SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT STIRLING

[2019] SC STI 3

F88/17/STI

JUDGMENT OF SHERIFF SG COLLINS QC

in the cause

JAMES FOX

Pursuer

against

KAREN FOX

Defender

Pursuer: Sajid; Aberdein Considine
Defender: Berrill; Hill & Robb

Stirling, 8 August 2018

The Sheriff, having resumed consideration of the cause:

FINDS IN FACT:

Marriage and divorce

1. The pursuer is 46 years of age. He is a British citizen. The defender is 39 years of age. She is a US citizen. The parties met in England in 2003 and formed a relationship. At that time the pursuer was living and working in Holland. The defender was living and working in the USA. The parties married at Bradford on 7 January 2004 and both relocated to the UK in order to live together.

2. The parties separated on 27 June 2015. They have not lived together nor had marital relations since that date. The pursuer seeks decree of divorce and the defender consents to this. The marriage has broken down irretrievably.

Residence and contact

3. There is one child of the marriage, AF, born 3 October 2011 and therefore now six years of age. AF has resided with the defender since the date of separation and it is in her best interests to continue to do so. The pursuer is entitled to contact with AF as set out in the interlocutor of the court of 26 April 2018. Parties are agreed that no further orders of court are required in relation to her.

The parties' finances during the marriage

Employment

4. Both parties were in full time employment for most of the period of the marriage prior to the date of separation. Their respective earnings fluctuated over this period. On a number of occasions the pursuer was on extended sick leave or garden leave, but continued to be paid his full salary. On other occasions he was unemployed and so not earning. The defender was almost continuously in employment throughout, but took maternity leave after the birth of AF, which caused her income to fall around this time.
5. The parties' respective gross annual incomes from employment are as set out at paragraphs 29 to 32 of the joint minute number 21 of process. The pursuer's total gross employment earnings for the tax years relative to the period of cohabitation after marriage totalled around £373,000. The defender's total gross employment earnings for this same period totalled around £314,000. Both parties contributed all of their earnings

to the marriage. The pursuer earned more than the defender in seven of their eleven years together; the defender earned more than the pursuer in the other four years.

Savings

6. When they married the pursuer and the defender both had current accounts in their own names. They retained these accounts after the marriage and each paid their employment income into their own account. However the parties used the pursuer's current account as the main household account for payment of bills, etc., including credit cards which were used for day to day expenditure. Accordingly the defender would transfer an agreed sum from her current account to the pursuer's current account every month, thereby contributing to the payment of the parties' joint expenditure.
7. As at the date of the marriage the pursuer also held a savings account and a cash ISA account in his own name. The combined balance of these accounts was around £4,000, albeit that within a few weeks of the marriage this had been reduced to around £2,500. The pursuer subsequently paid £4,400 into these accounts which he received from the sale of a car purchased prior to the marriage. The parties had a number of significant expenses around this time, for example, the costs of their respective relocations, their honeymoon in the USA, etc., and the pursuer paid for most of these.
8. Prior to the marriage the defender agreed with the pursuer that any pre-marriage savings of his would be for him to spend as he wished after the marriage, and without reference to her. However there was no agreement between them that she would make no financial claim against any item of matrimonial property which he chose to purchase with such savings, were the parties later to separate.

9. From the outset of the marriage, the parties' joint intention was to save for a deposit on a house. The pursuer's savings and ISA accounts were used for this purpose. Accordingly the parties tried to live frugally, and if there was money left in the pursuer's current account after paying the parties' joint monthly expenditure he would transfer it to his savings account or ISA account. On occasions, however, the parties chose to spend some of their savings in order to make joint purchases. On these occasions the pursuer would withdraw money from his savings account or ISA account for this purpose. Accordingly the balances of these said accounts rose and fell over the course of the marriage. Additionally, the parties opened and made deposits into new saving accounts or ISAs during the marriage, in their sole names or in joint names, moving their money around so as to maximise available tax advantages and interest rates.

10. In the circumstances the pursuer did not ring fence nor isolate his said pre-marriage savings from the savings to which both parties were contributing after the marriage. Money was paid into the pursuer's said ISA and savings accounts, and the balances of these accounts were added to, drawn upon, transferred to other accounts, or simply maintained, according to the joint needs, resources and contributions of both parties during the marriage. No significant, identifiable part of the pursuer's said pre-marriage savings can be clearly traced to the purchase of any item of matrimonial property held at the date of separation.

The matrimonial home

11. For around the first two years of the marriage the parties lived in rented accommodation in England. They subsequently moved to Scotland and in February 2007 they purchased a house in Cooperage Quay, Stirling ("the matrimonial home"). The purchase price was

£180,000. Title was taken in joint names. The parties paid a deposit of £9,000 and took out a joint mortgage for the balance. The fees and outlays associated with the purchase were £2,835. The parties paid the said deposit, fees and outlays from their joint savings.

12. Between around 2008 and 2011 the parties moved to Kent in order that the pursuer could take up new employment there. They let out the matrimonial home and received rental income in respect of it. The rent received was between £600 and £800 per month. That income was paid into a joint account and used or saved for joint purposes. Thereafter the parties returned to live in the matrimonial home together, and continued to do so until they separated.

Money from the pursuer's mother

13. In March 2008 the pursuer's mother, Mrs Carolyn Fox, loaned the parties £2,000 to assist them with expenses in connection with their relocation to Kent. This loan was repaid by them in April 2008.

14. In December 2009 Mrs Fox made a further payment to the pursuer, this time of £9,000. The pursuer's father having recently died, and Mrs Fox having realised some money from sale of a house, she wished to gift this sum to each of her four children. The pursuer said to Mrs Fox that he did not want to accept the money as a gift. She therefore agreed to call it a loan, by which she meant only that the pursuer could pay it back when and if she had need of it. No other time or conditions for repayment were ever agreed.

15. The pursuer did not put the said £9,000 into a separate account, nor did he ring fence it from the parties' income or other savings. Instead, he put the money into his current account, where it was used, along with the parties' earned income from employment, to pay their joint day to day expenses. Some of it was transferred to the parties' other

accounts and used or saved for joint purposes along with the other funds in those accounts. No significant, identifiable part of this money can be clearly traced to the acquisition of any item of matrimonial property held at the date of separation.

16. Mrs Fox has never asked the pursuer to pay the said £9,000 back. As the parties have spent the money she will not now do so.

Mortgage overpayments

17. The mortgage taken out by the parties over the matrimonial home in 2007 was a capital and interest repayment mortgage. The total monthly payment was around £970 of which only around £200 was attributable to repayment of capital.

18. Between around January 2009 and January 2012 the parties overpaid their mortgage by an additional £500 per month. This overpayment was paid from joint resources, earned during the marriage. This was done with a view to reducing the parties' interest payments and to build up equity in the matrimonial home. The decision to do so was a joint decision by the parties, taken in the light of their financial position at the time.

19. The mortgage taken out when the parties purchased the matrimonial home was a five year fixed rate mortgage. This came to an end in February 2012, at which time the parties took out a new mortgage, at a much lower rate of interest. When they did so they made an additional overpayment in the sum of £11,000. As a consequence, the parties' monthly repayments under their new mortgage were reduced to around £750, of which around £585 was attributable to capital.

20. The total overpayments made by the parties, including the £11,000 paid in March 2012, amounted to £29,000. The parties did not make any further overpayments thereafter. All the overpayments were made as a result of the joint effort of both parties during the

marriage. They both contributed to these overpayments from their joint savings, their respective earnings from employment and the said rental payments, all as available net of the joint day to day living expenses which they jointly chose to incur.

The defender's student loan

21. Prior to the marriage, and when still resident in the USA, the defender had taken out a student loan to help pay for her college course. A significant balance of this loan was outstanding at the date of marriage. Between the date of marriage and the date of separation the parties made repayments of this loan of around £5,500.

22. When the parties were on holiday in the USA during the course of the marriage, visiting the defender's family, the pursuer was able to make cash withdrawals from his current account in such a way that he could avoid currency charges. He would make such withdrawals and payments would then be made directly into the defender's student loan account to reduce the balance. The defender would however make payments into the pursuer's current account prior to and after their visits to the USA, at least some of which were for the purpose of reimbursing him for the sums taken out and paid into the defender's student loan account. The defender would also on occasion make transfers of money direct from her current account into a Wells Fargo bank account held by her in the USA, from which payments were then made to her student loan account.

23. All the said repayments to the defender's student loan, however made, were ultimately derived from the parties' joint earnings from employment during the marriage.

The pursuer's life insurance policy

24. In around 2003 the pursuer had received a redundancy payment when he left employment in Holland. He later put this money into a ten year pension fund in that country, which was later still transferred into a life insurance policy. The life insurance was due to be paid out over a period of six years. The first payment was not made to the pursuer until around 2014, and was for £3,374. The pursuer used this money to pay the parties' credit card bills.

Pensions

25. The parties both made contributions to employment related and personal pension arrangements throughout the marriage.

The matrimonial property at the date of separation

26. As at the date of separation the parties had the following matrimonial property and matrimonial debts:

    i. The matrimonial home, which had a market value of £180,000, and in respect of which the outstanding balance of the mortgage was £106,169;

    ii. The pursuer's pensions, with Diageo, Kone-Prudential and Saint-Gobain. The cash equivalent transfer values (CETV) of these three pensions at the date of separation were £24,044, £7,282 and £40,454 respectively;

    iii. The defender's pensions, with Bakkavor and Standard Life. The CETVs of these two pensions at the date of separation were £42,787 and £21,789 respectively;

    iv. The pursuer's shares in Diageo and Saint-Gobain. The value of those shares at the date of separation were £17,370 and £21,518 respectively;

v. The pursuer's First Direct bank account in his own name with a balance of £1,472; and

vi. The defender's First Direct and Wells Fargo bank accounts in her own name with balances of £237 and £2,128 respectively.

The parties have separately agreed division of the contents of the matrimonial home and no claims are made by either party in this action in relation to these.

The parties' finances since separation

Employment

27. When the parties separated the pursuer was earning around £29,000 per annum. He had a further period of sickness absence followed by a period of unemployment in 2016. In early 2017 he obtained new employment in Bolton, with a salary of around £30,000, and moved to Horwich for this purpose.

