



The Scottish Parliament
Pàrlamaid na h-Alba

SPICe

The Information Centre
An t-Ionad Fiosrachaidh

SPICe Briefing

Pàipear-ullachaidh SPICe

The law applying at the end of adult relationships

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This briefing covers intimate adult relationships of a type which have legally recognised consequences. These relationships are marriages, civil partnerships and cohabiting relationships. The briefing discusses the law which applies when these relationships end.



17 December 2024
SB 24-58

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Executive Summary

Couples in Scotland, whether same-sex or mixed-sex, can choose to marry, enter a civil partnership or live together. Different areas of the law cover what happens when these relationships end.

On a point of terminology, and as is well known, **divorce** is the formal procedure that ends a marriage. The equivalent procedure for ending a civil partnership is known as **dissolution**.

The need for court action to obtain a divorce or dissolution

In Scotland, obtaining a divorce or dissolution itself always requires court action, with one person raising court proceedings against the other. This requirement applies even if a couple are in complete agreement on other issues relating to the divorce or dissolution, [such as what should happen to their property and finances](#).

Most divorces or dissolutions and court-based disputes between cohabiting couples are considered by [the local sheriff court](#).

For some couples, [where certain conditions are satisfied](#), a [simplified divorce or dissolution court procedure](#) may be used in the sheriff court.

The grounds for divorce or dissolution

Scotland, [unlike England and Wales](#), has a 'mixed system' of divorce or dissolution. This means that some of the grounds for the divorce or dissolution focus on one person's behaviour. However, other grounds are based on the couple having been separated for a period of time. In practice, [most divorces or dissolutions in Scotland now rely on the separation-based grounds](#).

The role for private negotiations

While court action is necessary to obtain a divorce or dissolution itself, in all types of legally recognised relationships, what happens to the couple's property and finances, or to their children, can be resolved between the couple themselves in private negotiations, if the couple so choose.

The couple may be [supported by solicitors](#) and [other dispute resolution specialists](#) such as [family mediators](#). The couple may reach a legally binding agreement as part of the process.

However, a court may still become involved in an individual case to resolve a dispute about the couple's property, finances and children which cannot be resolved by other means.

The focus of this briefing is on the couple's property and finances. For more detail on issues relating to children, see the separate SPICe Briefing entitled [Parental Responsibilities and Rights](#).¹

The Family Law (Scotland) Act 1985 - the statutory regime for spouses and civil

partners

For spouses and civil partners, there is [a comprehensive statutory regime](#) relating to a couple's property and finances provided by [the Family Law \(Scotland\) Act 1985](#), as amended.

Section 9 of the 1985 Act sets out [the principles that the courts must apply when deciding whether to make a relevant court order](#). A key principle is [fair sharing](#), which usually means equal sharing, [unless special circumstances apply](#).

The family home, even if only owned by one spouse or civil partner, and a person's pension entitlement built up during the marriage or civil partnership, are important examples of [the types of property covered by this regime](#).

The regime for cohabiting couples

For cohabiting couples, the main piece of legislation which applies is [the Family Law \(Scotland\) Act 2006 \('the 2006 Act'\)](#). Section 28 of the 2006 Act permits a financial claim by a cohabitant from the other cohabitant in some circumstances. [A strict time limit applies here](#) - the court application must be made **one year** from the date in which the couple ceased to cohabit. There is no discretion to extend the time limit in any circumstances.

Note that the statutory regime for cohabitants is much more limited in scope compared to the one for spouses and civil partners.

SPICe can only provide general information relating to the law of Scotland. If a person wishes to receive legal advice in relation to the circumstances of their individual case they should contact a solicitor. On how to find a solicitor, [see the final section of this briefing](#).

Introduction and overview

To have their relationship recognised as having legal consequences, all couples in Scotland, whether mixed-sex or same-sex, have three options, namely to:

- marry
- enter into a civil partnership
- live together.

This briefing discusses the law which applies in Scotland when these relationships end.

There are two main legal topics covered in this briefing:

- for **divorce** and **dissolution**, [the grounds on which they can be obtained](#)
- for **all types of legally recognised relationships**, how the couple's property and finances are treated at the end of that relationship.

The law in Scotland in these areas differs from the law in the rest of the UK.

When a couple's relationship breaks down, as well as considering their property and finances, the couple may need to decide what arrangements will be made for the future care of any children of that relationship. [As noted earlier](#), the law on this topic is described in a separate SPICe Briefing, [Parental Responsibilities and Rights](#).¹

The choice between marriage, civil partnership or living together - and its legal consequences

The legal rights and obligations affecting cohabiting couples are currently much more limited than those applying to married couples or those in a civil partnership.

[On the other hand, the law applying to married couples, and the law applying to couples in a civil partnership, is virtually identical.](#)

Accordingly, the approach in this briefing is to describe [the law on divorce and dissolution of a civil partnership](#) together in the first main section of the briefing, with a second, separate section [on the end of a cohabiting relationship](#) following it.

[Some general topics, applying to all types of legally recognised adult relationships](#), are also covered at the end of the briefing.

Divorce and dissolution

This first section of the briefing describes the law on **divorce** and on **dissolution**. It covers the following topics:

- [an overview of the relevant legislation and other sources of law](#)
- [an introduction to the role of private negotiations between the couple](#)
- [the court process for obtaining a divorce or dissolution](#)
- [the grounds on which a divorce or dissolution can be obtained](#)
- [the law's treatment of the couple's property and finances.](#)

Key sources of law

There are **three main pieces of legislation** applying to divorce and dissolution in Scotland. They are all Acts of the UK Parliament, which have been subsequently amended, including by Acts of the Scottish Parliament.

The legislation is as follows:

- [the Divorce \(Scotland\) Act 1976](#), with **section 1** setting out the grounds for divorce
- [the Civil Partnership Act 2004](#), with **section 117** specifying the grounds of dissolution
- [the Family Law \(Scotland\) Act 1985](#), with a substantial part of the Act covering how the property and finances of a couple are dealt with on divorce or dissolution.

As well as family law, **contract law** also applies to [pre-nuptial agreements](#), that is agreements reached prior to a marriage or civil partnership, and [separation agreements](#), that is, agreements reached once the relationship has ended.

Case law, the branch of law developed by judicial decisions in individual cases, plays an important role in both family law and contract law.

The role of private negotiations

[As noted earlier](#), in Scotland, court proceedings are always required to obtain the divorce or dissolution itself.

However, certain issues associated with the divorce or dissolution can be legally agreed upon outside the court process:

- [how to divide up the couple's property and finances](#)

- the arrangements for the future care of any children, [covered by the separate SPICE Briefing](#).¹

In practice, the outcome for a couple depends on whether they are willing to attempt an out of court process, and are able to reach an agreement satisfactory to both of them when they try.

Crucially, relationships with a significant power imbalance, such as those affected by domestic abuse, are unsuitable for negotiations outside the court process. Anyone signposting people to legal or other specialist services should always keep this important issue in mind.

For those couples considering an approach outside the court process, the following sections of the briefing are likely to be particularly helpful:

- [Legally binding agreements](#)
- [Resolving disputes without going to court](#)
- [Advice and support for constituents](#).

Key features of the court process

This section of the briefing considers the role of the court in more detail.

A key point is that, in an action for divorce or dissolution, one spouse or civil partner (**the pursuer**) must always start court proceedings against the other spouse or civil partner (**the defender**).

Court proceedings begun together in joint names are not possible. Again, this applies even if the couple are in agreement in all issues relating to their divorce or dissolution.

