)* at paragraph [37]. Section 28 is not designed to tackle the full extent of child care costs for a child after cohabitation until the child is aged 16. Other provisions exist in relation to enforcing responsibilities for the maintenance of the child: *EM v AI*, unreported, 20 February 2012 at paragraph [29].

[22] The costs incurred by the respondent were in relation to regular expenses including vehicle maintenance and running costs, food and clothing for the respondent and Emma, and weekend activities for Emma. The very nature of those costs (or at least those associated with Emma) is what child maintenance is designed to contribute towards. Accordingly, no award should have been made under section 28(2)(b).

### **Submissions for the respondent**

#### *Award made under section 28(2)(a)*

[23] Baroness Hale's *obiter* comments at paragraph [54] of *Gow* were not solely about contrasting the start and end points of a period of cohabitation; she said that a court should consider whether there had been an economic advantage or an economic disadvantage. The use of such language was a direct reference to the test at section 28. The criticism of the sheriff was without merit. The application of the test in section 28 and Baroness Hale's *obiter* comments amounted to the same thing.

[24] The sheriff was correct to take into account the Minute of Agreement's financial impact in assessing whether either party had gained an economic advantage or suffered an economic disadvantage. The sheriff did not interfere with the Agreement in any way. He merely recorded the monetary contributions that each party made to the purchase of their first property, which was the starting point, and compared it against where they stood at the end of the cohabitation.

[25] With respect to the errors in the sheriff's calculations, it was accepted by the respondent that the sheriff had erred in calculating: (i) the respondent's contributions to household expenditures between June 2011 and December 2014; (ii) the amount of the respondent's statutory maternity pay received in 2017; and (iii) the respondent's contractual

sick pay received in 2015. Notwithstanding those errors, however, their magnitude was insufficient to affect the overall fairness of the sheriff's judgment and the award under section 28(2)(a) should not be disturbed.

*Award made under section 28(2)(b)*

[26] The sheriff applied the test correctly. He considered the economic advantage and disadvantage of each party. He found the respondent sacrificed her employment and pension prospects to raise Emma. The appellant benefitted from that significantly. He was relieved of the burden of child care. He was able to: (i) acquire a significant shareholding; (ii) make investments; and (iii) invest in property.

[27] The criticism of the sheriff's approach is that he had no evidence as to what the future child care costs for Emma would be. Such costs are, necessarily, hypothetical. It was reasonable for the sheriff to project what the future child care costs would be, based on the costs incurred by the respondent in the past for Emma. The sheriff was evidently concerned as regards the lack of security of tenure for the respondent and Emma in the appellant's property and that was factored in his decision making. The award made was reasonable.

**Joint minute**

[28] After this appeal was heard, parties produced a joint minute purporting to agree certain matters. Essentially, what was agreed was:

- (1) The amount of maternity pay received by the respondent in 2017 was about £8,385; therefore the respondent's contributions to household expenses should be reduced by £12,015, where they are set out in paragraph [35] of the sheriff's judgment.

- (2) The number of months between the start of the cohabitation and the end of 2014 was not 48, but was either 42 or 43 months. The sheriff's calculation at paragraph [32] of the judgment therefore falls to be corrected by reducing the respondent's contributions during that period by either £10,200 or £8,500 and the appellant's contributions by either £3,600 or £3,000.

By our calculation, the adjustments suggested in paragraphs 1 and 2 of the joint minute (using 42.5 months in the paragraph 2 calculation) result in a figure of £100,935 by way of financial contributions by the respondent and £301,461 by the appellant (including the deposit paid for the family home).

### **Decision**

[29] Section 28 of the 2006 Act provides a remedy for former cohabitants whose cohabitation has ended otherwise than on death. Orders that may be made are, in terms of subsection (2)(a), for payment of a capital sum and/or, in terms of subsection (2)(b), for such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are parents.

Subsection (2)(c) provides for the making of interim orders. Subsection (7) permits the court to specify that the amount of an order made under subsection (2)(a) or (b) shall be paid on a specified date or in instalments.

[30] In terms of section 28(2), the matters to which the court may have regard in deciding what order, if any, to make are those set out in subsection (3). Those matters are whether (and if so to what extent) the defender has derived economic advantage from contributions made by the applicant; and whether the applicant has suffered economic disadvantage in

the interests of the defender or any relevant child, being a child under 16 of whom the cohabitants are parents (subsections (9) and (10)).

[31] We do not disagree with the approach adopted by the sheriff in this case, referred to at paragraph [27] of his judgment, provided care is taken not to conflate the *obiter* statement of Baroness Hale at paragraph [54] of *Gow* with the requirements of the statutory test set out at section 28(3).