28. Overall, since even before the date of the parties' marriage, the pursuer has had a relatively unstable employment history. It has been affected by conflicts with his superiors, work related stress, extended periods of sickness absence, periods of unemployment and changes of employer. However the pursuer has generally continued to receive full pay during his periods of sickness absence, so his income has not fallen as a result. He remains in full time employment at the date of proof, and is committed to continue working and earning. Nevertheless he presently earns significantly less than he did prior to 2012 and his prospects of increasing his income in the future are uncertain.

29. The defender was earning around £34,000 per annum when the parties separated. In around January 2017 she obtained promotion and her income increased to around

£53,000 per annum. As at the date of proof her income has increased to more than £54,000 per annum.

30. Overall, since the date of the parties' marriage, the defender has had a stable and successful employment history. Her earnings have tended to increase throughout this period, with the exception of the period immediately following AF's birth. She is now in very well paid and secure employment, and is likely to maintain or further increase her level of earnings in the future.

The matrimonial home

31. When the parties separated the pursuer left the matrimonial home. The defender has continued to live there with AF.

32. For three months following separation the parties continued to pay the monthly mortgage payments jointly. Since then the defender alone has paid the mortgage. She continues to do so.

33. As at the date of proof the matrimonial home continued to have a market value of £180,000. However as a result of the said repayments since separation the balance of the mortgage was £86,451.

34. Since the date of separation the defender and AF have had the continued, exclusive use of the matrimonial home. This is a comfortable, furnished, three bedroom detached house, in a reasonable state of repair and maintenance, located in a good residential area. Since July 2017 the defender's new partner has resided there with her. She could have asked him for a contribution to the mortgage and other costs of ownership of the house, but has chosen not to do so.

35. Since leaving the matrimonial home the pursuer has lived in rented accommodation. Between July 2015 and February 2017 the pursuer lived in a studio flat in a shared house, paying a monthly rent of just under £300 per month. In February 2017, following his move to Horwich, he has resided as a lodger with a live-in landlord, having exclusive use of a single room only with shared use of common areas. For this accommodation, the pursuer has paid rent of just under £400 per month. The total sums paid on rent by the pursuer between the date of separation and the date of proof have therefore amounted to around £12,800.

36. The defender is well able to obtain and afford to pay a mortgage over the matrimonial home in her own name, in view of her current earnings from employment and the amount of equity in the property. She would be able to do so even if she were also required to pay a capital sum to the pursuer, increasing her borrowing against the matrimonial home for this purpose.

37. It is in AF's best interests to continue to reside in the matrimonial home at present. She has lived there all her life. She is settled there, and is doing well in her education, health and development. The matrimonial home is suitable accommodation for her. She has her own bedroom. She attends a local primary school, around ten minutes' walk from home. She has friends in the area and the usual range of interests and locally based extra curricular activities of a girl her age.

38. The pursuer wishes to purchase a house for himself. He has been unable, or in any event understandably unwilling, to do so own pending resolution of the parties' financial dispute. Meantime the rented accommodation in which he currently lives is not suitable for him to exercise residential contact with AF. In particular he has exclusive use only of a single room, which AF shares when she stays with him in Horwich. His

ability to purchase suitable accommodation, and in particular one in which he can provide AF with her own room, will depend at least to some extent on the outcome of this case.

Child care costs

39. In terms of the court's interlocutor of 26 April 2018 the pursuer has residential contact with AF every other weekend during school terms. Alternately, this contact takes place in Scotland and in Horwich. The pursuer also has residential contact with AF for nearly one half of all the school holidays. Averaged over the year he has residential contact for nearly two days per week.

40. The defender incurs the normal range of costs associated with having the majority care of a generally healthy young child as a single parent, working full time. In particular, the defender works 9am to 5pm, Monday to Friday and has a 30 to 45 minute commute to work. Accordingly AF has to attend a breakfast club and afterschool club four days a week. On the fifth day AF goes to a child minder. The defender is required in terms of her employment to sometimes travel and stay overnight away from home, and incurs further child minding costs on these occasions. The defender also has to pay for holiday clubs for AF for those periods during the school holidays when the defender is not herself on leave. AF also attends extra curricular activities such as gymnastics, Rainbows and swimming, which the defender pays for. More generally, the defender incurs costs in relation to providing food, clothing and accommodation for AF.

41. Given the contact arrangements, the pursuer incurs travelling costs, driving to and from Horwich to Stirling and back. On those weekends when contact takes place in Scotland, he incurs accommodation costs for himself and AF. Presently, he chooses that they stay

in hotels and eat out. The pursuer also incurs the costs of activities with AF, such as swimming. During the school holidays he too will likely incur the cost of holiday clubs, etc. and other activities for AF for those periods when he is not himself on leave. He will also have to bear a share of the ongoing costs of food and clothing for AF proportionate to the time when she is in his care, and of providing and maintaining suitable accommodation for her.

Child maintenance

42. Between the date of separation and April 2016 the pursuer made payments to the defender by way of aliment for AF, and paid childcare vouchers in respect of her, as agreed between the parties. In around May 2016 the pursuer lost employment and stopped making these payments. The defender made an application to the Child Maintenance Service (CMS). On 2 August 2016 the pursuer was assessed by CMS as liable to pay £7 per week in respect of the parties' child from 29 June 2016. From 13 February 2017, when the pursuer took up his new employment in Bolton, he was initially assessed as liable to pay £85.71 per week, although this was subsequently reassessed at £54.23 per week. From 29 June 2017 the pursuer was assessed as liable to pay £68.24 per week. From 7 February 2018 he has been assessed as liable to pay £49.57 per week.

43. Both parties have taken issue at different times with the assessments made by CMS since 2016. In particular, the pursuer challenged the assessment made with effect from 13 February 2017 and did not pay the full amount meantime. The defender failed to timeously notify CMS that the pursuer was not paying the full amount, and his liability

was subsequently reassessed at a lower figure. Accordingly the pursuer is not currently in arrears as regards payment of any of the sums assessed as due by CMS.

44. The pursuer's ongoing liability for child maintenance has now been reassessed to take account of the amount of contact which the pursuer is entitled to have with AF pursuant to the court's interlocutor of 26 April 2018. It has also been adjusted in his favour to make some allowance for the costs of his travelling in order to exercise contact.

FINDS IN FACT AND LAW

1. The parties' marriage has broken down irretrievably as evidenced by their non cohabitation for a period of more than one year immediately prior to the raising of the action and the defender's consent to divorce.
2. Fair sharing of the parties' matrimonial property will be achieved by equal division of the total value of it.
3. An order transferring from the pursuer to the defender his interest in the matrimonial home is justified and reasonable having regard to the principles in the 1985 Act and the resources of the parties.
4. An order requiring payment of a capital sum by the defender to the pursuer is justified and reasonable having regard to the principles in the 1985 Act and the resources of the parties.

THEREFORE

1. Divorces the defender from the pursuer;
2. Makes an order for payment of a capital sum by the defender to the pursuer in the sum of £24,760;

3. Grants decree, subject to payment of the said capital sum, for the transfer of the pursuer's right to title and interest in the heritable property at Cooperage Quay, Stirling FK8 1JH to the defender; ordains the pursuer to make, execute and deliver to the defender a valid disposition of his right title and interest in the said property and such other deeds as may be necessary to give the defender a valid title to it, and to do so on or before 1 November 2018; and in the event of the pursuer failing to make, execute and deliver such disposition and other deeds by this said date, authorises and ordains the sheriff clerk at Stirling to subscribe on behalf of the pursuer a disposition of the pursuer's right title and interest in the said property and such other deeds as may be necessary to give the defender a valid title to it, all as adjusted at the sight of the sheriff clerk; and
4. Reserves all questions of expenses meantime, other than already determined.

NOTE

Introduction

[1] In this action the pursuer seeks divorce, orders for contact with AF, and orders for financial provision. The defender opposed the contact orders sought (in their details rather than in principle), sought a specific issue order in relation to AF, and made her own claims as regards financial provision. By interlocutor of 21 November 2017 a diet of proof was assigned for 23 February 2018. At a pre-proof hearing on 23 January 2018 the diet of 23 February 2018 was confined to the question of the nature and extent of the pursuer's entitlement to contact with AF, with a further diet assigned on 18 May 2018 to address the question of financial provision.

[2] I heard evidence on the question of contact and the related specific issue order on 23 February 2018, and further evidence 19 April 2018. Both parties wished me to determine these issues as soon as possible and in particular without waiting until consideration of the financial provision issues at the proof diet already assigned. I therefore issued an interlocutor determining the contact and specific issue order issues on 26 April 2018 together with a Note explaining my reasons.

[3] Thereafter I heard oral evidence in relation to the parties' financial craves. This was ultimately led over four days, 18, 24, and 31 May and 8 June 2018. Formal evidence was also led in relation to the pursuer's crave for divorce, which was not opposed or challenged. I heard again from the pursuer and the defender, and also from the pursuer's mother, Mrs Carolyn Fox. I then heard submissions from parties' agents on 12 June 2018 and made avizandum.

[4] This judgment deals solely with the questions of divorce and financial provision, while taking account of the terms of the interlocutor of 26 April 2018, the nature and extent of contact being relevant in relation to the defender's claim for unequal division based on the costs of caring for AF. Parties were agreed that there was no need for any further orders in relation to her.

The relevant statutory provisions

[5] Section 1 of the Divorce (Scotland) Act 1977 provides that:

> "(1) In an action for divorce the court may grant decree of divorce if, but only if, it is established in accordance with the following provisions of this Act that—
>
> (a) the marriage has broken down irretrievably…

> …(2) The irretrievable breakdown of a marriage shall, subject to the following provisions of this Act, be taken to be established in an action for divorce if—
>
> … (d) there has been no cohabitation between the parties at any time during a continuous period of one year after the date of the marriage and immediately preceding the bringing of the action and the defender consents to the granting of decree of divorce; or
>
> …(e) there has been no cohabitation between the parties at any time during a continuous period of two years after the date of the marriage and immediately preceding the bringing of the action…"

The present action was brought on 26 June 2017, when warrant to serve was granted and service effected.