A court action for divorce or dissolution may be **undefended** for the other person. In other words, the defender does not lodge an objection with the court to [the ground of the divorce or dissolution](#) being relied upon, or any related court orders sought, such as those associated with [the couple's property or finances](#) or [the future care of the children](#).

When a divorce or dissolution is undefended then the court will often be playing a straightforward and administrative role in the divorce or dissolution process.²

Divorce and dissolution cases made up **75% of family cases** in 2022-23, [the latest year for which statistics are available](#).³

Almost all court actions for divorce or dissolution, [and indeed court actions to resolve disputes between cohabiting couples](#), are dealt with by [the local sheriff courts](#). Here the judges are known as [sheriffs](#) and [summary sheriffs](#).

The sheriff courts deal with a wide variety of criminal and civil matters. Individual sheriffs and summary sheriffs do not specialise in family law, except in large urban areas.

A small number of family cases each year (**less than 1%**) are dealt with by [the Court of Session in Edinburgh](#).³ Complex cases, including those involving divorce, with an international element, and/or 'high value' cases in terms of the extent of a couple's property and finances, may be more likely to be heard by the Court of Session.

Types of court procedure used in divorce or dissolution

There are two main types of court procedure which can be used to obtain a divorce or dissolution:

- the **ordinary procedure**, for which legal advice is recommended
- the **simplified procedure**, which is designed to be used without legal advice, although some people still wish to take legal advice in the context of using it.

The choice of court procedure, in circumstances where a choice is available, is one relevant consideration when deciding how to proceed with a divorce or dissolution.

The simplified procedure

The **simplified procedure** can only be used for certain grounds of divorce or dissolution, specifically, those based on the couple having been separated for a period of time. [The grounds for divorce or dissolution are considered in more detail in the next section of the briefing](#).

The simplified procedure can only be used when various **other conditions** are satisfied. For example, it cannot be used where there are **children under sixteen** and where there are issues associated with the divorce relating to **the couple's property and finances** that are still to be resolved by the courts.

In the year **2022-23**, **60% of divorces** used the simplified procedure and, for dissolutions, the equivalent figure was **80%**.⁴

For more information on the simplified divorce or dissolution procedure, see [the guidance on the website of the Scottish Courts and Tribunals Service](#).

Note that, in November 2024, the [Scottish Civil Justice Council](#) published a [consultation proposing changes to the court rules to allow an extension to the scope of the simplified procedure](#).⁵

Grounds for divorce or dissolution

A spouse or civil partner must successfully rely on a **ground for divorce or dissolution** to obtain a divorce or dissolution.

Strictly speaking, in Scotland it is possible to divorce or dissolve a civil partnership on only **two grounds**:

- The first ground is that a **marriage or civil partnership has broken down irretrievably**.ⁱ
- The second ground is that an **interim gender recognition certificate** has been issued after the date of the marriage or civil partnership.ⁱⁱ

However, [as explored in more detail in a later section of the briefing](#), irretrievable breakdown can be proved in a number of ways. In practice, it is these different ways which are commonly referred to as **the grounds for divorce or dissolution**.

Scotland has a 'mixed system' of divorce or dissolution. Some grounds for divorce or dissolution focus on one person's behaviour, which are sometimes called **fault-based grounds**. However, other grounds are based on the couple having been separated for a period of time (the **no-fault grounds**).

In contrast, [England and Wales now has an entirely 'no-fault' system of divorce](#).ⁱⁱⁱ

The briefing now considers [interim gender recognition certificates](#) and [irretrievable breakdown](#) in more detail.

Interim gender recognition certificate

The [Gender Recognition Act 2004](#) allows an individual **aged 18 or over** to apply to a Gender Recognition Panel for a gender recognition certificate.^{iv} Successful applicants, who are granted a **full gender recognition certificate**, are, from the date of issue, considered in law to be of their acquired gender.

If the individual applying for the certificate is married or in a civil partnership, and wants to stay married or in a civil partnership after obtaining the gender recognition certificate, then their spouse or civil partner will need to sign a document known as a **statutory declaration** saying that they agree to that.^v

A person can still apply for a gender recognition certificate even if their spouse or partner

i [Divorce \(Scotland\) Act 1976](#), section 1(1)(a); [Civil Partnership Act 2004](#), section 117(2)(a).

ii [Divorce \(Scotland\) Act 1976](#), section 1(1)(b); [Civil Partnership Act 2004](#), section 117(2)(b).

iii [Divorce, Dissolution and Separation Act 2020](#).

iv [Gender Recognition Act 2004](#), sections 1(1)(a), 3C, 3D, 3E, 3F and 4.

v [Gender Recognition Act 2004](#), section 4(2) and 4(3C).

refuses to sign the document or the applicant does want to end the marriage or civil partnership. In these circumstances, if the application is successful, the applicant will receive an **interim gender recognition certificate**.^{vi}

Before a certificate is issued, several criteria must be satisfied, which are in outline:

1. the applicant must be living in the new gender, intends to do so for the remainder of their life, and must have done so already for the last two years
2. the applicant has or has had gender dysphoria, and can provide medical reports on this.^{vii}

[Advice on how to obtain a gender recognition certificate can be found on the UK Government website.](#)

Where the applicant for the interim gender recognition certificate is married or in a civil partnership, they, or indeed their spouse or civil partner, can apply for divorce or dissolution based on the fact that an interim gender recognition certificate has been issued.^{viii}

This ground of divorce or dissolution does not apply where the Gender Recognition Panel goes on to issue a full gender recognition certificate after issuing an interim one. In those circumstances, the spouse or civil partner will have consented to stay in the marriage or civil partnership after the interim certificate was issued.^{ix}

This ground of divorce or dissolution does remain available if 1) [the sheriff court](#) issues a full gender recognition certificate where the applicant has had an interim certificate issued by the Panel; and 2) the applicant's spouse or civil partner has not given a statutory declaration of consent to the marriage or civil partnership continuing.^x

Irretrievable breakdown

Irretrievable breakdown of a marriage can be proved in four different ways:

1. since the date of the marriage the defender has committed **adultery**^{xi}
2. since the date of the marriage the defender has **behaved** in such a way that the pursuer cannot reasonably be expected to continue to cohabit with the defender^{xii}
3. the couple have not cohabited for **one year** and both people **consent** to the divorce^{xiii}

vi [Gender Recognition Act 2004](#), section 4(3) and section 4(3D).

vii [Gender Recognition Act 2004](#), sections 2 and 3.

viii [Divorce \(Scotland\) Act 1976](#), section 1(1)(b) and (3B); [Civil Partnership Act 2004](#), section 117(2)(b) and (3A).

ix [Gender Recognition Act 2004](#), section 4C; [Divorce \(Scotland\) Act 1976](#), section 1(1)(b) and (3B)(a); [Civil Partnership Act 2004](#), section 117(2)(b) and (3A)(a).

x [Gender Recognition Act 2004](#), section 4E; [Divorce \(Scotland\) Act 1976](#), section 1(1)(b) and (3B)(b); [Civil Partnership Act 2004](#), section 117(2)(b) and (3A)(b).

xi [Divorce \(Scotland\) Act 1976](#), section 1(2)(a).

xii [Divorce \(Scotland\) Act 1976](#), section 1(2)(b).

