



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 38

F89/22

Lord Malcolm
Lady Wise
Lady Carmichael

OPINION OF THE COURT

delivered by LADY CARMICHAEL

in the Reclaiming Motion

by

F

Pursuer and Reclaimer

against

F

Defender and Reclaimer

and

A

Minuter

Pursuer and Reclaimer: Party with Bain, lay representative
Defender and Reclaimer: Cheyne KC, Cartwright; Allan McDougall

15 July 2026

Introduction

[1] This is an action for divorce, in which both parties sought orders for financial provision. Both reclaim (appeal) against the decision of the Lord Ordinary. The pursuer and reclaimer is the husband, and the defender and reclaimer is the wife. We will refer to them in this opinion as the husband and the wife.

[2] The minuter (A) was a party to the proceedings before the Lord Ordinary. She had made a secured loan to the wife. The husband applied, unsuccessfully, to have the loan and the standard security set aside. The husband reclaimed against an award of expenses made against him and in favour of the minuter, who was not present or represented at the summar roll (appeal) hearing.

Background

[3] The parties married in 2014. They separated on 5 February 2019, which is the relevant date for the purposes of the Family Law (Scotland) Act 1985. All references in this opinion to statutory provisions are references to that Act. The parties had been in a relationship for several years before they married, and their children were both born before the marriage.

[4] The competing submissions before us related in part to the correct approach to heritable property referred to by the Lord Ordinary in his opinion ([2025] CSOH 99) as 13b. The Lord Ordinary found that the husband and his sister grew up in a house known as 13. In 1995 the husband's parents disposed to him the two uppermost floors of that house. The portion disposed was described in the following way:

“ALL and WHOLE that dwelling house to be known as Number Thirteen A [street, city] lying on the south side of [street, county] being the uppermost two floors of the house formerly known as Number Thirteen [street, city], and being the subjects coloured pink, and marked ‘flat A’ on the plan annexed and docketted as relative hereto (which plan is demonstrative only and not taxative).”

[5] The husband’s parents retained title to, and resided in, the remainder of the house.

The part that they retained came to be known as 13b. The parties came to live together in 13a.

[6] The husband’s mother and father died. Each of them had, by Will, left his or her respective half *pro indiviso* share in 13b equally to the husband and the husband’s sister.

[7] The executors of the husband’s father and the executors of the husband’s mother disposed both of those one-half *pro indiviso* shares to the husband, presumably as part of an agreement with the husband’s sister. By that transfer the husband came to be heritable proprietor of the whole of 13b. The copy disposition in process is partly executed. It is subscribed by the executors of the husband’s father on 15 and 28 July 2014. The Lord Ordinary found that it was recorded on 15 October 2014.

[8] By disposition dated 1 December 2014 the husband disposed a one-half *pro indiviso* share in 13b to the wife for love, favour and affection. The description of the property was of 13 under exception of 13a. In 2015 the parties granted a standard security over 13b. They renewed the borrowing with a different lender, Virgin Money, in 2017. The loan was an interest only loan.

[9] We set this out in some detail, as there was at one stage a dispute between the parties as to whether a conservatory was properly to be regarded as part of 13a or part of 13b. The Lord Ordinary found that the conservatory formed part of 13b. The husband remained concerned, at the time of the reclaiming motion, about whether the Lord Ordinary should have made an order to that effect.

[10] By the time of the reclaiming motion, there was no longer a dispute that the conservatory formed part of 13b. It was not within the description of the property (13a) disposed to the husband in 1995. In December 2020 solicitors acting for the husband applied for voluntary registration of title in respect of 13a. The description in the application included the conservatory. The application resulted in a registration for the property address 13a which included the conservatory. Both parties had sought orders relating to that state of affairs. The husband submitted in the reclaiming motion that the Lord Ordinary should have made orders about that in the terms he had requested.

