



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 83

F34/26

OPINION OF LADY TAIT

In the cause

JK

Pursuer

against

LAK

Defender

**Pursuer: Brabender KC; Morton Fraser MacRoberts LLP
Defender: McAlpine KC; SKO Family Law Specialists**

3 September 2026

Introduction

[1] This is a divorce action in which financial provision is in dispute. On 1 July 2026, I heard the pursuer's opposed motion for interim aliment in the sum of £16,000 per month. Having heard parties' respective senior counsel, I made orders for the defender to pay to the pursuer (i) the sum of £12,750 per calendar month as interim aliment; (ii) the sum of £8,000 to meet removal costs within 28 days; and (iii) the sums invoiced for necessary dental treatment within 28 days of production of vouching. It is recorded in the minute of proceedings that the defender will pay the sum of £2,000 per calendar month as child

maintenance for the parties' younger child and will continue to pay her school fees. I was invited to provide a written decision.

[2] The parties married in July 2003. They separated in March 2023 on the pursuer's averments and in December 2024 on the defender's averments. There are two children of the marriage, one of whom is under the age of 16 years. The younger child attends fee-paying school and the defender pays her fees. The elder child is in tertiary education and the defender meets her alimentary needs.

[3] The parties and their younger daughter continued to live in the matrimonial home following separation. It was submitted on behalf of the pursuer, that such living arrangements were detrimental to her health and to the younger child's wellbeing. The motion proceeded on the basis that the pursuer and younger child would vacate the matrimonial home and rent suitable accommodation.

[4] On the basis that the pursuer would move to rented accommodation, the defender offered to pay £6,000 per month as interim spousal aliment; £2,000 per month as child maintenance; school fees; the pursuer's removal costs (to include a rental deposit); and the cost of significant dental treatment necessitated by the pursuer's cancer treatment.

[5] I heard detailed submissions about potential sources of the defender's income and resources. Ultimately the matter in contention was not the ability of the defender to meet an alimentary award (at the date of the motion and subject to certain observations as to the climate in which his business operates) but whether I should take into account and make allowance for the pursuer's legal fees.

Applicable law

[6] Sections 4 and 6 of the Family Law (Scotland) Act 1985 (“the 1985 Act”) provide:

“4 Amount of aliment.

- (1) In determining the amount of aliment to award in an action for aliment, the court shall, subject to subsection (3) below, have regard —
 - (a) to the needs and resources of the parties;
 - (b) to the earning capacities of the parties;
 - (c) generally to all the circumstances of the case.
- (2) Where two or more parties owe an obligation of aliment to another person, there shall be no order of liability, but the court, in deciding how much, if any, aliment to award against any of those persons, shall have regard, among the other circumstances of the case, to the obligation of aliment owed by any other person.
- (3) In having regard under subsection (1)(c) above generally to all the circumstances of the case, the court —
 - (a) may, if it thinks fit, take account of any support, financial or otherwise, given by the defender to any person whom he maintains as a dependant in his household, whether or not the defender owes an obligation of aliment to that person; and
 - (b) shall not take account of any conduct of a party unless it would be manifestly inequitable to leave it out of account.

...

6 Interim aliment.

- (1) A claim for interim aliment shall be competent —
 - (a) in an action for aliment, by the person who claims aliment against the other;
 - (b) in an action for divorce, separation, declarator of marriage or declarator of nullity of marriage, by either party against the other party...
on behalf of the claimant and any person on whose behalf he is entitled to act under section 2(4) of this Act.
- (2) Where a claim under subsection (1) above has been made, then, whether or not the claim is disputed, the court may award by way of interim aliment the sum claimed or any lesser sum or may refuse to make such an award.
- (3) An award under subsection (2) above shall consist of an award of periodical payments payable only until the date of the disposal of the action in which the award was made or such earlier date as the court may specify.

- (4) An award under subsection (2) above may be varied or recalled by an order of the court; and the provisions of this section shall apply to an award so varied and the claim therefor as they applied to the original award and the claim therefor.”

[7] Section 22 of the 1985 Act provides:

“22 Expenses of action.

The expenses incurred by a person in pursuing or defending —

- (a) an action for aliment brought —
 - (i) by either party to a marriage, or
 - (ii) by either party in a civil partnership, on his own behalf against the other party or partner,
- (b) an action for divorce, separation, declarator of marriage or declarator of nullity of marriage;
- (bb) an action for dissolution of a civil partnership, declarator that a civil partnership exists or declarator of nullity of a civil partnership,
- (c) an application made after the commencement of this Act for variation or recall of a decree of aliment or an order for financial provision in an action brought before or after the commencement of this Act, shall not be regarded as necessities for which the other party to the marriage or the other partner in the civil partnership is liable.”

Relevant submissions

Pursuer

[8] In November 2024, the pursuer was made redundant from the limited company in which the defender is sole shareholder and director. She received statutory redundancy. She made claims for unfair dismissal and disability discrimination and was awarded approximately £3,500. The award was expended on legal fees in relation to the employment and present proceedings. The defender paid monthly aliment between May and November 2025 when he ceased payment. Thereafter, the pursuer had access to the parties’ joint account into which the defender made minimal deposits at irregular intervals, and which operated in overdraft. The defender described his operation of the joint account as

reactive cash management and as being consistent with the account's operation throughout the marriage. Such management of the joint account was submitted to be financial control and to result in the pursuer's inability to meet her alimentary needs, including food shopping.