4. the couple have not cohabited for **two years**.^{xiv}

95% of divorces in 2022-23 were based on a separation ground: **22%** on ground 3, **73%** on ground 4.⁶

Establishing **irretrievable breakdown of a civil partnership** is a similar but not identical process. Here irretrievable breakdown can be proved in three different ways:

1. since the date of registration of the civil partnership the defender has **behaved** in such a way that the pursuer cannot reasonably be expected to continue to cohabit with the defender^{xv}
2. the couple have not cohabited for **one year** and both people **consent** to the dissolution^{xvi}
3. the couple have not cohabited for **two years**.^{xvii}

98% of dissolutions in 2022-23 were based on a separation ground: **26%** on ground 2 and **72%** on ground 3.⁷

xiii [Divorce \(Scotland\) Act 1976](#), section 1(2)(d).

xiv [Divorce \(Scotland\) Act 1976](#), section 1(2)(e).

xv [Civil Partnership Act 2004](#), section 117(3)(a).

xvi [Civil Partnership Act 2004](#), section 117(3)(c).

xvii [Civil Partnership Act 2004](#), section 117(3)(d).

Adultery and marriage

The definition of adultery is that a married person has had voluntary heterosexual intercourse with someone who is not their spouse.

The above definition applies even when the marriage in question is a same-sex marriage.^{xviii} Accordingly, if a spouse in either a same-sex or mixed-sex marriage has a voluntary extra-marital sexual relationship with a person of the same sex to them this is not adultery. However, it will be relevant under the ground that considers the defender's behaviour.⁸

Adultery and civil partnerships

Adultery is not a ground for dissolution of a same-sex or mixed-sex civil partnership.

When the legislation was proposed to enable mixed-sex couples to enter a civil partnership the Scottish Government made a policy decision not to add adultery to the grounds for dissolution. [For example, in its 2018 consultation on the future of civil partnerships](#), the Government commented as follows:

“ Adultery has remained part of divorce law due to a number of religious bodies and people of faith being of the view that it should be a reason for ending a marriage. It does not seem to the Scottish Government that these arguments apply in relation to ending a civil partnership.”

Scottish Government, 2018⁹

The couple's property and finances

[As noted earlier](#), it is [the Family Law \(Scotland\) Act 1985](#), as amended ('the 1985 Act'), which sets out the principles to be applied when dividing up the couple's property and/or making financial arrangements on divorce or dissolution.^{xix} The collective term for this exercise relating to property and finances is **financial provision on divorce or dissolution**.

The policy emphasis in the 1985 Act is on a 'clean break', with the aim of return to financial independence for both people as soon as possible. However, [as explored in more detail later](#), the 1985 Act does allow the courts to modify this approach in individual cases. Broadly, this is where the divorce or dissolution will cause one spouse or civil partner financial difficulty.

This section of the briefing considers the following aspects of the law and practice:

- [legally binding agreements which can be reached outside the court process](#)
- [the concept of matrimonial and partnership property](#)

xviii [Divorce \(Scotland\) Act 1976](#), section 1(3A).

xix [Family Law \(Scotland\) Act 1985](#), sections 8-16.

- [the legislative principles to be applied in relation to financial provision on divorce or dissolution](#)
- [the various court orders which can be used to give effect to those principles in an individual case.](#)

Legally binding agreements

This section of the briefing considers two different types of legally binding agreement:

- **separation agreements**, that is [those which can be made after a relationship has broken down](#)
- **pre-nuptial agreements**, that is [those made before the marriage or civil partnership about what should happen if the relationship breaks down.](#)

Separation agreements

As a preliminary point, one possibility is that the court ends up fully considering the division of the couple's property and finances and reaching a decision on areas in dispute by applying the principles set out in the 1985 Act. [This topic is considered in more detail later.](#)

However, [as already alluded to](#), when their relationship ends, many couples privately reach a legally binding separation agreement about the terms of their divorce or dissolution. This section of the briefing introduces **two key terms** in this context:

- A **minute of agreement** is the name given to a legally enforceable document that records the terms of any agreement reached outside the court process. It can be, and usually will be, registered in [the Register of Deeds](#), one branch of a register known as **the Books of Council and Session**.
- A **joint minute of agreement** is a similar document but which has been approved by the court as part of a court process. A typical pattern would be that one spouse or civil partner initially commences court proceedings, but the couple are later able to agree the terms of an agreement, which the court then approves.

Note that, where couples are seeking to reach agreement themselves, and both parties have access to legal advice, their respective solicitors will negotiate on behalf of the couple [with reference to the same principles set out in the 1985 Act as the courts use.](#)

Pre-nuptial agreements

Whilst pre-nuptial agreements have not been the subject of extensive case law, in Scotland, as a general concept, they are regarded as being legally enforceable and not contrary to public policy.

In practice, [pre-nuptial agreements are commonly used to ring-fence certain assets](#), in order to exclude them from [the statutory definition of matrimonial or partnership property](#).

^{10 11} This is significant because, as explored in more detail later, [there is a key legislative principle that such property requires to be fairly shared on divorce or dissolution.](#)

However, as explored in more detail later, prenuptial agreements can also be set aside by the court [under the 1985 Act on the basis that they were not fair and reasonable at the time they were entered into](#).^{xx}

In addition, under the **general rules of contract law**, there are other restrictions on a couple's freedom to contract. For example, a contract can be struck down on grounds including:

- **error**, where the couple misunderstood some material aspect of the contract or the circumstances surrounding it
- **fraud**, that is, deception for gain, and **extortion**, threats of something to obtain someone's consent
- **facility and circumvention**, where a vulnerable person has been taken advantage of for someone else's gain
- **undue influence**, where there has been an abuse of a position of trust.

While the concept of a prenuptial agreement itself is accepted in public policy terms in Scotland, the specific provisions of the agreement itself also **must not be contrary to public policy**.⁸

Reported cases on legal challenges to relationship agreements in Scotland have focused on property and finances so any discussion outside that area must be speculative. However, a leading textbook has suggested that a contract with a clause preventing either person from seeking a divorce or dissolution might be one example of a provision contrary to public policy, for placing undue restrictions on personal freedom.⁸

The court's power to set aside legally binding agreements

The court has power to set aside all or part of a [separation agreement](#) or [prenuptial agreement](#)¹² on the basis that it, or any term of it, was **not fair and reasonable** at the time it was entered into.^{xxi}

Subsequent case law has developed this test with reference to a number of individual principles. One leading case set out the following principles:¹³

- The agreement has to be examined from the point of view of both fairness and reasonableness.
- All the relevant circumstances leading up to and prevailing at the time of the signing of the agreement need to be considered, including the nature and quality of the legal advice given to either party.
- Evidence that some advantage had been taken by one party of the other by reason of

xx [Family Law \(Scotland\) Act 1985](#), section 16 (1)(b).

xxi [Family Law \(Scotland\) Act 1985](#), section 16.

the circumstances existing at the time of the negotiations might be very significant.

- The court should not be unduly ready to overturn agreements that were validly entered into.
- An agreement which has led to an unequal, and possibly very unequal, division of assets, does not in itself necessarily give rise to any inference of unfairness or unreasonableness.

In practice, the circumstances in which an order has been made setting aside all or part of an agreement include, for example, in relation to marriage: ¹⁴

- failure to disclose material information relating to matrimonial property ¹⁵
- absence of knowledge on the part of both the spouses that [pension interests could constitute matrimonial property](#) ¹⁶
- coercion and failure to disclose assets and liabilities. ¹⁷

Note that most of the existing case law here relates to marriage (as the older institution) but it is potentially relevant in the context of civil partnerships as well, depending on the circumstances of an individual case.

The Family Law (Scotland) Act 1985

This part of the briefing focuses on cases which come before court under the 1985 Act and the approach which the 1985 Act sets out for such cases.

[As noted earlier](#), the approach in the 1985 Act also usually underpins a key part of private negotiations between a couple, where that couple [has access to legal advice](#).