[11] The Lord Ordinary found that the relevant date value of 13b, including the conservatory, was £515,500, and that its current value was £530,000. The secured borrowings at both dates amounted to £215,852. There were no other matrimonial debts. He found that only the wife's one-half *pro indiviso* share of 13b was matrimonial property. The relevant date value of that share was £257,500.

[12] The remainder of the matrimonial property was relatively modest in value. Both parties were owed money by way of directors' loans at the relevant date. Since the relevant date the wife had received payment of the sum due to her, but the husband had not received payment of the sum due to him. The Lord Ordinary recorded that it was common ground that the sum due to the wife should be left out of account. In the course of the reclaiming motion senior counsel for the wife indicated that she now accepted that the sum due to the husband by way of director's loan at the relevant date should also have been left out of account.

[13] The Lord Ordinary found that the husband should retain a pension the apportioned value of which was £5,396.61, and the whole relevant date balance of £27,526.34 on an instant access savings account. The wife had retained a La Mondiale Bond, but the

Lord Ordinary wished that to be shared equally between the parties. He proceeded on the basis that parties had retained equal shares of the balances on various joint bank accounts, and the wife retained the whole balance of a TSB account in her name.

[14] The husband sought transfer to him of the wife's share of 13b and payment of a capital sum. The wife sought sale of 13b, payment of a capital sum, and payment of a periodical allowance.

The order made by the Lord Ordinary

[15] The Lord Ordinary pronounced an interlocutor (made a court order) on 24 October 2025. He ordered that the wife transfer her one half share of 13b to the husband, and that she pay him a capital sum of £30,000. The interlocutor was silent as to what was to happen in respect of the wife's liabilities for the secured borrowing from Virgin Money.

[16] The effect of the Lord Ordinary's interlocutor, leaving out of account both directors' loans, and on the basis of the other figures that he used in the appendices to his opinion, was as follows, so far as the division of matrimonial property at relevant date values was concerned. The table below also proceeds on the assumption that the wife, on transferring her share of the property, would be relieved of her liability for the secured borrowing, and that the husband would bear sole responsibility for that.

Assets	Husband (£)	Wife (£)
13b	257,500	
Pension	5,396.61	
RBS 4325	7,826.00	7,826.00
RBS 8236	2,602.00	2,602.00

RBS 4728	505.30	
RBS 4736	27,526.34	
TSB 6451		17,767.00
TSB 7464		29.67
RBS 3099	283.00	283.00
La Mondiale bond		26,107.00
Total	301,639.25	54,614.67
Debt	(215,852.00)	
Capital sum	30,000.00	(30,000.00)
Total	115,787.25	24,614.67

[17] The interlocutor also dealt with expenses. The Lord Ordinary found no expenses due to or by the husband or the wife up to the date of proof (evidential hearing). In relation to the proof, he found the wife liable, as an assisted person, to the husband in relation to half of the expenses of the proof and of two subsequent by order hearings. He modified those expenses to nil in terms of Rule of Court 42.6 and section 18(2) of the Legal Aid (Scotland) Act 1986. He found the husband liable to the minuter for the expenses of a by order hearing, but otherwise found no expenses due to or by as between the husband and the minuter.

The Lord Ordinary's reasoning

[18] After establishing the value of 13b and the extent of the secured borrowing, the Lord Ordinary began by considering whether he should order the sale of 13b or order the transfer sought by the husband. He proceeded by considering what benefit the wife would

derive on sale of the property. He set the whole of the secured borrowing against the value of her half of 13b, and concluded that the only benefit that she could derive on sale at current values would be £41,148. That sum would be diminished further by the wife's share of marketing and conveyancing costs, and costs associated with making 13b a fully "stand alone" property. The Lord Ordinary concluded that he should make an order for transfer of the wife's interest to the husband

[19] The Lord Ordinary went on to consider individual items that the parties had agreed were matrimonial property. Amongst those were the husband's interest in a pension scheme and the husband's director's loan account. He excluded the values of those from the value of the matrimonial property available for sharing between the parties because he held that special circumstances had been established. The Lord Ordinary concluded that because a segment of a La Mondiale investment retained by the wife had its origins in property inherited by the husband, the wife should transfer half of its value (£13,053) to the husband. The Lord Ordinary excluded also a balance of £27,526.34 on the husband's RBS bank account 4736.