***Section 28(2)(a)***

[32] In section 28(2)(a) claims only, subsection (4) also requires the court to consider what we shall call the “offsetting provisions” in subsections (5) and (6). They require that the court, in terms of subsection (5), shall have regard to the extent to which any economic advantage derived by the defender from contributions made by the applicant is offset by any economic disadvantage suffered by the defender in the interests of the applicant or any relevant child. Subsection (6) requires the court to have regard to the extent to which any economic disadvantage suffered by the applicant in the interests of the defender or any relevant child is offset by any economic advantage derived by the applicant from contributions made by the defender. Thus, the exercise that the court requires to undertake in section 28(2)(a) cases involves assessing either or both of the net economic advantage derived by the defender and the net economic disadvantage suffered by the applicant. The court is given no further guidance as to what is to be done once it is established that a net economic advantage has been derived by the defender or a net economic disadvantage has been suffered by the applicant.

*Gow v Grant*

[33] The leading authority on section 28 is *Gow v Grant* 2013 SC (UKSC) 1. The pursuer's claim was based on economic disadvantage said to have been suffered by her as a result of the relationship; so it relied solely on section 28(2)(a). The court held that "the principle that lies at the heart of the award" made under section 28 is "fairness to both parties"

(Lord Hope of Craighead at para [31]). He added (at para [33]):

"what sec 28 seeks to achieve is fairness in the assessment of compensation for contributions made or economic disadvantages suffered in the interests of the relationship."

[34] The court also observed that it is impracticable for people in intimate relationships to work out who has paid for what, and who enjoyed what benefits in kind during the relationship. Instead, when applying the fairness principle, regard should be had to where parties were at the beginning and at the end of their relationship:

"It is much more practicable to consider where they were at the beginning of their cohabitation and where they are at the end, and then to ask whether either the defender has derived a net economic advantage from the contributions of the applicant or the applicant has suffered a net economic disadvantage in the interests of the defender or any relevant child. There is nothing in the Scottish legislation to preclude such an approach, as the court is bound to be assessing the respective economic advantage and disadvantage at the end of their relationship." (Lady Hale, para [54], with whom Lord Hope agreed, para [40]).

[35] This observation by Lady Hale follows discussion by her, at paragraphs [45] to [53], of the case for reform of the law in England and Wales, the Law Commission of England and Wales' 2007 report on *Cohabitation: The financial consequences of relationship breakdown* (no 307) and the lessons that might be learned from the Scottish approach. Seen in that context, it is no more than a commentary on the difficulties of applying the principle of compensation, and commends the more practical approach in section 28 rather than that proposed by the Law Commission of England and Wales.

**Section 28(2)(b)**

[36] *Gov* was concerned only with section 28(2)(a). What then of section 28(2)(b) cases, where the court is to determine what order, if any, to make in respect of the economic burden of caring for a relevant child after the end of the cohabitation? That burden may extend for many years after the end of the cohabitation, until the child reaches the age of 16. Subsection (3), however, is clearly framed in the past tense and restricts the matters to which the court may have regard to whether, and if so to what extent, the defender has derived economic advantage from the contributions of the applicant; and whether, and if so to what extent, the applicant has suffered economic disadvantage in the interests of the defender or any relevant child. Therefore, unless the applicant has proved economic advantage or disadvantage in terms of subsection (3) no award may be made.

[37] In section 28(2)(b) cases, the offsetting provisions do not apply. Therefore, the exercise required of the court is to establish whether the test in subsection (3) is met and, if so, whether an order should be made in respect of the economic burden of caring, after the end of the cohabitation, for a child of whom the parties are parents. If the test is met, the question then is what does the economic burden of child care amount to and what order is the court to make.

[38] There is something of a dearth of authorities on claims under section 28(2)(b). In this appeal, we were referred to *M v I* [2012] 2 WLUK 585 and *G v F* 2011 SLT (Sh Ct) 161. In the former case, the sheriff, in making an order under section 28(2)(b), observed that section 28

“is not designed to tackle the full extent of ... care costs for [the child] after the cohabitation. Other provisions relate to the defender’s responsibilities towards the maintenance of [the child] ...”



and that the order would provide “a modest contribution by the defender towards [the burden of child care]”. In *G v F*, the sheriff refused to make any order in terms of section 28(2)(a) or (b). The sheriff held that,

“[36] ...[an order under sec 28(2)(b)] can only be made after having regard to the economic advantage which has been derived or economic disadvantage suffered. Thus an order relating to future child care costs can be made only if there has been economic advantage/disadvantage as set out in s.28(3).

[37] The future childcare costs are relevant in considering whether to make an order in terms of s.28(2)(b), and, if so, the amount of such an order and how it is to be paid. Future childcare costs are not in themselves a freestanding ground on which an order for financial provision in terms of s.28 can be made. It is only once economic advantage/disadvantage has been established in terms of s.28(3) that the court can consider any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents.”