Matrimonial or partnership property

This section of the briefing considers the concept of **matrimonial property**, as it is referred to in the context of a marriage, or **partnership property**, as it is referred to in the context of a civil partnership.

While the labels attached to the property are different between marriage and civil partnerships, the underlying legal concept is the same in both instances.^{xxii}

The process of division of a couple's assets (envisaged by the 1985 Act) only applies to matrimonial or partnership property.

Matrimonial or partnership property is all property **belonging to the two parties, or to either of them**, before the relevant date.^{xxiii}

xxii [Family Law \(Scotland\) Act 1985](#), section 10(4) and (4A).

The **relevant date** is the earlier of:

- the date the couple ceased to cohabit as spouses or civil partners
- the date that one spouse or civil partner was served notice of the court proceedings for divorce or dissolution.^{xxiv}

Generally speaking, matrimonial or partnership property must be acquired **during the marriage or civil partnership**.^{xxv} However, there is an exception to this relating to the **family home** and its **contents**. This can still be matrimonial or partnership property if acquired before the marriage or civil partnership, but with the intention that it be used as a family home.^{xxvi}

For couples that own their own home, the **family home** is often the largest asset falling into the category of matrimonial or partnership property.

The benefits of a **pension** accrued during a marriage or civil partnership are matrimonial or partnership property.^{xxvii} In practice, a pension can also be a very significant asset for some couples.

There is a specific exception in the 1985 Act where the property is acquired by one person by **gift or inheritance from a third party**. Providing this property stays in the same form, or substantially the same form, the property falls outside the scope of matrimonial or partnership property.^{xxviii} 18 19

On the other hand, where the funds from an inheritance or gift are used to buy a different form of property during a marriage or civil partnership, the property acquired is matrimonial or partnership property. So, for example, if someone uses funds from an inheritance to buy a house, this then becomes matrimonial or partnership property.²⁰

xxiii [Family Law \(Scotland\) Act 1985](#), section 10(4) and (4A).

xxiv [Family Law \(Scotland\) Act 1985](#), section 10(3) and 27(2).

xxv [Family Law \(Scotland\) Act 1985](#), section 10(4)(b) and (4A)(b).

xxvi [Family Law \(Scotland\) Act 1985](#), section 10(4)(a) and (4A)(a).

xxvii [Family Law \(Scotland\) Act 1985](#), section 10(5).

xxviii [Family Law \(Scotland\) Act 1985](#), section 10(4) and (4A).

Pets and other animals

The law in Scotland gives animals a degree of protection from harm, but, in the context of financial provision on divorce or dissolution, it also classifies them as property.

Accordingly, whether the animal in question is, for example, livestock on a farm, or a household pet, the 1985 Act can apply to them. Specifically, if acquired - other than as a gift or inheritance from a third party - during the marriage or civil partnership by either spouse or civil partner, or by both of them jointly, the animal will be treated as matrimonial or partnership property. The normal legislative principles, [including the fair sharing of matrimonial or partnership property](#), will apply to them.²¹

The two-stage test

The court must consider a statutory **two-stage test** set out in the 1985 Act before deciding whether to make a court order.^{xxix}

- First, a court order must be justified by the principles set out in the 1985 Act [and explained in the next part of the briefing](#).
- Second, the order must be reasonable having regard to the resources of the couple.

Both parts of the test must be satisfied in an individual case.

The need for a court to take account of the couple's resources ensures that a spouse or civil partner is not left with the financial liability of a court order which is justified by the legislative principles but with which they cannot afford to comply.²²

The principles applied by the court

This section of the briefing considers **the five legislative principles** which are considered by the court under the 1985 Act.

As a preliminary point, note that the details of the legislative principles have been further developed by the decisions of judges in individual cases, that is **case law**.

Also, [as a reminder from earlier in the briefing](#), the overall policy emphasis in the 1985 Act is on a 'clean break', with the aim of return to financial independence for both people as soon as possible. However, the courts are permitted under the 1985 Act to modify this approach in some circumstances.

The **starting point** for any case relating to financial provision on divorce or dissolution is

xxix [Family Law \(Scotland\) Act 1985](#), section 8(2).

the first legislative principle, **fair sharing of matrimonial or partnership property**, [discussed later](#).

Once this principle has been considered, **the remaining four principles** must be considered to see if any of them justify a further financial award to one spouse or civil partner.

[As explored in more detail later in the briefing](#), the conduct of the spouses or civil partners during the marriage or civil partnership is only relevant in very limited circumstances.

Principle 1: fair sharing of matrimonial or partnership property

[As referred to in the preceding section](#), the first priority for the court is applying Principle 1. This says that the **net value** of a couple's matrimonial or partnership property must be **shared fairly** between them.^{xxx}

Net value

The property's **net value** is its value after the deduction of **certain outstanding debts** accrued by the individuals.

These are those debts acquired either a) during the marriage or civil partnership; or b) before the marriage or civil partnership, in so far as these relate to [matrimonial or partnership property](#).^{xxxii}

For example, an outstanding mortgage in relation to the family home could be a relevant debt to be deducted.

In terms of **valuing the matrimonial or partnership property**, the valuation is usually done at [the relevant date](#) but may be done a later date in some circumstances.^{xxxii} This is a complex area, and a solicitor can advise on the application of the law to an individual case.

Fair sharing

Fair sharing is usually **equal sharing**, unless **special circumstances** apply.^{xxxiii}

xxx [Family Law \(Scotland\) Act 1985](#), section 9(1)(a).

xxxi [Family Law \(Scotland\) Act 1985](#), section 10(2).

xxxii [Family Law \(Scotland\) Act 1985](#), section 10(3A) (cross-referring to section 8(1)(aa)).

xxxiii [Family Law \(Scotland\) Act 1985](#), sections 9(1)(a), 10(1) and (6).

If special circumstances apply, fair sharing might involve some other split, like a 60/40 split.

There is a **non-exhaustive list** providing examples of what qualifies as special circumstances in the 1985 Act.^{xxxiv}

The list is not described in full in this briefing. However, note that it includes the **terms of any agreement** between the parties on the ownership or division of **any matrimonial or partnership property**, such as in a **prenuptial agreement** or **separation agreement**.^{xxxv}

Another example of special circumstances is **the source of funds or assets** used to acquire the matrimonial or partnership property where these funds or assets were not derived from the income or efforts of the couple during the marriage or civil partnership. For instance, these funds or assets might pre-date the marriage or civil partnership, and/or have come from the sale of a gift or inherited property. The court can give the spouse or civil partner an increased share of the matrimonial or partnership property purchased from those funds or assets.^{xxxvi}

The court's power to look at the source of funds in this context is not to be confused with the **general exclusion from matrimonial or partnership property** of property which is an inheritance or gift from a third party, and which remains in the same form.

Another important example of possible special circumstances is **the nature of the matrimonial or partnership property and the use made of it**. For example, the property might be used for business purposes, or as a family home. Here the court can, for example, look at the extent to which it is reasonable to expect it to be sold, divided or used to take out a loan over the property (where the loan funds would then be used to meet financial obligations under the 1985 Act).^{xxxvii}

Special circumstances can also cover the situation where one spouse or civil partner has **destroyed, dissipated** (squandered or wasted),²³ or **alienated matrimonial or partnership property** (sold or otherwise transferred ownership of it to a third party).^{xxxviii}

Case law has established that, when the court agrees that a special circumstance exists, this does not mean that an unequal division of the matrimonial or partnership property is automatically justified.