[20] The wife submitted that she had sustained economic disadvantage and had conferred economic advantage on the husband. She sought a periodical allowance on the basis that she had been dependent to a substantial degree on the financial support of the husband. The Lord Ordinary rejected both of those arguments.

[21] The Lord Ordinary found that the wife should pay £52,742 to the husband. That was half of the expenditure that the husband had incurred in the upkeep of 13b since the parties separated.

[22] On the Lord Ordinary's calculations (set out in the appendices to his opinion), the net amount due from the wife to the husband was £59,171.

[23] He arrived at that figure by calculating that the total net value of the matrimonial property was £107,549, of which, on his analysis, the husband had retained £11,251 and the wife had retained £96,298. On that approach, the wife required to make a balancing payment of £42,523. On the Lord Ordinary's calculations, the husband required to pay only £49,148 to the wife for her share of 13b. The net payment from the husband to the wife would therefore be £6,625. Against that, the Lord Ordinary set half the value of the La Mondiale investment, and the sum of £52,742 referred to in the foregoing paragraph.

[24] He modified the sum of £59,171 to be paid to the husband to £30,000 having considered the parties' respective resources.

Submissions

Wife

[25] Senior counsel submitted that the Lord Ordinary had erred in his calculations. He had not identified the net value of the matrimonial property for division. He had set against the wife's one-half share of 13b the whole of a matrimonial debt secured over the whole of the property. He had failed to include in the assessment of the net value of the matrimonial property sums he considered were due to the husband through the operation of special circumstances. He had erred in finding that the wife should pay half the costs associated with 13b after separation.

[26] The division proposed by the Lord Ordinary – absent the capital payment of £30,000, and absent transfer of the wife's share of 13b to the husband – resulted in an allocation of about 65 per cent of the net matrimonial property to the husband

[27] Separately, the Lord Ordinary had erred in the exercise of his discretion in finding that the wife should pay a capital sum to the husband. There had been no evidence that she could procure funds to permit her to do so.

[28] If ordering transfer of the wife's property to the husband, the Lord Ordinary should have ordered the husband to make a capital payment of £69,234 to the wife.

Husband

[29] The husband submitted that the Lord Ordinary should have required the wife to make a capital payment of £219,960 to him. The Lord Ordinary found that the mortgage over 13a had been paid off from joint funds, to the benefit of the husband, but had failed to take into account that the wife had benefited from the use of joint funds to pay off the mortgage over a flat which belonged to her and which was not matrimonial property.

[30] The Lord Ordinary had erred in ascribing the whole liability for the mortgage over 13b to the wife. He should have added a further £13,000 to the £52,742 in respect of expenditure incurred by the husband in relation to 13b after the parties separated. That represented the wife's share of the mortgage payments that had fallen due. The Lord Ordinary had failed to make any allowance for money that the wife had removed from joint bank accounts after the parties separated.

[31] The Lord Ordinary had not provided a reasoned basis for reducing the capital sum by approximately fifty per cent. He should have left out of account the husband's resources. Only the resources of the paying party, in this case the wife, were relevant for the purposes of section 8(2)(b) of the Act. That provision required to be construed by reference to the Scottish Law Commission Report on Aliment and Financial Provision (No 67, 1981), which referred to the resources of the "payer".

[32] In any event, rather than modifying downwards the capital sum payable by the wife, the Lord Ordinary should have considered making an order which provided for the payment to be deferred until a later date. The husband had offered to take a standard security over the wife's home to secure the eventual payment of the capital sum, and would not seek payment until the parties' younger child had finished high school.