[39] Neither of these decisions is binding on this court, but each illustrates, albeit in different ways, the difficulty of applying the subsection (3) test which requires analysis of the past economic consequences of the relationship and application of the outcome of that analysis to quantification of a claim in respect of future, as yet unknown and uncertain, events. Some assistance can be derived from the meanings attributed to the phrases “economic advantage” and “economic disadvantage” in subsection (9). The court may consider gains or reductions in capital, income and earning capacity; it is not, however, confined to considering those matters, and may, having regard to the language of the section as a whole, also take account of other gains or losses which amount to economic advantages or disadvantages.

[40] Section 28 leaves much to the discretion of the judge at first instance and an appellate court may not interfere with the decision unless it can be shown that the judge has misdirected himself in law, failed to take account of a material factor or reached a result that is manifestly inequitable or plainly wrong (*Gow* Lord Hope, para [42]).

*Award made under section 28(2)(a)*

[41] The sheriff awarded a capital sum of £36,000 in respect of the respondent's claim under section 28(2)(a). He calculated the "main contributions" made by the parties during the relationship in order to ascertain the total monetary contributions each made. Following the appeal hearing, parties produced a joint minute, purporting to set out agreed facts which were relevant to the exercise of calculating the parties' respective monetary contributions during the cohabitation. Yet, paragraph 2 of that joint minute presents this court with two possible figures representing contributions made between the start of the cohabitation and the end of 2014. We cannot reconcile the differences, which are in any event relatively modest. So, we have used median figures to reach a final amount representing the monetary contribution made by each party. The contribution by the appellant is thus £301,461 and the respondent's is £100,935. The appellant's contribution includes £73,961 paid by the appellant towards the purchase of the family home, which property is jointly owned by the parties. That property, at the date of proof, was worth around £580,000. A sale would give the respondent proceeds of £150,962 and the appellant £274,462, because of the parties' agreement to distribute the proceeds in proportions relative to their contributions towards its purchase.

[42] The sheriff, at paragraph [38] of his judgment, sets out the various factors that he took into account in reaching the conclusion, at paragraph [39], that as a result of the cohabitation the defender enjoyed a net economic advantage, while the pursuer, who by the end of the relationship had no career or security of tenure and was the main carer for Emma, was at a disadvantage. The sheriff then proceeded in paragraph [40] to consider offsetting,

concluding that “the offsetting does not fairly account for the economic disadvantage suffered by the pursuer” and that an award should be made in her favour.

[43] The sheriff then, at paragraph [42] explains how he quantified the respondent’s non-financial contribution to the household, by reference to the loss to her of the potential to earn around four years’ salary, including a potential period of sick pay. He offset against that what he described as “the various economic advantages” she received as a result of the defender’s contributions. Having carried out that exercise, he awarded the respondent a capital sum of £36,000, the equivalent of one year’s salary.

[44] The result of this order is that the respondent will have £36,000 by way of a capital sum, while retaining her, as yet unrealised, interest in the family home, worth around £151,000.

[45] In paragraph [38] of sheriff’s judgment he carefully set out the factors that he considered when assessing the extent to which each of the parties had derived economic advantage as a result of the contributions of the other, or suffered economic disadvantage in the interests of the other or Emma. Having considered the factors set out in the previous paragraph he concluded, at paragraph [39], that the defender had enjoyed a net economic advantage as a result of the relationship and that the pursuer had suffered economic disadvantage at the end of the relationship.

[46] The sheriff went on, somewhat incongruously at first sight, to explain the offsetting process that he had undertaken and that, after carrying out the offsetting exercise required by subsection (6), the respondent was still left with economic disadvantage, such that an award should be made in her favour. Having reached that conclusion, the sheriff quantified the award in the sum of £36,000, a sum equivalent to one year’s full-time salary had the

pursuer not given up work. We cannot fault the sheriff's approach in this regard, albeit it was not expressed as clearly as it might have been.

*Award made under section 28(2)(b)*

[47] The difficulty for any sheriff in determining a claim under section 28(2)(b) is that the only matters that the court may take into account are those in subsection (3). In this case, having determined in relation to her section 28(2)(a) claim that the respondent had suffered net economic disadvantage, the sheriff quantified that claim at £36,000. Care must be taken not to double count that net economic disadvantage.

[48] As an amount in respect of the future economic burden of child care may be awarded, by reference to economic advantage already derived or economic disadvantage already suffered, the court must have some regard to the economic capacity of each party to meet the economic burden of child care, in order to determine how that might fairly be borne. The terms "economic advantage" and "economic disadvantage" are defined in subsection (9) by reference to gains and losses in capital, income and earning capacity. It is apparent that the sheriff had that in mind when he noted, in paragraph [39] of his judgment, that the respondent at the end of the relationship, "has no career, no security of tenure and the responsibility of being the main carer for [Emma]."