The special circumstance must be assessed and balanced against any other factors in the case before deciding whether it justified a departure from equal sharing.^{24 22}

xxxiv [Family Law \(Scotland\) Act 1985](#), section 10(6).

xxxv [Family Law \(Scotland\) Act 1985](#), section 10(6)(a).

xxxvi [Family Law \(Scotland\) Act 1985](#), section 10(6)(b).

xxxvii [Family Law \(Scotland\) Act 1985](#), section 10(6)(d).

xxxviii [Family Law \(Scotland\) Act 1985](#), section 10(6)(c).

Principle 2: economic advantages and disadvantages

Principle 2 says that fair account should be taken of:

- any **economic advantage** derived from one person in the marriage or civil partnership by the contributions of the other
- any **economic disadvantage** suffered by a person in the marriage or civil partnership in the interests of the other or of the family.

Contributions include indirect and non-financial contributions, such as looking after the family home or caring for the family. **Economic advantage** includes gains in capital, income or earning capacity; **economic disadvantage** includes losses in capital, income and earning capacity.

In the context of Principle 2, the court will weigh up the respective economic advantages gained and the economic disadvantages sustained by the two individuals and assess whether there is an imbalance.^{xxxix}

Where it finds that such an imbalance exists, the court must then consider the extent to which the imbalance will be corrected by [sharing the value of the matrimonial or partnership property](#). As explained earlier, only if the imbalance cannot be corrected in that way will a financial award under Principle 2 will be justified.^{xl}

Principle 3: caring for children under 16

Principle 3 says that the ongoing economic burden, after divorce or dissolution, of caring for a child of the marriage or civil partnership **under the age of 16**, should be shared fairly between the spouses or civil partners.^{xli}

While Principles 1 and 2 consider the period during the marriage and civil partnership, Principle 3 covers what will happen in the future.²⁵

The definition of a **child of the marriage or civil partnership** includes any child who has been accepted by the parties as a child of the family.^{xlii} This could include, for example, a child who is the biological child of one spouse or civil partner and the stepchild of the other.

The 1985 Act says the court must take account of the following factors when considering a financial award under Principle 3.^{xliii}

xxxix [Family Law \(Scotland\) Act 1985](#), section 11(2)(a).

xl [Family Law \(Scotland\) Act 1985](#), section 11(2)(b).

xli [Family Law \(Scotland\) Act 1985](#), section 9(1)(c).

xlii [Family Law \(Scotland\) Act 1985](#), section 27(1).

xliii [Family Law \(Scotland\) Act 1985](#), section 11(3).

- any court order or other legal arrangement for the financial support of the child
- any expenditure or loss of earning capacity caused by the need to care for the child
- the need to provide suitable accommodation for the child
- the age and health of the child
- the educational, financial and other circumstances of the child
- the needs and resources of the spouses or civil partners
- all the other circumstances of the case.

Principle 4: period of adjustment

Principle 4 can apply when one spouse or civil partner has been dependent to a substantial degree on the financial support of the other spouse or civil partner.

It says the dependent spouse or civil partner should be awarded such financial provision as is reasonable to enable them to adjust, over a period of **not more than three years**, from the date of the divorce or dissolution.^{xliv}

In assessing what, if any, order to make for financial provision under Principle 4, the court is directed by the 1985 Act to consider:^{xlv}

- the age, health and earning capacity of the person who is claiming the financial provision
- the duration and extent of the dependence of that person prior to the divorce or dissolution
- any intention of that person to undertake a course of education or training
- the needs and resources of the spouses or civil partners
- all the other circumstances of the case.

Principle 5: avoiding serious financial hardship

Principle 5 says that where one spouse or civil partner is likely to suffer **serious financial hardship** from the divorce or dissolution, they should be awarded reasonable financial provision to relieve that hardship, **for a reasonable period**.^{xlvi}

xliv [Family Law \(Scotland\) Act 1985](#), section 9(1)(d).

xlv [Family Law \(Scotland\) Act 1985](#), section 11(4).

xlvi [Family Law \(Scotland\) Act 1985](#), section 9(1)(e).

In assessing what, if any, order to make for financial provision under Principle 5, the court is directed by the 1985 Act to consider:^{xlvi}

- the age, health and earning capacity of the person who is claiming the financial provision
- the duration of the marriage or the civil partnership
- the standard of living of the individuals during the marriage or civil partnership
- the needs and resources of the spouses or civil partners
- all the other circumstances of the case.

Principle 5 is intended as a last resort for the courts. Ideally, applying the other principles will address any financial hardship which might result from the divorce or dissolution.

The conduct of the spouses or civil partners

As a general rule, the court is not to consider the conduct of either spouse or civil partner unless:

- the conduct has adversely affected the financial resources which are relevant to the decision^{xlvi} 26
- in relation to **Principle 4 (a period of adjustment)** and **Principle 5 (avoiding serious financial hardship)** it would be **manifestly inequitable** to leave the conduct out of account.^{xlvi}

In relation to the first bullet point above, a specific expression of this general rule can be found in the 1985 Act in relation to **Principle 1 (fair sharing of matrimonial or partnership property)**.

As discussed earlier, **special circumstances** justifying an unequal split of matrimonial or partnership property can include the situation where one spouse or civil partner has destroyed property, squandered or wasted it, or sold or otherwise transferred it to a third party.¹

xlvi Family Law (Scotland) Act 1985, section 11(5).

xlvi Family Law (Scotland) Act 1985, section 11(7)(a).

xlvi Family Law (Scotland) Act 1985, section 11(7)(b).

1 Family Law (Scotland) Act 1985, section 10(6)(c).

Possible court orders under the 1985 Act

The court can make **various court orders** to give legal effect to a decision under the 1985 Act in an individual case.^{li} This section of the briefing describes those orders.

Orders for transfer of property and orders for payment of a capital sum

One type of order which can be made under the 1985 Act is a **property transfer order**. As its name suggests, it requires one spouse or civil partner to transfer property, or their share of property, such as the family home, to the other spouse or civil partner.^{lii}

Another type of order is **an order for the payment of a capital sum** from one spouse or civil partner to the other.^{liii} As the family home is often a couples' main financial asset, this may result in the home having to be sold to comply with such a court order.

Both types of order (for **property transfer** and **the payment of a capital sum**) can be **deferred** so they only take effect at a future date.^{liv}

For example, it may be that, under the terms of the divorce or dissolution, the children of any marriage or civil partnership are to live with one spouse or civil partner in the family home.

Here the court can decide that the sale of that family home, where the proceeds of sale are to be used to fund payment of a capital sum, could be deferred until the children have reached the age of 18.

An order for payment of a capital sum can also be **paid in instalments**, if the court decides this is appropriate.^{lv} This can be used, for example, when one of the main assets is something which it would be difficult to sell without destroying its value, such as an ongoing business.

Order for the payment of a periodical allowance

In respect of **Principle 3** ([fair sharing of the economic burden of childcare](#)), **Principle 4** ([period of adjustment](#)) and **Principle 5** ([avoiding serious financial hardship](#)) it is also possible for the court to make an order for the payment of what is known as a **periodical allowance**.^{lvi} This is a regular payment from one spouse or civil partner to the other ([not associated with an order for the payment of a capital sum](#)).

li [Family Law \(Scotland\) Act 1985](#), sections 12-14.

lii [Family Law \(Scotland\) Act 1985](#), sections 8(1)(aa) and 12.

liii [Family Law \(Scotland\) Act 1985](#), sections 8(1)(a) and 12.

liv [Family Law \(Scotland\) Act 1985](#), section 12(2).

lv [Family Law \(Scotland\) Act 1985](#), section 12(3).

lvi [Family Law \(Scotland\) Act 1985](#), sections 8(1)(b) and 13.