[6] Section 8 of the Family Law (Scotland) Act 1985 ("the 1985 Act"), insofar as relevant and material to the present action, provides as follows:

> **8.— Orders for financial provision.**
>
> (1) In an action for divorce, either party to the marriage… may apply to the court for one or more of the following orders—
>
> (a) an order for the payment of a capital sum to him by the other party to the action;
>
> (aa) an order for the transfer of property to him by the other party to the action;
>
> … (c) an incidental order within the meaning of section 14(2) of this Act.
>
> (2) Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any, as is—
>
> (a) justified by the principles set out in section 9 of this Act; and
>
> (b) reasonable having regard to the resources of the parties.
>
> (3) An order under subsection (2) above is in this Act referred to as an "order for financial provision"….

[7] Section 9 of the 1985 Act provides:

> **9.— Principles to be applied.**

(1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that—

(a) the net value of the matrimonial property should be shared fairly between the parties to the marriage…;

(b) fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family;

(c) any economic burden of caring, should be shared fairly between the persons–

(i) after divorce, for a child of the marriage under the age of 16 years;

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

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

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

[8] Section 10 of the 1985 Act, again as material and relevant to the present case, provides:

10.— Sharing of value of matrimonial property…

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

(2) Subject to subsection (3A) below, the net value of the property shall be the value of the property at the relevant date after deduction of any debts incurred by one or both of the parties to the marriage… —

(a) before the marriage so far as they relate to the matrimonial property… and

(b) during the marriage…

which are outstanding at that date.

(3) In this section "the relevant date" means whichever is the earlier of—

(a) subject to subsection (7) below, the date on which the persons ceased to cohabit;

(b) the date of service of the summons in the action for divorce…

(3A) In its application to property transferred by virtue of an order under section 8(1)(aa) of this Act this section shall have effect as if—

(a) in subsection (2) above, for "relevant date" there were substituted "appropriate valuation date";

(b) after that subsection there were inserted—

"(2A) Subject to subsection (2B), in this section the "appropriate valuation date" means—

(a) where the parties to the marriage … agree on a date, that date;

(b) where there is no such agreement, the date of the making of the order under section 8(1)(aa).

(2B) If the court considers that, because of the exceptional circumstances of the case, subsection (2A)(b) should not apply, the appropriate valuation date shall be such other date (being a date as near as may be to the date referred to in subsection (2A)(b)) as the court may determine.";
and
(c) subsection (3) did not apply.

(4) … in this section and in section 11 of this Act "the matrimonial property" means all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)—

(a) before the marriage for use by them as a family home or as furniture or plenishings for such home; or

(b) during the marriage but before the relevant date.

… (6) In subsection (1) above "special circumstances", without prejudice to the generality of the words, may include —

(a) the terms of any agreement between the persons on the ownership or division of any of the matrimonial property or partnership property;

(b) the source of the funds or assets used to acquire any of the matrimonial property… where those funds or assets were not derived from the income or efforts of the persons during the marriage…;

(c) any destruction, dissipation or alienation of property by either person;

(d) the nature of the family property…, the use made of it (including use for business purposes or as a family home) and the extent to which it is reasonable to expect it to be realised or divided or used as security;

(e) the actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce…"

[9] Section 11 of the 1985 Act provides as follows:

11.— Factors to be taken into account.

(1) In applying the principles set out in section 9 of this Act, the following provisions of this section shall have effect.

(2) For the purposes of section 9(1)(b) of this Act, the court shall have regard to the extent to which—

(a) the economic advantages or disadvantages sustained by either person have been balanced by the economic advantages or disadvantages sustained by the other person, and

(b) any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property… or otherwise.

(3) For the purposes of section 9(1)(c) of this Act, the court shall have regard to—

(a) any decree or arrangement for aliment for the child;

(b) any expenditure or loss of earning capacity caused by the need to care for the child;

(c) the need to provide suitable accommodation for the child;

(d) the age and health of the child;

(e) the educational, financial and other circumstances of the child;

(f) the availability and cost of suitable child-care facilities or services;

(g) the needs and resources of the persons; and

> (h) all the other circumstances of the case.
>
> …(6) In having regard under subsections (3)… above to all the other circumstances of the case, the court may, if it thinks fit, take account of any support, financial or otherwise, given by the person who is to make the financial provision to any person whom he maintains as a dependant in his household whether or not he owes an obligation of aliment to that person.
>
> (7) In applying the principles set out in section 9 of this Act, the court shall not take account of the conduct of either party to the marriage… unless—
>
> (a) the conduct has adversely affected the financial resources which are relevant to the decision of the court on a claim for financial provision…"

[10] The policy aim underlying these provisions is to achieve a fair, and presumptively equal, sharing of the matrimonial property on divorce, being the property held by the parties to the marriage at the relevant date. The legislation recognises and values non-economic contributions made by one or both of the parties. And it recognises that not all property held at the relevant date will have been derived from the parties' collective efforts during the marriage, and therefore that the contribution by one party of non-matrimonial resources over time to the creation of matrimonial property may be a special circumstances justifying departure from the presumption of equal sharing: see *EP, G* v *GG* 2016 Fam LR 30 per Lady Wolffe at paragraph 71. But the mere fact that special circumstances are found to exist does not mean that an unequal division must necessarily follow. If such circumstances exist, the question remains as to whether they are such as to justify an unequal division in all the circumstances of the case: see *Jacques* v *Jacques* 1997 SC (HL) 20 per Lord Clyde at 22. And detailed though the legislation is, the question for the court remains essentially one of discretion, aimed at achieving a fair and practicable result in accordance with common sense. As such, the appellate courts are particularly reluctant to open up the assessment of

the details by the court of first instance: see *Little* v *Little* 1990 SLT 785 per Lord Hope at 786I – 787 D. These various observations fall to be applied in the present case.

The witnesses

The pursuer

[11] I found the pursuer to be a rather unimpressive witness. Although not unintelligent, he was often unable or unwilling to answer a straight question with a straight answer, let alone a concise one. He appeared rather anxious, but repeatedly went off on tangents, engaging in long monologues on matters peripheral to the questions asked of him. These often involved him in introspective over-analysis of the issues, and exploration of his motivations and feelings in relation to them. On occasions he would by the end of such a monologue have wholly forgotten the question which he had been asked, and thus have completely failed to answer it. He was also keen to stress how reasonable he thought he was being in relation to his financial claims, and how hurt he therefore was that the defender was not prepared to agree them. Some of his evidence therefore came across as rather rambling and self-pitying. However I was also driven to the conclusion that behind these aspects of his presentation were also elements of evasion and outright dishonesty. I have in mind in particular his evidence in relation to the fact that it was only shortly prior to the proof that he claimed for the first time that the money received from his mother was a loan rather than a gift. On other matters his position was inconsistent even over the course of the proof and changed repeatedly. I have in mind in particular his evidence in relation to his claim for unequal division based on the mortgage overpayments.

[12] Although sometimes pedantic in his attention to the detail of the parties' financial arrangements, the pursuer also appeared unable or unwilling to stand back and recognise

the broader picture, namely that the parties' matrimonial property at the date of separation was essentially due to the efforts of both parties during the marriage. He seemed to want to treat the proof as a kind of forensic accounting exercise, inviting me to pore over years of bank statements and other financial documentation so to separate out 'his' money from 'her' money. In my view that is not the approach required by the 1985 Act, indeed it is almost antithetical to it. The pursuer was keen to emphasise that he was the higher earner during the marriage, and so the bigger contributor to the parties' joint finances. At times he came close to seeming to suggest that this fact alone entitled him to a greater share of the matrimonial property. In the first place this ignores the fact that his overall earnings were not hugely greater than those of the defender during the relevant period – on the agreed income figures he earned only around 55% of the whole to the defender's 45%. But in the second place his approach seemed to want to ignore the very fact that the parties were married, and so made joint decisions on earning, saving and spending over many years, all against the background of a presumption of equal sharing of matrimonial property. It seemed to me that there was therefore at times a somewhat mean failure by the pursuer to acknowledge the extent of the contribution which the defender had made to the marriage, and so to the accumulation of the matrimonial property held at the relevant date.

[13] For these reasons I was unwilling to accept the pursuer's oral evidence on certain key matters as credible and reliable. I rejected his evidence otherwise than as reflected in and consistent with the findings in fact set out above.

Carolyn Fox

[14] Mrs Fox is the mother of the pursuer. Her evidence in chief was given in an affidavit and related solely to the question of whether the £9,000 which she gave to the pursuer in

December 2009 was a loan or a gift. She was called for cross examination on this matter by the defender. Her relationship with both of the parties was clearly a strained one, but she gave her oral evidence in a straightforward matter and I thought her to be generally credible and reliable. She was prepared to say that she had agreed to give the £9,000 to the pursuer as a loan because he said that he would not accept it as the gift she had wanted it to be. However it was clear that she had never asked for it back, and she also said that she would not ask for it back if the pursuer had already spent it. In the circumstances, whether this money really was a loan – and thus a matrimonial debt due for repayment at the date of the parties' separation – or a gift, remained a matter for me to determine.

The defender

[15] Relatively speaking, I thought the defender a better witness than the pursuer. She was intelligent and articulate. However like the pursuer she was, in my view, sometimes overly forensic in her approach, for example in relation to her claim for unequal division in relation to child care costs. Like him, she was firmly of the view that she and only she was being reasonable in her approach to the points in dispute. And like him also, she was not above telling the odd untruth and persisting in it in the face of clear evidence to the contrary. I have in mind in particular her insistence that she did not know the meaning of the expression 'working under the table', when she herself had used this expression in an email, and had already made it clear earlier in her evidence that she knew that it referred to the possibility of her working illegally in the UK prior to getting her visa (although there is no suggestion that she in fact did so). That the parties shared these various characteristics may go some way to explain the need for proof in this case, and indeed the prolonged nature of it.

[16] Nevertheless, in fairness to the defender, her evidence was considerably clearer and more to the point than that of the pursuer. And unlike him she had not, it seemed to me, entirely lost sight of the wood for the trees, in particular in that she had a better appreciation of the very fact that by being married the parties provided financial and emotional support to one another in many ways over the years, and were jointly responsible for the financial decisions which they made. For example, the defender said (and I accept) that the parties only moved to Kent in 2008 because the pursuer had lost his employment in Scotland and had found new employment in Kent. The consequence for her however was that she had to give up her job in Scotland, relocate, and start new employment. Also, she pointed out that the pursuer was unemployed when she was pregnant with AF in 2011. Hers was then the only income coming into the household for a period, and the parties were unable to afford for her to return to work part time, following her maternity leave, as she would otherwise have wished. However she did not seek to advance claims in the present case in relation to such matters, properly recognising them as part and parcel of the parties' married life.