[49] The sheriff then calculated the likely cost of caring for Emma until she is 16, based upon speculative future expenditure and an assumption that the amount of child maintenance paid by the appellant will remain as it currently is. He arrives at an amount in respect of the future economic burden of child care until Emma is 16, applies a discount in acknowledgement of the appellant's likely future contributions and sets an amount for the

section 28(2)(b) award. The amount awarded is somewhat arbitrary and no account is taken of possible changes in the circumstances of either of the parties or of Emma. The sheriff does not distinguish between an award that is made to the respondent having regard to economic advantage and disadvantage and one that is alimentary in nature.

[50] There can be no doubt that the sheriff has identified that the economic burden of caring for Emma on a day to day basis will fall mainly upon the respondent, as her main carer. However, little account has been taken of the appellant's contributions by way of provision of accommodation, or the availability to the respondent of her share of the family home, which is as yet unrealised. The appellant's evidence was that she planned to return to work full time in March 2024. The consequences of her having given up work during the relationship would likely then be alleviated.

[51] The sheriff concluded that the majority of the responsibility for looking after Emma will remain with the respondent. He was entitled on the evidence to reach that conclusion. In determining the amount to be paid under section 28(2)(b) he took into account that it is uncertain whether the respondent would be fully fit to return to work as a teacher by March 2024. He also took into account that the appellant and his family would undertake more of the childcare duties, which would offset some of the childcare costs. He does not appear to have taken account of the likelihood that, as Emma gets older, the costs associated with her care will change. He does not take account of the likelihood that the circumstances of the parties or Emma will change over time. He does not take account of the provision by the appellant of accommodation for Emma, or the risk that that might change.

[52] We do not agree with the appellant's submission that what section 28(2)(b) is designed to do is alleviate the burden on one party of the cost solely of child care. That is not what section 28(2)(b) says. It is the economic burden, upon the applicant, of caring for

the child in a broader sense that is sought to be alleviated by an order for payment of an amount by the defender to the applicant. The economic responsibility of caring for a child amounts to more than the cost of child care, such as, as the appellant would have it, nursery and child minder costs and after school clubs. A significant aspect of the economic burden of child care is the provision of a home for the child, meeting the child's day to day needs and the expenses relating to the child's care. Often, the main carer, as in this case, requires to reduce their working hours, does not seek promotion or gives up work entirely to provide child care. All of those expenses and losses form part of the economic burden of child care. Any amount awarded in terms of section 28(2)(b) is a capital payment in recognition of that economic burden; it is not alimentary provision.

[53] The sheriff acknowledged that the parties will need to share the cost of looking after Emma throughout her childhood, and that the appellant "can not be responsible for the full financial amount". He acknowledges the "other" contributions that the appellant currently makes. He concludes that the majority of the responsibility of looking after Emma will fall to the respondent and that an award of £45,000 is a fair and appropriate figure under this head of claim.

[54] Based as it is on a calculation of what the respondent currently spends on Emma, multiplied until she is 16 and then discounted, the amount awarded under section 28(2)(b) cannot be reasonably justified by reference to the test set out in subsection 28(3). The sheriff has, however, made findings in fact in relation to the future living arrangements for the respondent and Emma, including that the appellant has offered to provide accommodation at his property, where the respondent and Emma currently live, until Emma finishes primary school, though he is not bound by that offer. Further, that the rental market value of the jointly owned family home, where the appellant currently lives, is £1,100 per month.

The respondent would have settled these proceedings for ownership of the family home or payment of £90,000 to purchase a similar property in the area.

[55] The sheriff observes that the respondent has no career and no security of tenure. She also has the economic responsibilities inherent in being the main carer for Emma. Each of those circumstances amounts to economic disadvantage suffered by the respondent in the interests of the relationship, and in the interests of Emma. To some extent, these economic disadvantages have been taken into account by the sheriff in determining the amount of the award of capital he has made under section 28(2)(b). However, the consequences of these economic disadvantages will continue to have a bearing on the respondent's ability to meet the economic burden of caring for Emma until she is 16. In particular, she is unable to provide Emma with a secure home in her current circumstances and can at best rely on the provision to her of accommodation by the appellant until Emma leaves primary school. Without contribution from the appellant, she is currently unable to provide accommodation for Emma that provides them both with the necessary security of tenure. In those circumstances, we do not intend to interfere with the order made by the sheriff under this head, albeit we have reached the same conclusion by different means.

### **Disposal**

[56] The appeal shall be dismissed. Expenses follow success.