[9] Senior counsel for the pursuer submitted that the present action is exceptional.

In terms of section 4 of the 1985 Act, the court should have regard to the needs and resources of the parties; to their earning capacities; and generally to all the circumstances of the case.

The pursuer has no realisable assets; she will only be able to realise capital through financial provision on divorce; she cannot seek sale of any assets; and she cannot secure a payment of capital to account as the defender has refused. The pursuer has no income from any source. She is currently unfit for work and has no earning capacity. Once in receipt of aliment at the level offered, the pursuer will be ineligible for legal aid. She cannot obtain any legal expenses funding and her deferred fee arrangement has expired. Consequently, the pursuer's ability to access justice has been impacted. She has experienced real hardship.

[10] In terms of section 27 of the 1985 Act, resources means present and foreseeable resources. Accordingly, the court is not limited to consideration of immediately available resources. The defender has ample resources to make payment of interim aliment beyond what he chooses to declare as a dividend and having regard to distributable reserves.

Detailed submissions were made in respect of the defender's use of his director's loan account; retention of cash within the company; and transfers between companies.

[11] The pursuer seeks a payment of £5,000 per month in respect of prospective legal fees to conclusion of a preliminary proof. She produced a detailed estimate of fees and outlays.

The payment sought is not in respect of arrears of fees. Senior counsel anticipated that it would be argued against her that legal expenses are not alimentary by convention.

Defender

[12] As noted above, the defender proposed payment of interim aliment but the proposal did not take legal fees into account. Senior counsel for the defender submitted that it was widely understood that legal expenses do not form part of an aliment claim. The basis for that is section 22 of the 1985 Act. However, senior counsel did not suggest that it was incompetent to include legal fees. He did not suggest that the sum claimed was excessive. Rather, it was neither reasonable nor justified in all the circumstances. There was a lack of vouching both as to (i) the need to include legal expenses; and (ii) any attempts to obtain either litigation or legal aid funding.

[13] A situation may arise where the defender succeeds at proof and seeks expenses against the pursuer. He may not be able to recover the sums paid by him towards the pursuer's legal fees. Senior counsel appropriately accepted that the defender could have agreed to make a payment to account of capital which would avert such a situation. Were the pursuer to succeed at proof and seek expenses, there may be an element of double counting as her expenses had already been paid. There was scope for uncertainty. Further, to accede to the pursuer's motion may amount to a Legal Services Payment Order ("LSPO") by the back door. While such an application may be made in England, there is no such mechanism in Scotland. An LSPO is subject to a statutory test. There is the potential to open the floodgates to such applications.

Decision

[14] Specifically in relation to whether legal expenses are alimentary, senior counsel for the pursuer referred me to the Scottish Law Commission Report (Scot Law Com No 67) on

Aliment and Financial Provision at paragraphs 2.146 to 2.150 in relation to expenses of litigation as necessities. The report recommended that the expenses of a spouse in conducting or contesting consistorial litigation should no longer be regarded as necessities for which the other spouse is liable. I was referred to section 22 of the 1985 Act as set out above. While section 22 provides that the legal expenses of one party are not to be regarded as necessities for which the other party is liable, that does not mean that they are not alimentary. Section 22 was submitted not to exclude legal expenses from alimentary needs in terms of the section 4 test. It was accepted that the court is likely only to consider legal expenses as part of alimentary need in exceptional cases given the availability of civil legal aid. The pursuer's circumstances were submitted to be exceptional. The defender's conduct means that the pursuer's needs include legal fees. Such need could reasonably be met by a payment of capital to account. The defender refused such an option.

[15] In *Scott v Scott* [2021] SC ABE 40 at [60], Sheriff Mann held:

"In looking at the pursuer's outlays it cannot escape notice that the pursuer is expending a sum of £3,000 per month towards her legal expenses in these proceedings. That is a very significant proportion of her income. Section 22 of the Family Law (Scotland) Act 1985 provides that the expenses incurred by a party in pursuing an action of divorce are not to be regarded as necessities for which the other person is liable. But, that is simply a provision which abolishes an old rule that the provider of legal services to a married person could recover those expenses directly from the other party to the marriage who owed the person a duty of aliment on the basis that the legal services were necessities. It does not detract from the fact that the pursuer is making those payments. It does not detract from the fact that the pursuer has been dependent to a substantial degree on the financial support of the defender in the form of interim aliment. I would not discount the payment of legal fees on account of section 22."

[16] Senior counsel for the defender fairly accepted that section 22 of the 1985 Act did not preclude consideration of legal fees as part of a claim for interim aliment. His concern came to rest on the possible implication for any final determination of expenses and any development of currently understood practice. In considering the pursuer's legal fees as

part of alimentary need, I was clear that the present case is exceptional. The pursuer has no income and no foreseeable earning capacity (consistent with medical reports before the court); she has no realisable assets; she cannot seek to realise any matrimonial assets; her deferred funding arrangement has expired; she is ineligible for legal aid and unable to secure litigation funding; she has expended any limited resources paying legal fees; she has a claim for a significant capital sum; and the defender has refused to make any payment of capital to account.

[17] In the event of any future consideration of expenses, it will be open to parties to address the implications of the present order and for the court to have regard to same in the exercise of its discretion. In the exceptional circumstances of the action, the court neither seeks to develop practice nor to mimic an LSPO.