[17] Overall, and importantly, the defender's evidence was that the parties put all their income and assets into the marriage, and that regardless of in whose name the various bank and savings accounts were held, there was in reality one big pot of money, to which they both contributed and from which they both drew. I accepted that, and also the defender's further evidence, that it is therefore hard, if not impossible, to trace whose income or savings went where and paid for what. My findings and conclusions reflect this. I also preferred the defender's evidence to that of the pursuer on certain points of factual dispute, for example, that there was no pre-nuptial agreement between them regarding the use of the pursuer's pre-marital savings in relation to the deposit on the matrimonial home, and that the money received from the pursuer's mother had in practical terms always been treated by all parties

as a gift and not a loan. Again, my findings reflect those parts of the defender's evidence, insofar as material and relevant, that I was prepared to accept.

Divorce

[18] This, at least, was not in dispute. The parties married on 7 January 2004. They separated on 27 June 2015, which is the relevant date for the purposes of the Family Law (Scotland) Act 1985. The parties are agreed that they have not lived together nor had marital relations since that date, and that there is no prospect of reconciliation. There might conceivably have been an argument that the period of two years referred to in section 1(2)(e) of the 1976 Act had not expired prior to the bringing of the action, but it is of no consequence. The defender consents to divorce and the parties had not cohabited for well over one year within the meaning of section 1(2)(d). It is clearly established that the marriage has broken down irretrievably and the pursuer is entitled to decree of divorce as first craved.

The matrimonial property

Schedule

[19] I am satisfied that the parties' matrimonial property in this case is as follows:

Asset	**Joint**	**Pursuer**	**Defender**	**Total**
<u>Matrimonial home</u>				
Cooperage Quay	180,000			
less outstanding mortgage	85,281			
	94,719			94,719

Pensions				
Kone/Prudential		7,282		
St Gobain		40,454		
Diageo		24,044		
Devro			21,789	
Bakkavor			42,787	136,356
Bank Accounts				
First Direct account		1,472		
First Direct account			2,128	
Wells Fargo account			237	3,837
Shares				
Diageo shares		17,370		
St Gobain shares		21,518		38,888
Total	**94,719**	**112,140**	**66,941**	**£273,800**
Half share thereof				**£136,900**

Much of this schedule was, in effect, a matter of agreement, with the parties' disputes largely focussing on how it should be divided. Both parties sought an unequal split in their favour, variously by reference to special circumstances under section 10(6) of the 1985 Act, to the claimed existence of economic advantage or disadvantage under section 9(1)(b), and to the need to achieve fair sharing of the economic burden of sharing care of the parties' child under section 9(1)(c). Two particular aspects of the schedule do require consideration however.

The equity in the matrimonial home

[20] There was no dispute that the market value of the matrimonial home had remained static between the date of purchase, the date of separation and the date of the proof. There was also no dispute as to the balance of the outstanding mortgage at the date of separation, nor that this balance had been reduced substantially since then, almost entirely due to the monthly mortgage payments made by the defender. Both parties' agents submitted, in effect, that the net value of the matrimonial home for present purposes was therefore its value at the date of separation less the outstanding mortgage at date of proof. Neither, however, was able to satisfactorily explain how this could be. Neither referred to the decision in *Wallis* v *Wallis* 1993 SC (HL) 49 – and see also the opinion of the Inner House given by the Lord President (Hope) at 1992 SC 455, and *Kennedy* v *Kennedy*, (unreported) Sheriff Principal Kerr QC, Paisley Sheriff Court, 8 March 2004. These authorities make clear that, as the law then stood, no account could be taken of changes to the value of matrimonial property which occurred post separation in making any order under section 8(1) of the 1985 Act, whether by reference to sections 8(2)(b), 9(1)(b) or 11(2)(b).

[21] The answer to this problem (leaving aside any question of making an award of interest under section 14(2)(f) of the 1985 Act cf. *Geddes* v *Geddes* 1993 SLT 494 at 500K) is that the law has been changed in response to *Wallis* v *Wallis* by the insertion of section 10(3A) of the 1985 Act. This has the effect that where an order for the transfer of matrimonial property is made under section 8(1)(aa) the net value of the property is determined not at the date of separation, but at the "appropriate valuation date". This date is a date agreed by the parties, which failing the date of the making of the property transfer order or,

exceptionally, such other date as near as may be to this latter date as the court may determine.

[22] In the present case the defender does seek a property transfer order under section 8(1)(aa) in respect of the matrimonial home. In her oral submissions the pursuer's solicitor confirmed that he was not in principle opposed to the making of such an order, and that the dispute related only to whether he should receive a capital payment in return, and if so how much. The defender's evidence, which I accept, is that the professional advice which she has received is that given her income she would be able to obtain a mortgage in her own name, even if she were required to make additional borrowing to satisfy all of the pursuer's financial claims against her. It is also plainly in AF's best interests that she should continue to live in the matrimonial home for the foreseeable future, where she is settled and secure. In all the circumstances I am satisfied that the making of a property transfer order is justified by the principles in section 9(1) of the 1985 Act and is reasonable having regard to the resources of the parties.

[23] Accordingly it seems to me that I can and should proceed on the basis that the relevant value of the matrimonial home is its net value at the appropriate valuation date pursuant to section 10(3A). Neither agent referred me to this provision, let alone agreed a date by reference to it. Accordingly the appropriate valuation date will be the date of the making of the property transfer order, that is, the date of the interlocutor to which this judgment is appended.

[24] In the period since the proof it is unlikely that the market value of the matrimonial home will have risen significantly. After all, it is agreed that it has not risen in value since 2007. However the balance of the mortgage will have continued to fall, as the defender will (I have no doubt) have continued to make the monthly payments as they have fallen due. It

is clear from the mortgage statement lodged that as at 8 May 2018 the outstanding balance was £86,451. Net of interest, by my calculation, this balance is reducing at the rate of roughly £585 per month. By the date of the making of the transfer order it will therefore have further reduced by a total of around £1,170 (2 months x £585). Accordingly the outstanding balance will now be in the region of £85,281, and it is for this reason that this figure is included in the schedule of matrimonial property.

[25] Although I have made the transfer order by the present interlocutor, I consider that it should not come into effect until 1 November 2018, being a date approximately three months from now: see 1985 Act, section 12(2). I have selected this date because, as will become clear, I am satisfied that given the transfer to the defender of the pursuer's interest in the matrimonial home, a fair division of the whole matrimonial property also requires a capital payment to him. The defender will require to obtain a new mortgage over the matrimonial home with increased borrowing in order to be able to make that payment. She is financially well able to do this, given her relatively high income, however it will take some time to organise. Three months should be sufficient.

[26] The pursuer should of course execute a discharge of the parties' joint mortgage over the matrimonial home, as part of the necessary conveyancing relative to the property transfer. I was not asked to make an incidental order to that effect under section 14 of the 1985 Act, but I hope that in light of the making of the property transfer order it will not be necessary to do so. However if such an incidental order is sought, the appropriate motion can be enrolled.

The money from the pursuer's mother

[27] The pursuer submitted that the £9,000 paid to him by Carolyn Fox in December 2009 was a loan which remained outstanding at the date of separation. Although also not reflected in his written submissions, I understood his position ultimately to recognise that if this submission was correct this sum should be included in the schedule as a matrimonial debt. Including this debt would have had the effect of reducing the total value of the matrimonial property to £264,800 and a half share thereof to £132,400. The pursuer's position then came to be that he sought an adjustment of any financial award by £4,500 in his favour, to reflect the fact it was he who was personally liable to repay the loan.

[28] There was no dispute that Carolyn Fox had indeed given the pursuer £9,000 in December 2009. She had realised some money following the death of the pursuer's father and she said that she wished to give £9,000 to each of her four children. The pursuer said that he had told his mother that he would only accept the money if it was a loan. This was confirmed by Carolyn Fox both in her affidavit and in her oral evidence. The defender had not been a party to this conversation and could not and did not suggest that it had not happened. The defender's position, however, was that this money was not a loan, but a gift. As such, it did not fall to be included as a matrimonial debt in the schedule. It was accepted that as a gift the money when received by the pursuer was not itself matrimonial property per section 10(4) of the 1985 Act. However the parties had long since spent it all. It had simply gone into the pursuer's current account and had been spent on day to day living along with parties' earned income. Accordingly there was no basis on which this money could justify an unequal division of the matrimonial property.

[29] In support of the defender's position it was submitted that the circumstances strongly pointed towards the money being a gift not a loan. Carolyn Fox had clearly

intended it to be a gift. That the pursuer had insisted that she call it a loan did not make it so. There was no intention that it would be repaid, let alone an obligation on the pursuer to do so. There was no agreed date for repayment, and Carolyn Fox had never asked for the money back at any time since 2009. The defender's evidence was that the parties had always regarded the money as a gift. Furthermore, on Record the pursuer had referred to the money as "his inheritance". He had then consistently referred to it as a "gift" in the correspondence between the parties in their attempts to reach a negotiated financial settlement prior to proof. Indeed he had sought payment of this sum on the basis that he would then be able to invest it for AF's benefit, which of course he could only have properly done if it was indeed a gift. Only around one month prior to the proof had the pursuer began to claim that the money was a loan. His oral evidence to this effect should therefore not be regarded as credible. As to Carolyn Fox's oral evidence, she had said no more than that she was "contemplating" asking for the money back, but that she would not do so if the parties had already spent it. It was clear that the money had already been spent, and therefore clear that Mrs Fox would not be asking for it back.