[33] The Lord Ordinary had failed to make findings about the wife's conduct of the proceedings that might have been relevant to his approach on expenses. He had not adjudicated on disputed issues about the "ownership and status" of the conservatory. He had been wrong to make the decisions that he did about expenses as between the husband and the wife, and as between the husband and the minuter. He should not have anonymised the minuter in his opinion.

Analysis and decision

[34] As Lord Hamilton observed in *Sweeney v Sweeney (No 2)* 2006 SC 82, at para [14], an order made on an application for financial provision must satisfy the dual criteria of being (a) justified by the principles set out in section 9 of the 1985 Act, and (b) reasonable having regard to the resources of the parties. He observed also that while there may be a logical order in which the application of the provisions of the Act should be addressed, it was the end result, in terms of the order made which, regarded as a whole, must satisfy the statutory requirements.

[35] In practice, however, it will generally assist decision makers to approach matters in a logical order. In the present case the Lord Ordinary's failure to do so hampered him in settling upon an order which did satisfy those statutory requirements. The first principle in

section 9 is that the net value of the matrimonial property should be shared fairly between the parties to the marriage: section 9(1)(a).

[36] It follows that, in practice, it is important to ascertain the net value of the matrimonial property. That involves identifying what property is matrimonial property as defined in section 10(4) of the Act (subject to subsections (5) and (5A)) and identifying debts of the type referred to in section 10(2)). It involves ascertaining the values of that matrimonial property and of any such debts. Section 10(2) directs that the value of those debts be deducted from the value of the matrimonial property in order to ascertain the net value of the matrimonial property. There is no statutory provision for “netting” by making deductions of any other sort when calculating the net value of the matrimonial property:

Sweeney v Sweeney (No 1) 2004 SC 372, paras [14], [15].

[37] The net value of the matrimonial property shall be taken to be shared fairly between the parties when it is shared equally or in such other proportions as are justified by special circumstances: section 10(1). Those special circumstances include the source of the funds or assets used to acquire any of the matrimonial property where those funds or assets were not derived from the income or efforts of the parties during the marriage: section 10(6)(b). The Lord Ordinary regarded the source of the funds used to acquire some items of matrimonial property into account as special circumstances which justified a departure from equal sharing, as he was in principle entitled to do.

[38] What the Lord Ordinary did in this case was to exclude from the value of the matrimonial property for division a number of items which the husband had retained. When then considering how to divide the matrimonial property, he left out of account that the husband had retained these items.

[39] The Lord Ordinary at no point assessed the net value of the matrimonial property. The calculation in his first appendix discloses the exclusion of items to which special circumstances applied – in effect a “netting down” process other than that mandated by section 10(2). By taking that approach he deprived himself of the opportunity of considering what equal sharing would require, and what departures from that might be justified while applying the principles set out in section 9. Even where special circumstances are established, they will not necessarily justify a departure from equal sharing (*Jacques v Jacques* 1997 SC (H.L.) 20).

[40] It will generally be indispensable to maintain an overview first, of the extent of the net matrimonial property, and second of where the division proposed by the court will leave the parties respectively in terms of the funds or assets they retain or are to receive. The Lord Ordinary’s approach afforded him an overview of neither of these. It is common ground that the Lord Ordinary erred in treating the mortgage debt as falling to be set only against the wife’s share of 13b, although the parties differ as to what they say were the consequences of that error. We are satisfied that the Lord Ordinary’s approach caused him to undervalue the net matrimonial property, and to fail to take into account the full extent of the property retained by the husband on the proposed division of the property.