Because of the overall policy emphasis of the legislation on a 'clean break', the 1985 Act makes it clear that this should not be the order of first choice for the courts. It says it should be only made where other available types of order, [such as those requiring transfer of property or payment of a capital sum](#), would be inappropriate or insufficient to satisfy what is required.^{lvii}

Orders relating to pensions

As discussed earlier in the briefing, pension benefits built up during the period of the marriage or civil partnership, but before [the relevant date](#), are [matrimonial or partnership property](#).^{lviii}

As with any other type of asset forming part of the matrimonial or partnership property, the up-to-date value of a pension belonging to either spouse or civil partner should be established. This is to ensure a division of all the couple's assets according to [the legislative principles set out under the 1985 Act](#). As noted earlier in the briefing, [these principles include fair sharing](#).

Valuation of a pension often occurs through a formal pension valuation process. On the valuation of public sector pensions, for example, [see the information provided by the Scottish Public Pensions Agency](#).

Pension benefits can be significant assets for some couples. However, one difficulty with pensions is that they are not capable of being realised immediately or at least that is often not the best financial approach.²⁷

One approach to pensions as a form of matrimonial or partnership property and [the fair sharing of them](#) is to undertake what is known as **off-setting**. Here one spouse or civil partner receives another asset to offset the value of the other spouse or partner's pension. For example, that spouse or partner might receive all of, or at least a larger share of, the family home.

However, separately, there are also a number of specific orders in the 1985 Act, as amended, relating to pensions, which are considered in this part of the briefing.

Pension sharing orders

Where various conditions are satisfied, the court can make a **pension sharing order**.^{lix} This type of order can relate to all pension benefits, including, for example, an income stream from a pension once the pension holder retires.

The order obliges the provider of a pension policy to transfer a proportion of the rights within a policy held by one spouse or civil partner to a policy in the name of the other

lvii [Family Law \(Scotland\) Act 1985](#), sections 8(2) and 13(2)(b).

lviii [Family Law \(Scotland\) Act 1985](#), section 10(4)(b), (4A)(b) and 5(b).

lix [Family Law \(Scotland\) Act 1985](#), sections 8(1)(baa), 8A and 27(1), (1A).

spouse or civil partner. Essentially, it involves taking all or part of a spouse or civil partner's pension entitlement and separating it off into a distinct pension entitlement for the other spouse or civil partner.²⁸

It is often used when the pension is the most valuable asset and the remaining [matrimonial or partnership property](#) is not valuable enough to offset it.²⁹

Pension capital sums: earmarking orders

Where the court has made a [capital sum order](#), requiring the payment of a capital sum from one spouse or civil partner to the other, the court can also order that all or part of that sum is paid direct from a pension lump sum payable on death or retirement.^{lx} This type of order is often referred to as an **earmarking order**.

Since the introduction of pension sharing orders, the use of earmarking orders has become much less common in practice.²

Pension compensation

It is also possible to make court orders relating to the situation where a spouse or civil partner is entitled to **compensation** from the [Pension Protection Fund](#) (PPF), which is administered by the Pension Protection Board ('the Board').

A person might receive such compensation from this statutory body if their [defined benefit pension scheme](#) has become insolvent and cannot fund the entitlement under the pension policy.^{lxi}

Again, providing it relates to the period during the marriage or civil partnership but [before the relevant date](#), this compensation is [matrimonial or partnership property](#).^{lxii}

The court may make either:^{lxiii}

- a **pension compensation sharing order**, which [operates in a similar fashion to a pension sharing order](#), to create an entitlement to compensation on retirement for the spouse or civil partner named in the order^{lxiv}
- a **pension compensation capital sum order** (or 'earmarking order'), [a possible order additional to a capital sum order](#), which says that compensation will be payable to the other spouse or civil partner when a lump sum becomes payable.^{lxv}

lx [Family Law \(Scotland\) Act 1985](#), sections 8(1)(ba) and 12A.

lxi [Pensions Act 2004](#), Parts 2 and 3.

lxii [Family Law \(Scotland\) Act 1985](#), section 10(4)(b), (4A)(b) and (5A).

lxiii [Family Law \(Scotland\) Act 1985](#), section 8(8).

lxiv [Family Law \(Scotland\) Act 1985](#), sections 8(1)(bab) and 8B.

Incidental orders

The court can also make a range of **incidental orders**, which are other orders which help give effect to the principles of the 1985 Act in practice.^{lxvi}

The court can make an order:

- for the sale of property, including a sale postponed to a future date
- for the valuation of property
- determining any dispute between the spouses or civil partners as to their respective property rights
- an order regulating the occupation of the family home, or use of the furniture and contents therein, or excluding either spouse or civil partner from such occupation.

lxv [Family Law \(Scotland\) Act 1985](#), sections 8(1)(bb) and 12B.

lxvi [Family Law \(Scotland\) Act 1985](#), sections 8(1)(c) and 14.

The end of a cohabiting relationship

This part of the briefing considers the law which applies at the end of a cohabiting relationship in relation to the couple's property and finances.

As with the equivalent area of law applying to divorce or dissolution, financial awards to a cohabitant are often referred to as **financial provision**.

This part of the briefing covers the following topics:

- [an introduction to key sources of law in this area](#)
- [the role of legally binding agreements](#)
- [the Family Law \(Scotland\) Act 2006](#), the main piece of legislation covering this area
- [how land and buildings owned by cohabitants are treated in law](#), including the couple's home
- [the specific role of an area of law known as unjustified enrichment](#).

Note that, in **2022**, the [Scottish Law Commission](#), the independent statutory body which makes recommendations for law reform to the Scottish Ministers, published [a report relating to the law on cohabitation](#). It makes recommendations for the reform of the law which applies to financial provision.

The [Scottish Government's](#) responded to this report in **February 2023**. In **December 2023**, it confirmed it would be consulting in this area.

Accordingly, it is possible that there may be legislative reform in this area at some future date. **This section of the briefing states the current law.**

Key sources of law

There are **three main sources of law** for cohabiting couples on relationship breakdown:

- the [Family Law \(Scotland\) Act 2006](#), an Act of the Scottish Parliament, [which contains important provisions for cohabitants at the end of their cohabiting relationship](#)
- [contract law](#), under which a couple can make a **cohabitation agreement** at the start of, or during, their relationship, as well as a **separation agreement**, once the relationship has broken down
- [the general principles of property law](#) - this area is relevant for any land or buildings owned by the couple, or either of them, including their home
- [the law of unjustified enrichment](#), which operates in practice to provide an important legal remedy for some cohabiting couples.

This section of the briefing explores each of these areas of law in more detail.

Legally binding agreements

Prior to living together, or at an early stage in their cohabiting relationship, a couple might reach an agreement about how all or some of their property and finances should be treated on separation.

Broadly, these arrangements, sometimes called **cohabitation contracts** or **cohabitation agreements**, are the equivalent of [prenuptial agreements for spouses and civil partners](#).

Likewise, at the end of their relationship, a separating couple might make a **separation agreement** and register it as a **Minute of Agreement** in [the Books of Council and Session, as described earlier for spouses and civil partners](#).

A key point to note is that, for the legal agreements described above, there is no legislative equivalent to the provision in the 1985 Act applying to spouses and civil partners. As noted earlier, for spouses and civil partners, [the 1985 Act allows a court to set aside a prenuptial or separation agreement on the grounds it was not fair or reasonable at the time it was entered into](#).^{lxvii}

However, under the general law of contract, there are restrictions on a couple's freedom to contract. For example, a contract can be struck down on grounds including:

- **error**, where the couple misunderstood some material aspect of the contract or the circumstances surrounding it
- **fraud**, that is, deception for gain, and **extortion**, threats of something to obtain someone's consent
- **facility and circumvention**, where a vulnerable person has been taken advantage of for someone else's gain
- **undue influence**, where there has been an abuse of a position of trust.