[30] I preferred the submissions for the defender. I did not find the pursuer's evidence to be credible or reliable on this matter. His attempt to use his daughter's interests as a means to leverage payment to him of the money as part of a negotiated settlement was in my view dishonest given his position at proof, and does him no credit at all. Nor does his further suggestion that he had consistently maintained that the money was a gift for two years prior to the proof so as to somehow "protect his mother" from having to give evidence, which I also thought to be untrue. In these circumstances, while the pursuer may well have insisted on his mother calling the money a loan, I consider that he was well aware that there was no intention that he would ever be required to pay it back. Once received, the money was

never ring fenced in a separate savings account, nor was it spent on any particular, identifiable item of matrimonial property. It was simply put into the pursuer's current account, intermingled with other sums held, and spent day to day or saved along with the parties' earned income. It is clear from Carolyn Fox's evidence, against a background when she had never intended it to be a loan in the first place, that she had no intention of asking for the money back when it was given, and that she will not now be asking for it back. In all the circumstances I am satisfied that this money was a gift, and accordingly that it should not be included as a debt in the schedule of matrimonial property.

[31] Because this money was a gift, it was not itself matrimonial property when received: 1985 Act, section 10(4). Accordingly if it could have been clearly traced to the purchase of an identifiable item of matrimonial property which was owned at the date of separation, then the pursuer would then have had grounds for an argument for unequal division of that item of property on the basis of the source of the funds to buy it: section 10(6)(b). Insofar as the pursuer sought to make such an argument by way of a fall-back in the event that the money was, as I have held, a gift and not a loan, he suggested that it could be traced to part of that element of the equity of the matrimonial home attributable to the early mortgage repayment which the parties made between 2009 and 2012. I will return to this argument below.

The pursuer's claims for unequal division

The deposit paid on the parties' matrimonial home

[32] The parties purchased the matrimonial home in February 2007. It was a matter of agreement that they paid a deposit of £9,030, together with legal fees and outlays of £2,835, a total of £11,865.

[33] The pursuer's position in evidence was that all the money which went to pay for these items was money which had come from his pre-marital savings. It was submitted that as result there were special circumstances justifying an unequal split of the equity in the matrimonial home to this extent. In the first place the pursuer gave evidence to the effect that there had been a verbal agreement between parties prior to their marriage that if his pre-marriage savings were utilised to purchase a home, that this sum would not be disputed by the defender in the event of a separation: 1985 Act, section 10(6)(a). In the second place he submitted that in any event it had been demonstrated that the source of the funds was his pre-marital savings, which had been ring fenced by him since the marriage: section 10(6)(b).

[34] The defender's position was that there were no special circumstances justifying an unequal division of the equity in the matrimonial home based on the sums paid by way of deposit. In the first place, the money spent on fees and outlays could not, it was submitted, be taken into account. These were simply bills which the parties paid. The money used to do so was spent and gone. It was not matrimonial property at the appropriate valuation date, and no part of the equity of the matrimonial home could be attributed to it.

[35] In the second place it was disputed that there had been any pre-nuptial agreement such as that claimed by the pursuer. The defender said, in effect, that she had not and would not have made such an agreement. What she did accept was that in relation to a certain part of the pursuer's savings, namely life insurance policies held in Holland and ultimately cashed in for £3,374 in 2014, that she had agreed that these would be for him to spend as he wished and she would not question his decisions in this regard. She did not accept however that she had gone on to also agree, should he chose to spend this money on matrimonial property, that she would not claim a share of the value of this property should it still be retained if the parties separated.

[36] In the third place, the defender's position was that the pursuer had not established that the money used to pay the deposit had come from his pre-marriage savings. It was submitted that he had not established the level of any pre-marriage savings. He had said in evidence that he had had around £15,000 to £20,000, but no vouching had been produced to support this. On the contrary, he had produced a schedule in which he had calculated that as at 4 January 2004 (thus three days before the parties' marriage), the combined balance of his savings accounts was only around £4,000. Furthermore, it was not correct to say, as the pursuer had done in evidence, that he had ring fenced his savings between the date of the marriage and the purchase of the house. On the contrary, it was apparent that money had been withdrawn from his savings accounts from time to time, and that further sums had gone in as and when the parties could afford it from resources earned during the marriage. This was the very opposite of ring fencing. That the pursuer had been earning more than the defender during this period was irrelevant. Pre-marital funds in the savings accounts had been withdrawn and spent and replaced with matrimonial funds. There was no clear traceability or audit trail between any savings which the pursuer may have had prior to the marriage, and the payment of the deposit on the matrimonial home three years later.

[37] In my view, the defender's first submission is unsound in principle. Section 10(6)(b) provides that the "source of funds or assets *used to acquire* any of the matrimonial property" may be a special circumstance justifying unequal division of it. There is no distinction made between those funds or assets representing the purchase price of the item of property, and those representing the ancillary costs of making the purchase. Therefore I do not see in principle why the £2,835 spent on fees and outlays to enable the purchase of the matrimonial home is in a different category than the £9,000 paid by way of deposit in this context. Both sums of money were "used to acquire" the matrimonial home. The question remains

whether, if either or both sums were paid by the pursuer from his pre-marriage savings, this justifies an unequal split of the equity in the house, and if so to what extent.

[38] However in the circumstances this is beside the point, because I accept the defender's position in relation to both her second and third submissions on this issue. Accordingly I do not accept it as established that there was a verbal pre-nuptial agreement between the parties in the terms suggested by the pursuer. I did not find his evidence on this point to be either credible or reliable. I think it implausible that parties would have made an agreement in the terms suggested by the pursuer. The pursuer said, in effect, that but for such an agreement he would not have married the defender. The defender said, in effect, that she would not have married the pursuer had he insisted on such an agreement. Overall I thought the defender's evidence to be more probable, namely her acceptance that she had agreed that it would be for the pursuer to choose how to spend his pre-marriage savings, without further agreeing that should he choose to spend them on purchasing a house she would make no claim in relation to the value of the savings thus spent in the event of the parties later divorcing. If the pursuer regarded such an agreement as a pre-condition of marriage, as he suggested, he could and should have obtained it in writing. His oral evidence does not satisfy me that such an agreement was in fact made.

[39] Further and in any event, I also do not accept that the pursuer has established that his pre-marriage savings were the source of the funds used to pay the deposit and the fees and outlays. The pursuer's evidence about this was, in my view, neither credible nor reliable. In the first place there is the question of how much savings he actually had as at the date of the marriage. He said he had around £15,000 to £20,000 in savings at this point. No vouching of that was produced. However any savings which he had at the date of the marriage (leaving aside his life assurance policy) were, as I understood it, held in his ISA

and savings accounts. Copy statements are available for these accounts, but only going as far back as 2 August 2005, when the balance of the pursuer's ISA was £3,040 and the balance of his savings account was £6,083. The pursuer said that he had tried to obtain copy statements going back to the date of the marriage but that these were no longer available due to the passage of time. However he had created a schedule, production 9/6 for the pursuer, which gave balances for the ISA and savings accounts at the date of marriage of £2,140 and £1,816 respectively, a total of around £4,000.

[40] The pursuer initially said that he had back calculated these balances, from February 2007, from his current account statements. He was able to do so because these statements were available back to the date of marriage, and because all the money going in and out of his ISA and savings account had gone via his current account. He initially seemed oblivious to the sharp contrast between the resulting figures and his claim to have had £15,000 to £20,000. When that contrast was pointed out to him, and the possible significance of it for his claim, he then disputed his own schedule and said that it could not be relied on. I then pointed out to him that his back calculation on the schedule did in fact accord with the balances shown on the earliest statements available for the ISA and current accounts in August 2005. If the back calculation was accurate to this point, why was it not accurate back to the date of the marriage? The pursuer had no answer to this. In cross examination he then seemed to suggest that some money had been transferred from his Dutch savings accounts after the date of the marriage, but this was not documented either, and in all the circumstances I am not prepared to accept as credible or reliable his evidence that he had the £15,000 to £20,000 in savings which he claimed. I consider that it is more likely that he had around the £4,000 stated in his schedule.

[41] But secondly and in any event, I accept the defender's argument that the evidence does not establish that the pursuer ring fenced even this modest sum of pre-marital savings in the three year period between the parties' marriage and the date of the purchase of the matrimonial home in 2007. According to his own schedule, in February 2004, a month after the marriage, the combined balance on the pursuer's ISA and current account had gone down to less than £2,500. True, he paid £4,400 into his ISA in around December 2004, and there was no challenge to his evidence that this money came from the sale of a car which he had owned pre-marriage. But both parties were earning throughout the period 2004 to 2007, and putting all their earnings into the marriage. And generally it appears that money was taken from the pursuer's savings account when the parties needed it, and paid into and/or maintained in this account (and the ISA) when the parties could afford it. In particular it seems that the parties had some significant expenses around the time of the marriage, such as the costs of their respective relocations and their honeymoon, for which the pursuer paid, probably from such savings which he had prior to the marriage.

[42] I agree with the defender that this is all the very opposite of ring fencing of the pursuer's pre-marriage savings. As was submitted, if savings owned prior to the marriage are spent, and then money is saved from income during the marriage to replace them, the resulting savings are no longer pre-marriage savings. What has been done is to replace pre-marriage savings with matrimonial savings. I agree with the defender that to say that these savings are still the original pre-marriage savings is factually untrue and entirely artificial. And in my view it makes no difference, because the pursuer was earning substantially more than the defender during the period 2004 to 2007, that the bulk of the matrimonial funds used to replenish his savings accounts came from his earnings rather than the defender's.

The fact is that the parties were pooling their joint incomes earned during the marriage and jointly working to save for a deposit.

[43] The pursuer accepted that the defender had paid money from her earnings into his current account every month. However he claimed that all the money contributed by the defender went solely to pay for day to day expenses and credit card bills, while all the money which went from his current account to the ISA and saving accounts came from his earnings alone. Therefore, in effect, the money thereby saved in these accounts was 'his savings'. In my view this is a hopeless argument. The obvious point is that had the defender not contributed her earnings to the parties' day to day expenses and credit card bills the pursuer would have had to have paid them from his earnings, with the result that he could not then have made the payments which he did into his ISA and savings account. Indeed he might well have had to have drawn on these accounts to meet day to day expenses. His response to this point was to say that had he been on his own he would not have had these day to day expenses in the first place. That ignores the further obvious point that he was not on his own – precisely because the parties were married. It also of course does a considerable dis-service to the efforts and financial contributions made to the marriage by the defender. In the circumstances I have no hesitation in rejecting the pursuer's evidence and submissions on this point.