[41] The Lord Ordinary found that the wife should refund £52,742 to the husband. That half share of post separation expenses for 13b relates to matrimonial property (the wife’s one half pro indiviso share in 13b) the value of which itself falls to be shared in the division of matrimonial property. It was on any view excessive to require the wife to “repay” the whole of £52,742 to the husband in those circumstances, particularly where the property was to be transferred to the husband. The Lord Ordinary’s approach to this sum was a significant factor in his finding that the net amount due from the wife to the husband

was £59,171. Had he looked at the net matrimonial property as a whole, the assets the husband was retaining, and the effect on the overall division of matrimonial property of allocating liability for the expenses associated with 13b in this way, it is unlikely that he would have made the order that he did.

[42] The husband complains that the Lord Ordinary did not make findings about the parties' retention of the relevant date balances of their joint bank accounts, and about later intromissions with those accounts by the wife with those accounts. The husband's submission in the reclaiming motion came to be that he should be credited with an additional sum of £7,395. In this connection, the husband founds on parts of his affidavit evidence and of the wife's affidavit evidence. His submission is selective in relying on certain parts of the wife's affidavit evidence; other parts of her evidence were to the effect that the husband withdrew nearly £9,000 from account 4325 just over a month after the relevant date, and after the wife had made a deposit of €5,000 into it. We are not in a position to resolve the matter by reference to the affidavits in the way the husband proposes. The sums involved are relatively modest. So far as the relevant date balances are concerned, the Lord Ordinary proceeded on the broad basis that the parties each retained half of the balance on each of the joint accounts. We are not persuaded that we should interfere with his approach in that regard.

[43] We are satisfied that there was no proper basis for finding the wife liable to make a payment of £30,000 to the husband. It contributed, in the context of the Lord Ordinary's broader approach to the matrimonial property and its division to a significant imbalance in the division of property between husband and wife. We note, further, that the Lord Ordinary found that the wife received Universal Credit of £995 per month, and that she had more than £261,850 in equity in the home in which she now lives. Even were it

reasonable to expect her to realise funds for a capital sum by releasing equity from the home in which she resides, her limited income would not permit her to do so by borrowing. The child of the marriage who is under the age of 16 years resides with the wife. There is nothing in the Lord Ordinary's opinion that would support a requirement that the wife realise funds by selling the home in which she and the child live.

[44] We are satisfied that that while in principle the decision to transfer the wife's interest in the property to the husband was the correct one, the Lord Ordinary should not also have ordered the payment of a capital sum from the wife to the husband. We will recall his interlocutor to the extent that it makes provision for that payment. It follows that we reject the husband's arguments that the Lord Ordinary should have ordered payment to him of a larger capital sum and that he should have considered particular incidental orders to facilitate that payment.

[45] When the capital sum of £30,000 is removed from the equation, and on the basis (a) of the sums that the Lord Ordinary otherwise found the parties had or should retain and (b) that the wife is discharged from her liabilities under the standard security, the division of the matrimonial assets at relevant date values would be such that the husband retains £85,787.25 and the wife retains £54,614.67, without making any adjustment in respect of the La Mondiale bond. That recognises that the husband would assume sole liability for the whole of the mortgage borrowing. The resulting departure from equal sharing is still marked, in the context of quite a modest body of matrimonial property. With that in mind we do not adhere fully to the Lord Ordinary's approach in requiring a further adjustment in the husband's favour as regards the La Mondiale bond. The balancing payment in order to achieve equal sharing would be £15,586.29. On a broad approach, we have assessed the appropriate balancing payment to be one of £10,000.

[46] The wife's share in 13b has increased in value by £7,500 since the relevant date. It is the current value of an asset that is used for the purposes of a transfer of property order – 1985 Act, section 10(3A). Taking that into account we have concluded that we should order the husband to pay a capital sum of £17,500 to the wife.

[47] The Lord Ordinary did not deal explicitly with certain of the conclusions directed to question of whether the conservatory was within the title of 13b. He did, however, make a finding of fact and law that the conservatory formed part of 13b, and fell within the title to 13b, perhaps better described as 13, under exception of 13a. On the order that the Lord Ordinary made for transfer of the wife's one-half pro indiviso share of 13b to the husband, the husband will have title to the whole of the property – 13a and 13b. If there are difficulties which still require to be resolved arising from the voluntary registration of the title to 13a purporting to include the conservatory, those will be more straightforward to remedy where there is no party other than the husband with an interest in the matter.