[The next section of the briefing](#) explains that a cohabitant might make a financial claim under the [Family Law \(Scotland\) Act 2006](#) ('the 2006 Act') at the point of relationship breakdown.^{lxviii}

The 2006 Act does not say what the legal relationship is between a prior cohabitation agreement and a later financial claim under the 2006 Act. [This contrasts with the position for spouses and civil partners, where the legislation says that, in certain circumstances, a legally binding agreement is a relevant consideration for the court](#).^{lxix}

lxvii [Family Law \(Scotland\) Act 1985](#), section 16.

lxviii [Family Law \(Scotland\) Act 2006](#), section 28.

lxix [Family Law \(Scotland\) Act 1985](#), section 10(6)(a).

Family Law (Scotland) Act 2006

This section of the briefing now considers the [Family Law \(Scotland\) Act 2006](#) ('the 2006 Act'):

- The most important provision of the 2006 Act permits a former cohabitant to apply to the court for [a financial award from the other person in the couple](#).^{lxx}
- Two other statutory provisions cover rights in [certain household goods](#), as well as [certain savings and property](#).^{lxxi}

A financial claim for cohabitants

First, the possibility of a **financial claim for cohabitants** under the 2006 Act is explored.

Who may make a financial claim?

To make a financial claim, or to fall in scope of the other relevant sections of the 2006 Act, the person must qualify as a **cohabitant** under the 2006 Act.^{lxxii}

The original definition of this term still appears on the face of the 2006 Act. However, the 2006 Act must now be read with section 4 of the [Marriage and Civil Partnership \(Scotland\) Act 2014](#). Accordingly, for the purposes of the 2006 Act, the working definition of a cohabitant (whether they are part of a mixed-sex or a same-sex couple) is as follows:

“ A person who is (or was) living with another person as if they were spouses.^{lxxiii} ”

In deciding whether a person qualifies under this definition, the 2006 Act directs the court to have regard to:

- the length of the cohabitation
- the nature of the relationship during that period
- the nature and extent of any financial arrangements during that period.^{lxxiv}

Time limit for making a financial claim

Under the 2006 Act, the court action must be made not later than **one year** after the day on which cohabitants stop cohabiting.^{30 31} The court has **no discretion to extend the time limit** in any circumstances.^{lxxv}

lxx [Family Law \(Scotland\) Act 2006](#), section 28.

lxxi [Family Law \(Scotland\) Act 2006](#), sections 26 and 27.

lxxii [Family Law \(Scotland\) Act 2006](#), section 28.

lxxiii [Family Law \(Scotland\) Act 2006](#), section 25; [Marriage and Civil Partnership \(Scotland\) Act 2014](#), section 4.

lxxiv [Family Law \(Scotland\) Act 2006](#), section 25(2).

Types of court order

Section 28 of the 2006 Act empowers the court to make the following orders:

- an order for the payment of a capital sum (referred to by solicitors as a **section 28(2)(a) order**)
- an order to pay the applicant an amount to cover any economic burden of caring, after the end of cohabitation, for a child of whom the cohabitants are parents (a **section 28(2)(b) order**)
- such **interim order** (that is, a temporary one) as the court thinks fit, pending final resolution of the case.^{lxxvi}

Unlike with divorce or dissolution, the court cannot make an order in respect of the transfer of property, or orders in respect of pensions.

Payments of a capital sum can be deferred to a future date and paid in instalments.^{lxxvii}

There is some academic debate as to whether [an order for a periodic allowance](#) might be competent for a section 28(2)(b) order.^{32 33} One leading textbook says that legal practitioners and courts are proceeding on the basis that claims are limited to a capital sum.³²

Economic advantages and disadvantages

In considering whether to make [any of the court orders under section 28 of the 2006 Act](#), the 2006 Act says the court must "have regard to" certain issues.^{lxxviii} In practice, the significance of these issues is in the context of [a section 28\(2\)\(a\) order](#) (an order for the payment of a capital sum).

[Drawing its inspiration from the statutory regime for divorce and dissolution](#), these issues are:

- whether, and if so to what extent, the cohabitant defending the court claim (**the defender**) has gained an **economic advantage** from the contributions made by the applicant
- whether, and if so to what extent, the applicant has suffered **economic disadvantage** in the interests of the defender and any **relevant child**.

lxxv [Family Law \(Scotland\) Act 2006](#), section 28(8).

lxxvi [Family Law \(Scotland\) Act 2006](#), section 28(2).

lxxvii [Family Law \(Scotland\) Act 2006](#), section 28(7).

lxxviii [Family Law \(Scotland\) Act 2006](#), section 28(3).

Which children are covered?

A **relevant child**, considered as part of the assessment of any economic advantages and disadvantages, is under the age of 16 and is either a child of the cohabitants or was accepted by the cohabitants as a child of their family.^{lxxix}

This is a broader, but overlapping, category of child compared to the child who is the focus of a [section 28\(2\)\(b\) order](#), that is, the order specifically relating to the financial burden of childcare. Such an order can only be made in respect of a child of whom the cohabitants are the parents.

Contributions include indirect and non-financial contributions made by looking after any relevant child or any house in which the couple lived.

Economic advantage includes gains in capital, income or earning capacity; **economic disadvantage** includes losses in capital, income and earning capacity.^{lxxx}

In respect of [any possible section 28\(2\)\(a\) order](#), the court must then consider:^{lxxxi}

- the extent to which any economic advantage derived by the defender from the applicant's contributions is offset by any disadvantage sustained by the defender in the interests of the applicant and any relevant child
- the extent to which any economic disadvantage sustained by the applicant in the interests of the defender is offset by any economic advantage the applicant has derived from the defender's contributions.

It is only if, after this balancing exercise, there is an economic imbalance in favour of the applicant, that a [section 28\(2\)\(a\) order](#) can be made.

Gow v Grant (2012)³⁴

In this leading UK Supreme Court case, the court emphasised that the overarching principle here was one of fairness rather than precise economic calculation focusing on where the couple were at the beginning of their relationship compared to where they were at the end.

Essentially, a broad brush approach is required and any balancing exercise should be done in a non-technical and practicable way.³³

Household goods

The 2006 Act also contains provisions on certain issues associated with the couple's

^{lxxix} [Family Law \(Scotland\) Act 2006](#), section 28(10).

^{lxxx} [Family Law \(Scotland\) Act 2006](#), section 28(9).

^{lxxxi} [Family Law \(Scotland\) Act 2006](#), section 28(4),(5) and (6).

property.

Specifically, it covers **household goods**, as well as **certain savings and property**. The first topic is considered in this section of the briefing [and the second topic is covered in the next section](#).

To be covered by the parts of the 2006 Act on household goods and certain savings and property, the couple in question [must qualify as cohabitants under the statutory definition in the 2006 Act](#).

Section 26 of the 2006 Act covers the situation where the ownership of any household goods might be an issue between the couple.

Section 26 says that there is a **presumption** (broadly, a fixed starting point for the court) that each cohabitant has **an equal share of ownership** in any household goods acquired during the period of cohabitation.