[44] In order for the pursuer to be entitled to an unequal division of the matrimonial property in his favour, on the ground that the money for the deposit, fees and outlays paid on the matrimonial home came from his pre-marital savings, he would in my view have to establish certain matters. Firstly, he would need to prove that he had pre-marital savings to at least the same amount as was later paid for the deposit, fees and outlays. Secondly, he would have to prove that these savings could be clearly traced from the date of the marriage

to the date of the purchase of the house, such that the money paid for the deposit, fees and outlays could be readily identifiable, in effect, as the same money held at the date of marriage: cf. *EP, G* v *GG*, *supra*, per Lady Wolffe at paragraph 33. Thirdly, and in any event, the circumstances would have to be such that an unequal division was justified: cf. *Jacques* v *Jacques*, *supra*. In my view the pursuer has established none of these matters. For the reasons stated, he has not established that his pre-marital savings were sufficient to pay the deposit, fees and outlays. He had not established that the funds used to pay the deposit fees and outlays can be properly traced to any pre-marital savings rather than the resources of the parties earned during the marriage. And even if some of the funds for the deposit, fees and outlays might ultimately have come from his pre-marital savings, or from the funds from the sale of his car, the amount of these is likely to have been relatively small, and he has not satisfied me that the circumstances justify departing from the presumption that the matrimonial property should be shared equally in this regard.

The mortgage overpayments

[45] There was no dispute that between 2009 and 2012 the parties made overpayments totalling £29,000 to the mortgage on the matrimonial home, thereby decreasing the interest element of their monthly payment, and also significantly increasing the equity. In addition to paying an additional £500 per month during this period, they made a lump sum payment of £11,000 when they re-mortgaged in March 2012.

[46] The pursuer's initial position appeared to be that all these overpayments were made from his earnings and bonuses and that accordingly he should be entitled to an unequal division of the matrimonial property in a way that reflected a repayment to him of the whole £29,000. In cross examination, however, he expressly accepted that these payments had

been made by the parties' joint efforts. He stated that he was no longer seeking repayment of all of this sum, and indeed that it should be split equally. In the written submission lodged on his behalf, however, his position came to be that without the £9,000 loan from his mother, his bonuses of around £10,000, and the Dutch life insurance payment of £4,000 (sic.), totalling £22,000 (sic.), the overpayments could not have been made. It was said that these funds were "non-matrimonial in nature", that there were thus special circumstances to justify unequal sharing, and that this should be reflected by a division of the matrimonial property representing a repayment to the pursuer of the whole £22,000. There is therefore obvious inconsistency and confusion in the pursuer's position on this matter.

[47] The defender's position was that the overpayments were made by joint efforts of parties and that there were no good grounds for unequal division. In the first place, it was submitted, even if the pursuer had paid £29,000 towards the overpayment from non-matrimonial funds, that would not entitle him to repayment of this whole amount. Half of it was paid to his benefit, by increasing the equity in the house. At most he could therefore only be entitled to half of the sum sought. Otherwise there would be double counting.

[48] Secondly, as discussed, the defender's position was that the money from the pursuer's mother was a gift not a loan. That involves an acceptance that it was not matrimonial property when received. However the defender submitted that it was not possible to clearly trace any of the £9,000 received from the pursuer's mother to the overpayments to the mortgage. It was submitted that this money had simply gone into the parties' accounts and had been spent or saved indistinguishably from their income earned during the marriage. It was not possible to say if any of this sum had "ended up in the house", as the pursuer claimed nor, if some of it had, how much.

[49] Thirdly, as regards the pursuer's bonus the defender's position was that this was simply matrimonial property, money earned by the efforts of the parties during the marriage. The defender too had contributed all her earnings to the marriage over the period of the overpayments and so had contributed to them. There was no clear evidence as to how much more of these overpayments the pursuer had made due to his greater earnings during the period of the overpayments. Ultimately, it was submitted, his argument in this regard appeared to be based on little more than a general sense of entitlement that as he was earning more at this time he must have been solely responsible for the overpayments and so entitled to the whole sum back. But in any event, if the money to make the overpayments came from matrimonial funds, there was no source of funds argument justifying unequal division of the matrimonial property in any event.

[50] I reject the pursuer's submissions, insofar as I can make sense of them. In the first place, and for the reasons set out above, I have determined that the money received from the pursuer's mother was a gift and not a loan. It is therefore not matrimonial property, and in principle, had it been clearly traced to the mortgage payments, there might have been a basis to consider whether unequal division of the equity in the house on grounds of source of funds to acquire it was justified. However I am not satisfied that the pursuer has established a clear trace between the money received from his mother and the overpayments. I agree with the defender that the evidence suggests that the £9,000 was never ring fenced or kept in a separate account but was simply paid into the pursuer's current account and immediately intermingled, spent and transferred to other accounts, indistinguishably from the parties' earned income and other savings. It is possible that some of the funds 'ended up in the house' as the pursuer said, but I am not satisfied that I can make a positive finding to this effect, nor that I could identify how much of these funds might have been used to make

overpayments. Even the pursuer, in answer to a direct question from me, was simply unable to say how much of the money from his mother went 'into the house', and accepted that it was unclear. Therefore I am not satisfied that there are good grounds for a source of funds argument in relation to any quantifiable amount of the equity in the matrimonial home in this regard. Even if some of the money from his mother 'ended up in the house', I am not satisfied, in the circumstances, that such of it that did justifies an unequal division of the matrimonial property.

[51] In the second place, as regards the pursuer's bonuses, there is again no dispute that he received a total of around £10,000 in this respect in the period between 2009 and 2012. And it may well have been that receipt of these bonuses was one aspect of the parties' decision to look to pay down their mortgage and so reduce their interest payments and increase the equity in the matrimonial home. But the pursuer's bonuses were all derived from his employment in the course of the marriage. It was all matrimonial property when received. And the decision to use it to make overpayments to the mortgage was a joint decision, made by both parties. I agree with the defender's submission that the only basis for claiming an unequal division of the equity in the house on this basis is some apparent belief by the pursuer that because he earned more than the defender over the course of the marriage, and thereby put more money into it, he is thereby entitled to a correspondingly larger share of the matrimonial property on divorce. This is not a good ground for unequal division, on a source of funds argument or otherwise. On the contrary, I can see no special circumstances justifying unequal division on the basis of the pursuer's bonuses. The presumption is for fair sharing of matrimonial property acquired by the efforts of both parties in the course of the marriage, and the pursuer's bonuses from his employment fall squarely within that.

[52] As to the money received by the pursuer from his Dutch life insurance policy, reference to this in the context of the mortgage overpayments seems misplaced. In the first place, it is clear on the evidence that the sum received by the pursuer was not £4,000 but £3,374. In the second place, the pursuer said in evidence that he did not receive this sum until 2014, thus well after the parties stopped making overpayments to their mortgage. In the third place, the pursuer also finally said, after much prompting, that when received this money was spent by him to clear the parties' then credit card bills. Fourthly, I am not even satisfied that the payment was not matrimonial property, because I am not satisfied on the evidence that this policy was taken out prior to the start of the marriage, even if all of the funds to pay for it came from a pre-marriage redundancy payment. But even if it was non-matrimonial property when received, there is no good basis to suggest, let alone for me to hold, that it was put towards the parties' mortgage overpayments, nor to make an unequal division of the equity in the matrimonial property on this basis.

[53] Finally, and in any event, even if all of the funds used to make the mortgage overpayments could have been clearly traced to non-matrimonial funds belonging to the pursuer, and even if I had been satisfied that there were as a result good grounds to justify an unequal division of the equity in the matrimonial home to reflect this, I would have done so only to the value of half the funds. That is because, as the defender submitted, the matrimonial home is jointly owned and the pursuer is on the face of it entitled to half the equity. To make an award reflecting the whole overpayment would be to double count that half of the overpayment which was made to his benefit. In the circumstances, however, this issue does not arise.

The defender's student loan

[54] The defender had an outstanding pre-marriage student loan. During the marriage a significant amount of this was repaid. The exact figure in sterling is unclear because the loan was repayable in US dollars and the exchange rates have obviously fluctuated over the years. Ultimately I understood that £5,500 could be taken as an agreed figure. There is no dispute that this sum was repaid periodically by the defender, by various means, and that the sums to do so came from the parties' earnings during the marriage.

[55] The pursuer's position was that this was debt solely due by the defender, but that the repayments had been made from joint resources. He should therefore be "reimbursed" half of the total sum repaid, accordingly £2,750. The defender's position was that there was no clear traceability of the pursuer's funds being used to pay the defender's loan debt and thus no good special circumstances argument. It was also disputed that he had established that he had in fact paid half the loan.

[56] Although the pursuer did not analyse the matter in this way in his written submissions, it seems to me that this aspect of his claim can only really be understood by reference to section 9(1)(b) of the 1985 Act. In other words he is claiming that the defender derived an economic advantage from his contributions, namely the payment by him of half of her pre-marriage student debt, or alternatively that he sustained an economic disadvantage by so doing. In my view he is, technically, correct in this, insofar as I accept that around £5,500 of the defender's pre-marriage debt was repaid from money earned due to the joint efforts of the parties during the relevant period. The defender's argument on traceability works against her in this aspect of the case, the practical onus here being on her to show that she alone repaid the debt. She has failed to do so.

[57] But any argument under section 9(1)(b) of the 1985 Act has two further aspects which have to considered. In the first place there is the question whether any economic advantage to the defender or disadvantage to the pursuer is balanced by corresponding economic disadvantage to the defender or advantage to the pursuer: section 11(2)(a). In the second place, it is necessary to consider whether, in the light of any such economic advantages and disadvantages to both parties, it would be fair to unequally divide the matrimonial property to reflect the pursuer's contribution to repayment of half the defender's student loan. The requirement of section 9(1)(b) of the 1985 Act is to take "fair account", and I take this to mean that even if there may be found to be some element of economic advantage or disadvantage to one party, the court retains a residual discretion as to whether or not that should as a matter of overall fairness in all the circumstances of the case, be reflected by a departure from the presumption of equal sharing of the matrimonial property in that party's favour.