[48] We will recall the interlocutor of the Lord Ordinary. In relation to the transfer of the wife's share of 13b to the husband we shall specify that the transfer is to be in exchange for a discharge of her liabilities under the standard security in favour of Virgin Money.

[49] The interlocutor that we pronounce will also dispose of the pursuer's first and fourth conclusions, which are for divorce and for transfer of the wife's share in 13b, and of the defender's first conclusion, which is for payment of a capital sum. We will dismiss all of the other conclusions for the parties.

Expenses

[50] Senior counsel for the wife submitted that in the event that her reclaiming motion succeeded, this court should make a finding of no expenses due to or by as between the

husband and the wife, both in respect of the reclaiming motion and the proceedings before the Lord Ordinary.

[51] The wife has been successful in the reclaiming motion. So far as the expenses in the Outer House are concerned, the Lord Ordinary made the award of expenses that he did partly because the husband had offered, on the morning of the proof, to settle on the basis that the wife transfer her one half share of 13b to him, and that the parties otherwise retain their respective assets and liabilities. In the event, the Lord Ordinary's order was more favourable to the husband than the offer he had made. The Lord Ordinary also considered that there was divided success between the parties.

[52] We have recalled that part of the Lord Ordinary's interlocutor that required payment of a capital sum by the wife to the husband. It is not appropriate that she should be found liable, even as an assisted person, to the husband in respect of half of the expenses of the proof. We will therefore recall the Lord Ordinary's interlocutor insofar as it makes provision for that liability, and will substitute a finding of no expenses to or by the husband or the wife.

The Minuter

[53] The husband was unsuccessful in his application to have the loan and standard security set aside. He has not reclaimed in relation to the Lord Ordinary's conclusion about that matter. The husband submits that the by order hearing on 15 August 2025 was necessitated by "procedurally incompetent and misleading submissions advanced by [the wife] and entertained by the court". Those submissions appear to relate to a concern on the part of the Lord Ordinary as to whether the amended pleadings had been served on

Virgin Money, and as to the position of Virgin Money in relation to the transfer of the wife's share of 13b to the husband.

[54] The Lord Ordinary records at para [118] of his opinion that the husband sought a continuation of the hearing on 15 August 2025. As a result of that continuation, the minuter required to appear on a further occasion. The matter that concerned the Lord Ordinary was not one in which the minuter was directly interested. It cannot be said that the decision of the Lord Ordinary was irrational or otherwise vitiated by the sort of error that would permit us to interfere with his discretion in the matter.

[55] Turning to the husband's submission that the Lord Ordinary should not have anonymised the minuter, it is clear that the Lord Ordinary wished to protect the privacy of the parties' children. The minuter was someone known personally to the parties as a friend and member of their social circle. It is reasonable to anonymise her to mitigate the risk of jigsaw identification of the children.

Postscript

[56] Paragraphs 90 to 122 of the Lord Ordinary's opinion deal with matters which arose at by order hearings after the proof. It is desirable that the published opinion after proof be identical to that issued to parties before any post-proof by order hearings: *Foster v Foster* 2024 SC 99, para [45]. Although the Lord Ordinary in the present case did not issue an opinion in draft, similar considerations apply to the practice adopted here. The Lord Ordinary's opinion is his final opinion on the matters before him at proof, and should ordinarily be published at the same time as it is issued to the parties. There should be no room for any potential confusion between what has been decided at proof and what comes

to be decided afterwards. If there is a need for an opinion setting out the Lord Ordinary's reasoning on issues that arise after proof, a separate opinion should be prepared. We note that the second appendix to the Lord Ordinary's opinion appears to have been prepared in the light of submissions made to him at a by order hearing: see para [104].