Household goods includes ornamental or decorative goods. It does not include, for example, money, shares, a car (or other road vehicle) or any domestic animal, such as a pet.^{lxxxii}

It does not include those items gifted to one cohabitant, or inherited by them, from a third party.^{lxxxiii}

The statutory presumption relating to the ownership of household goods is **rebuttable**, meaning it can be departed from in an individual case if the circumstances justify this.^{lxxxiv}

Certain savings and property

Section 27 of the 2006 Act, like [section 26 \(household goods\)](#), is adapted from an equivalent provision for spouses and civil partners (and not so far discussed in this briefing).^{lxxxv}

The provision for spouses and civil partners aimed to accommodate the traditional marriage. Specifically, it focused on the situation where one spouse receives a **housekeeping allowance** from the other.

Section 27 of the 2006 Act says that any **savings** made from housekeeping allowances by cohabitants, or any **property bought with such money**, should be owned equally between them.

^{lxxxii} [Family Law \(Scotland\) Act 2006](#), section 26(4).

^{lxxxiii} [Family Law \(Scotland\) Act 2006](#), section 26(2).

^{lxxxiv} [Family Law \(Scotland\) Act 2006](#), section 26(3).

^{lxxxv} [Family Law \(Scotland\) Act 1985](#), section 26.

This rule applies unless there is **any agreement to the contrary** between the cohabitants.

Significantly, **property**, as defined in section 27, does not include a residence used by the cohabitants as the sole or main home in which they live (or lived) together.^{lxxxvi}

The couple's home and other land and buildings - the role of property law

It is important to emphasise the limited regard the 2006 Act has to **heritable property**, that is land and buildings.

Heritable property includes, for example, any home the couple share (or rather shared) and any investment properties, such as flats which are rented out.

The approach of the 2006 Act here to heritable property was a deliberate choice by policymakers compared to [the approach for spouses and civil partners set out earlier in the briefing](#).

For cohabitants, the ordinary rules of property law apply. This means that where the legal title to land or property is **in the name of both cohabitants**, then they will own in jointly, in the proportions set out in the [title documents](#) (or, to use the more traditional term, **title deeds**).

If the legal title is registered **in the name of one of the cohabitants**, only that cohabitant is the owner of the property. This can lead to unfairness, if, for example, the non-owning cohabitant has made contributions relating to that property, such as contributions to the purchase price, home improvements, mortgage payments or contributions to household bills.

However, if a cohabitant's application to the court is [made within the one-year statutory time limit](#), these contributions may form part of [an assessment of economic advantages and disadvantages](#) for the purposes of [a possible financial award under the 2006 Act](#).

There is also a potential role for **the law of unjustified enrichment**, [discussed in the next section of the briefing](#).

^{lxxxvi} [Family Law \(Scotland\) Act 2006](#), section 27(3).

Unjustified enrichment

Unjustified enrichment (the scope of which extends beyond family law) is a legal remedy based on the idea that where one person has benefited without legal justification at the expense of another person the law ought to compel them to provide compensation.

A key issue associated with this area of law (over a long time period) is whether claims can be pursued on the basis of unjustified enrichment when other legal remedies are available to a person.

Some judges have strongly agreed that all other remedies must take priority over unjustified enrichment, while others thought it was a matter of circumstance for each case.
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Pert v McCaffrey (2020) ³⁶

This leading case related to a dispute between cohabitants and concerned the interrelationship between the law of unjustified enrichment and [possible financial claims under section 28 of the 2006 Act](#). The cohabitant applying to the court could not rely on section 28 as she had not made any such claim [within the one-year statutory time limit](#).

On appeal, the Court of Session decided that an (expired) claim under section 28 was not an alternative remedy which might affect the availability of unjustified enrichment as a possible remedy. In other words, the expired section 28 remedy did not prevent the case being made for unjustified enrichment.

For a concise history of the judicial thinking in this area prior to this case, and related challenges for solicitors, see [a 2020 article by a legal practitioner in the Journal of the Law Society of Scotland](#).³⁷

Resolving disputes without going to court

This section of the briefing, and the [Advice and support section](#) which follows it, apply to the breakdown of all types of legally recognised adult relationships.

When a couple cannot agree on an issue which is important to them, going to court has potential benefits, including the court reaching a legally binding decision as to what should happen next.

However, court action also has potential drawbacks, including the expense, [unless the costs are fully met out of the Civil Legal Aid budget](#),³⁸ and the possibility of additional stress for the couple involved.

For many couples, it is best if they can come to an amicable agreement on issues associated with the divorce, dissolution or separation.

[As noted earlier in the briefing](#), for some couples, resolution outside the court process, with direct communication between the people concerned, is not a desirable or indeed safe option. For example, this can apply if one party is abusive and poses a risk to the other party or to any child.

As noted earlier, anyone signposting people to possible services should always keep this important issue in mind.

Alternative dispute resolution (ADR) is the specific term sometimes used to describe a collection of methods designed to enable people to resolve disputes outside the court process.

This section of the briefing describes types of ADR used in disputes between couples. [Ways of finding an individual provider of ADR are discussed in the final section of the briefing.](#)

Family mediation

The main type of ADR currently used is **family mediation**. Mediation involves an independent and impartial person helping the couple to negotiate a potential solution to a problem in a confidential setting.

The couple, not the mediator, decide the terms of any agreement. The outcome is not legally binding without further steps being taken separately.

On entering into a legally binding agreement, see the earlier sections of the briefing [for spouses and civil partners](#), and [for cohabitants](#).

Mediation in family cases is mainly provided by third sector organisations or by solicitors who are also qualified as mediators.

There is no compulsion to participate in mediation. Both people must be willing to participate voluntarily for the process to work.

The cost of mediation depends on the type of mediation service that is used, as well as eligibility for legal aid.

For people on low and moderate incomes, legal aid may be available for family mediation (but not for other forms of ADR).

Collaborative law

With **collaborative law**, the couple and each of their lawyers meet together in a four-way conference, aiming to negotiate a fair outcome.

A key aspect of the process is that everyone enters into a contract at the outset. This prevents the couple from instructing the collaborative lawyers to raise a court action if their negotiation fails. The aim is to incentivise all those participating to reach a successful outcome.

Arbitration

In **arbitration**, a third party, who often has specialist expertise or knowledge, will decide how the dispute should be resolved. **The outcome is legally binding**. Arbitration is more commonly used in commercial or employment law cases, however, it can also be used in family cases.

Advice and support for constituents

This final section of the briefing outlines some sources of advice and support for constituents.

Legal advice

Some solicitors are family law specialists. If someone needs help finding a solicitor, as mentioned earlier, [the Law Society of Scotland](#) has [an online search facility](#). An individual can search by specialism, by geographical area and identify solicitors, or firms of solicitors, who take on legal aid cases.

In addition, the [Family Law Association](#), a membership organisation for family law specialists, has [a similar online search facility](#).

SPICe has also published a briefing entitled [Legal advice - where to go and how to pay](#).³⁹

Alternative dispute resolution

There are various ways to find a **family mediator** in Scotland:

- The network of [Relationships Scotland](#) provides family mediation services across Scotland. See [Relationships Scotland's webpage on family mediation](#) for more details.
- An individual can find a local mediation service [using the search facility on the Scottish Mediation website](#).
- [CALM Scotland](#) offers mediation services from experienced lawyer-mediators that can help with ways of resolving disputes and problems associated with parents separating.

For providers of **collaborative law**, [a specific type of ADR for family disputes discussed earlier](#), the [online search facility](#) of the organisation, [Consensus Scotland](#), is the recommended starting point.

Likewise, for **arbitration** in family cases, [a legally binding form of ADR](#), the [online search facility](#) provided by the [Family Law Arbitration Group Scotland \(FLAGS\)](#) can enable a search for solicitors specialising in this area.

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