[58] In my view, although I am satisfied that the pursuer sustained economic disadvantage, and the defender economic advantage, by his paying half of her student loan, there is balancing and corresponding advantage and disadvantage. The loan was in respect of the defender's college education. It seems entirely feasible to suppose that as a result of that education she was able, in the course of the marriage, to obtain better paid employment than she would otherwise have been able to do. She then put all of her earnings from employment into the marriage. In other words, it seems likely that the pursuer was economically advantaged by the defender contributing more earnings into the marriage than she otherwise would have done. There was likely more money in the marriage, from which he benefitted, than there would have been had the defender not been to college, sustained the debt, and so obtained better paid employment. This is, of course, hard to quantify, but

economic advantage and disadvantage have to be construed broadly in the present context, and not as a cold accounting exercise.

[59] In any event, however, I am also satisfied that it would not be fair to take account of any residual economic disadvantage to the pursuer which may exist in this regard by unequally dividing the matrimonial property. The sum claimed by the pursuer here, £2,750, is frankly rather small, set in the context of a marriage which lasted eleven and a half years, where parties' joint gross earnings during this period were nearly £700,000, and where the matrimonial property amounts to more than £275,000. In these circumstances, that the pursuer should even advance such a claim seems to me to demonstrate his rather narrow approach to this case. Even if he had been disadvantaged to some extent by his contributions to the defender's student loan, which overall I do not accept, I do not consider that the extent of any residual disadvantage is such, in all the circumstances, that it would be fair to take account of it by dividing the matrimonial property unequally in the pursuer's favour.

The defender's claims for unequal division

The cost of childcare

[60] The defender submitted that the matrimonial property should be divided unequally (60% to 40%) in her favour to reflect the greater economic burden on her of caring for the parties' child after divorce: 1985 Act, section 9(1)(c). She had painstakingly analysed years of bank statements to try to itemise precisely the amount of money which she had spent on child care since separation, and on this basis had drawn up numerous detailed schedules and spreadsheets setting out in mind-numbing detail her past expenditure and likely child care costs going forward. She argued that these costs were reasonable by reference to

national average expenditure on childcare. She acknowledged that the pursuer too had costs in relation to exercising contact with AF, but submitted that his figures were grossly exaggerated. She also pointed out that she too had travel costs in relation to the pursuer having contact with the child, standing the terms of the interlocutor of 26 April 2018 (driving AF to Gretna every other contact weekend), but that she had not included these in her own schedule. It was submitted that the money which the defender had received from the pursuer by way of assessed child maintenance was inadequate to meet her ongoing child care costs. Further, she submitted that the pursuer had deliberately and intentionally not paid all of the child maintenance which he should have paid since separation – she claimed a shortfall of around £1,000. Finally, she argued because of the pursuer's unstable employment history there was a significant risk that he would lose employment in the future, and thus that his liability for child maintenance would again reduce to a nominal amount. This would increase the child care burden on her yet further.

[61] The pursuer submitted in response that the defender's claimed costs for child care were also exaggerated taking into consideration the parties' resources. Accepting that AF resided with the defender most of the time, he pointed out that pursuant to the court's interlocutor of 26 April 2018 he had care of AF two days out of every 14 during term time and nearly one half of the whole of the school holidays – effectively two days in seven, averaged out over the course of the year. He too therefore would have a significant measure of economic burden in looking after AF. He had detailed his contact travel and accommodation costs in a schedule, and denied that his figures were exaggerated. In any event, he submitted that it was for both parties to make independent financial decisions in relation to child care costs, taking into account the child's needs and their respective resources. More fundamentally, the pursuer submitted that he was subject to assessment by

CMS. He said that he had paid what CMS had told him to pay, and would continue to do so. He was not currently in arrears. He also disputed the defender's assertions about risks to his future employment and earnings. He submitted that there was no good basis for this. The evidence showed that he had consistently and substantially contributed to the household income throughout the marriage, and that since February 2017 he had been in secure employment in Bolton. In all the circumstances, there should be no unequal division of the matrimonial property by reference to section 9(1)(c) of the 1985 Act.

[62] Section 9(1)(c) of the 1985 Act provides that the court must apply the principle that any economic burden of caring for a child under 16 years of age after divorce should be shared fairly by the parties. In applying this principle the court must have regard to the various factors set out in section 11(3). It does not follow, as the defender seemed to think, that just because the party with residence of the child is likely to have the greater burden of child care costs, or because any periodic financial contributions from the other party do not amount to half of the expenditure on child care, that this gives entitlement to an unequal division of the matrimonial property. It is necessary to consider the various factors in turn.

[63] Starting with section 11(3)(d), it is apparent that the child is 6 years old and generally in good health. She has no special needs giving rise to greater than normal child care costs.

[64] As to sections 11(3)(b) and (f), taken together, the defender has not suffered loss of earning capacity by the need to care for the child. She does however have expenditure caused by the need to care for the child. These include in particular the significant costs of wrap-around before and after school care, and a childminder, both for non-residential care and the regular if relatively infrequent occasions when the defender has to go away overnight for work purposes. The defender also has costs in relation to school holiday clubs – although the pursuer is likely to have similar costs during those school holiday periods

when he has contact with AF. Although the defender will have the greater burden of child care costs, the pursuer will also have some such costs, given the extent of residential contact to which he has been found entitled, and the travel and accommodation costs involved.

[65] As regards section 11(3)(e), the child is presently at the local state primary school and is likely to remain there for the foreseeable future. There are no relevant financial circumstances in relation to the child bearing on the present issue, for example, it is not suggested that she herself has any independent financial resources.

[66] As regards section 11(3)(g), it is clear that the defender is now in very well paid stable employment, earning around £54,000 per annum gross. Her career trajectory has been consistently upwards in terms of earnings since shortly after the start of the marriage, save only for the period immediately after the child's birth. The pursuer, by contrast, earns around £30,000 per annum gross and, as the defender herself argued, his income has been less consistent over recent years given his health and employment problems. Accordingly the defender is presently significantly better able to afford to bear a greater burden of the child care costs than the pursuer. Moreover, the parties' employment histories suggest that, if anything, the gap between the parties' respective incomes may well continue to increase in the future.

[67] As to section 11(3)(c), there is no dispute that a property transfer order should be made in respect of the pursuer's interest in the matrimonial home. This house is entirely suitable accommodation for AF when residing with the defender, both as regards amenity and proximity to her school and child care facilities, etc. The making of the transfer order will secure that this accommodation continues to be available for the child going forward. The pursuer's present accommodation, by contrast, is not suitable for AF when she is residing with him. He rents a single room with a live-in landlord. Understandably, he

would wish to purchase a property of his own, and which was more suitable to accommodate AF during contact visits. Not unreasonably, he has felt unable to do so prior to resolution of the present case. To unequally divide the matrimonial property as sought by the defender would reduce any capital payment to him and so restrict his ability to purchase suitable accommodation in which to exercise contact with AF.

[68] As regards section 11(3)(a), there is no formal decree or arrangement for aliment as such in the present case, but I am satisfied that the expression "arrangement for aliment for the child" can be read broadly so as to include a child maintenance assessment made under the Child Support Act 1991. Even if I was wrong about this, however, the existence of a maintenance assessment is plainly one of the relevant circumstances of the case of which account must be taken under section 11(3)(h).

[69] In general terms it has been recognised that the enactment of the 1991 Act has greatly reduced the scope for reliance on section 9(1)(c), because of the elements taken into account in making a child maintenance assessment. Assessment is now based principally on the income of the non resident parent, not the needs or resources of the resident parent or the child. Although section 9(1)(c) has not been wholly superseded by the 1991 Act, it has been observed that the courts should in particular now be slow to make a capital payment for revenue expenses in respect of a child, the jurisdiction in respect of which lies with the CMS, subject to appeal to the First Tier Tribunal. Put another way, the making (or adjustment) of a capital payment is not, in the normal case, to be used as a device to supplement the periodical child maintenance payments which the other party has been assessed as liable to make, effectively in lieu of aliment for the child. Awards have however continued to be made under section 9(1)(c), for example, where that is necessary in order for the principal carer of the child to obtain secure and suitable accommodation for it, and in other cases

outwith the norm. On these matters, see in particular *Maclachlan* v *Maclachlan* 1998 SLT 693 at 698 B – K per Lord Macfadyen; Clive, *The Law of Husband and Wife in Scotland* (4th Edition 1997) paragraphs 24.071 – 24.072 and cases cited there; Stair Memorial Encyclopaedia, *Child & Family Law* (Reissue), paragraph 668.

[70] In this case there has been a child maintenance assessment in place since 2016. The amount payable has fluctuated, but the pursuer is presently liable to pay the defender the sum of just under £50 per week, which takes account not only of the extent of the pursuer's contact with the child, but also the costs involved in his travelling to and from Horwich to exercise it. The law, procedure, and practical enforcement of child maintenance assessment are notoriously complex and difficult. Furthermore, such assessment will be subjection to re-assessment as the parties' circumstances change from time to time, and this can lead to further difficulties. The defender complained that the pursuer should have paid around £1,000 more than he has since 2016. He may have underpaid when challenging (as he was entitled to do) the assessment made from February 2017, but he said that he paid what he was told to pay and the defender did not report any underpayment timeously when she should have done. Ultimately the defender has not satisfied me that the pursuer sought wilfully to avoid paying maintenance for which he was assessed as liable. And the bottom line is that the pursuer is not in arrears as far as CMS is concerned. The pursuer will no doubt continue to test the child support system, and will be particularly astute to not pay any more than he is assessed as being liable to pay. But I accept his evidence that he has and will continue to pay the amount ultimately assessed as due by the CMS. I also have no doubt that the defender will be more astute in the future to ensure that he does so. And if she takes issue with the CMS assessments it is through the appeals and complaints mechanisms in the child support scheme that she must proceed.

[71] As for the defender's suggestion that the pursuer will likely lose employment in the future leading to reduction in child maintenance payments, in my view there is ultimately nothing in this argument. There is firstly the general point that what the defender is seeking is (in effect) a capital sum payment to supplement and guard against a risk of reduction in the pursuer's contribution to her ongoing revenue costs. I share the concerns expressed in *Maclachan* v *Maclachan, supra,* that the court should in principle be slow to make an order for capital payment (or unequal division) in such circumstances. But secondly and in any event, even if there were indeed a greater than normal risk that the pursuer might lose his employment in the future with consequent loss of income, that simply serves to highlight the already clear disparity between the parties' respective incomes. In other words, returning to section 11(3)(g), it would suggest that the defender's resources were even greater than those of the pursuer, and so that she was even better able than him to bear the economic burden of caring for the parties' child. It seems to me therefore that the defender's argument is double edged in this respect.

[72] Thirdly, however, I do not consider that the defender's argument is well founded in fact. It is true that the pursuer has had a chequered employment history. He has had short periods of unemployment in the past, and further periods when he has been in receipt of statutory sick pay. However for most of the periods when he has been on sick leave in the past he has generally continued to be paid his full salary, and so his income has not declined as a result. He may of course lose employment or go on sick leave again in the future and so suffer substantial reduction or complete loss of earnings. I accept that he is more likely to do so than the defender. However I am not prepared to say, on the evidence which I have heard, that the risk of this happening is so much greater than normal that it should be taken into account in the way that the defender submits. The pursuer said that he wanted to be in

employment, and would endeavour to remain in employment, and I accept that. The more important point is that his earnings are now, and are likely to remain, substantially less than those of the defender.

[73] Finally, also under section 11(3)(h), I should add that I consider that the schedules of child care costs produced by both the defender and the pursuer are open to criticism. As regards the defender's schedules, I would accept that her meticulous calculations show, unsurprisingly, that she is likely to bear a greater share of the costs of caring for AF going forwards. She calculated, broadly, that she bore three quarters of the cost to her of caring for AF. But as I have said, it does not follow from this that she is therefore entitled to a greater share of the matrimonial property. Further, the defender's schedules rather make the assumption that all the costs set out are somehow objective and unchangeable. In other words, it assumes that because she has paid the costs set out, that they are therefore reasonable, and that she is entitled to continue to pay them into the future. In relation to the main costs, such as child care outwith school, I accept that such costs are necessary in order that the defender can continue her career, and I would not criticise her for incurring them. I have no doubt that she has tried to minimise these costs and that juggling a successful career with child care as a single mother is a most difficult thing to do. However there are other costs – extra curricular activities, presents, parties, eating out, etc. – which are things which the defender pays the amount which she does because she can afford to. I agree that there are elements of choice on her part here. The ability to pay for such items are the product of the very success in her career which payment of her out-of-school child minding costs helps facilitate. To that extent, there is force in the pursuer's submission that the defender has made financial decisions on what to spend on the child taking into consideration her

relatively high earnings, and thus that he should not be penalised for those choices by unequal division of the matrimonial property.

[74] As regards the pursuer's schedule of contact costs, I agree with the defender that elements of these are exaggerated. Taken at face value, the pursuer would be spending almost his entire salary on contact since the present arrangement were put in place at the end of 2017, and I do not accept that he in fact does this. Nor do I accept that he could not find ways to reduce his costs, for example, by not staying in hotels and eating out on each occasion when he exercises contact in Scotland. The pursuer, of course, was not putting a positive case for unequal division based on his costs, merely seeking to put them in the balance in defence of the defender's section 9(1)(c) argument. And he undoubtedly will have significant travel and accommodation costs in relation to contact. But in the first place, these costs are directly as a result of the choice which he made to relocate to Horwich in February 2017. I am therefore less than sympathetic to his attempt to put all of the contact costs resulting directly from this choice in the present balance. The criticism which he levels at the defender in relation to her choices of expenditure can be turned back on him here. But in the second place, the pursuer's principal position in resisting this aspect of the defender's claim is that his contribution to child care costs should simply be left to assessment by CMS. If that is right, and on the authorities referred to above it has some force to it, it carries the consequence that his contact costs have already been taken account of in the making of the assessment. That is so even if his actual travel costs may be greater than the reduction in his liability. So his argument on this matter is also double edged.

[75] Having regard to all these considerations, and looking at matters in the round, I am satisfied that a fair sharing of the economic burden of care for the parties' child does not, in the circumstances, require or justify an unequal division of the matrimonial property under

section 9(1)(c) as contended for by the defender. In particular, the defender bears the greater burden of child care for AF, but has significantly greater resources enabling her to do so. The court should be slow to make a capital payment under the 1985 Act in respect of revenue costs, particularly where there is a maintenance assessment in place under the 1991 Act, and in effect for the purpose of supplementing such an assessment. I do not accept that this is a case where the pursuer has been shown to be wilfully refusing to pay his assessed child maintenance, and he is not in arrears. And while at the end of this case the defender will have suitable accommodation for AF to stay in, the pursuer will not, and to unequally divide the matrimonial property is likely to restrict his ability to acquire it.

The post separation mortgage payments

[76] The defender submitted that over and above the unequal 60% to 40% division of matrimonial property in her favour, claimed on the basis of ongoing child care costs, she should also be awarded a further payment representing one half of the reduction in the mortgage balance between October 2015 and the date of proof. By her calculation this amounted to £9,859 (£19,718 / 2). It was submitted that because the matrimonial property was jointly owned, the defender had been economically disadvantaged by this amount with corresponding economic advantage to the pursuer: 1985 Act, section 9(1)(b). For the reasons set out above, such an argument can be entertained because, and only because, the relevant valuation date of the matrimonial home is the appropriate valuation date under section 10(3A), and not the date of separation.

[77] In support of her submission the defender relied on the undisputed evidence that she had paid the whole of the mortgage on the matrimonial home during the period since October 2015. As the property was jointly owned, the pursuer was entitled in principle to

one half of the equity as a matter of property law. He had therefore benefitted at her expense to the extent of one half the increase in the equity. It was also submitted that the defender had had to meet the additional costs of paying the whole of the council tax, the utilities and of maintaining the property. Again, this had all been to the pursuer's benefit.

[78] The pursuer submitted that no award should be made to the defender in this regard. He accepted that he had been economically advantaged by the defender paying (in effect) his share of the mortgage since October 2015, but submitted that in terms of section 11(2) this advantage was offset by the corresponding economic disadvantage which he had suffered. In particular his undisputed evidence was that he had paid £12,800 in rent to private landlords between the date of separation and proof (albeit that this was inclusive of bills and council tax). This was a necessary consequence of his having to live elsewhere following the parties' separation. He could not reasonably have purchased another property suitable for himself (and AF) standing his income position and the ongoing financial dispute between the parties. Meantime the defender had had the use of a comfortable three bedroom house while he had been living in single rooms in shared houses.

[79] In my view the pursuer's submissions are to be preferred. I accept that the economic advantage to the pursuer identified by the defender is offset by the corresponding disadvantage to him which he identifies. Given the parties' separation it was inevitable that one of them would have to move out. It was not unreasonable of the pursuer do to so. It was in AF's best interests to reside with the defender post separation, and to do so in the secure and familiar surroundings of the matrimonial home. That being so, the pursuer had to live somewhere, and was bound to incur accommodation costs in so doing. I accept that it was not unreasonable of him, standing the level of his income and the ongoing financial dispute between the parties, to rent somewhere to live rather than try to purchase a property

of his own. The costs of the accommodation which he has rented do not appear to me to be excessive. Therefore while he has been economically advantaged by nearly £10,000 from the defender's contributions to the joint mortgage, this is balanced by the economic disadvantage which he sustained by paying nearly £13,000 in rent over the same period, even allowing that some of that sum represents bills and council tax that the pursuer would have had to pay anyway.

[80] Furthermore, and looking at economic advantage and disadvantage more broadly, I also accept the pursuer's point that the defender has had the benefit of living in the matrimonial home since 2015. It is a three bedroom detached house in a good area which is plainly of significantly greater amenity than the single room, rented accommodation in which the pursuer has been living. The defender said that she would have preferred to move out herself, that initially she struggled to pay the whole mortgage. Even accepting that, the fact remains that she has still had the use of the house for the past three years and the pursuer has not. This may not have been an unqualified benefit but it seems to me that she has still been advantaged to some extent in this respect vis a vis the pursuer.

[81] There is also the point that, as the defender had a spare room in the property, she could have let it out to a lodger so as to reduce her mortgage costs. While I would not go so far as to hold that it was unreasonable of her in general terms not to have done so since 2015, I do take account of the fact that for around a year since July 2017 the defender's new partner has been residing in the house without making any contribution to her housing costs. It seems to me that the reason for this is that the defender did not want her new partner to be effectively giving money to the pursuer by helping to pay his share of the mortgage. One can understand this reluctance, in principle, given the poor state of the parties' relationship, but the difficulty is that the defender is now making a greater financial

claim on the pursuer than she could have made had she taken a reasonable contribution towards the mortgage costs from her new partner. Had he paid, say, half the mortgage cost (a not unreasonable figure – less than the rent which the pursuer is currently paying) the economic disadvantage in respect of which the defender could now have made a claim would have been significantly less than has in fact been made. Instead, she has chosen to allow her new partner to live in the house rent free, and seeks to recover her resulting loss from the pursuer.

[82] Overall therefore, and taking all these factors into account, I am not satisfied that there is an economic imbalance which justifies the unequal division of the matrimonial property sought by the defender in relation to this matter. I am satisfied that fair sharing of the equity in the matrimonial home at the appropriate valuation date will be achieved by equal sharing.

Conclusion

[83] For all the reasons set out above, I reject both parties' various claims to unequal division of the matrimonial property. Overall I am satisfied that fair sharing of all their property is achieved by equal division. That means that each party is entitled to property to the value of £136,900, as per the schedule of matrimonial property set out above. This division will be effected by, in the first place, the making of a property transfer order in relation to the pursuer's interest in the matrimonial home. Simply making such an order would have the result that the defender would then have property to the value of the whole equity in this property, namely £94,719, plus the value of the moveable property which she has retained, namely £66,941, a total of £161,660. In order to achieve equal division in the light of the property transfer order, therefore, I will make an order for payment by the

defender to the pursuer of the sum of £24,760 (£161,660 - £136,900). For the reasons discussed above, the date when the property transfer order will have effect will be on 1 November 2018, and it will be conditional on the said order for payment being made.

Expenses

[84] I was asked by both parties to reserve all questions of expenses, other than already determined, and will do so. Failing agreement the appropriate motion can be enrolled and a hearing assigned if necessary.