

## Putting fairness first: Grant v Grant and the date at which property is acquired for the purposes of the Family Law (Scotland) Act 1985

Article (Accepted Version)

Holligan, Bonnie (2018) Putting fairness first: Grant v Grant and the date at which property is acquired for the purposes of the Family Law (Scotland) Act 1985. *Edinburgh Law Review*, 22 (3). pp. 411-416. ISSN 1364-9809

This version is available from Sussex Research Online: <http://sro.sussex.ac.uk/id/eprint/80441/>

This document is made available in accordance with publisher policies and may differ from the published version or from the version of record. If you wish to cite this item you are advised to consult the publisher's version. Please see the URL above for details on accessing the published version.

### **Copyright and reuse:**

Sussex Research Online is a digital repository of the research output of the University.

Copyright and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable, the material made available in SRO has been checked for eligibility before being made available.

Copies of full text items generally can be reproduced, displayed or performed and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

# Putting fairness first: *Grant v Grant* and the date at which property is acquired for the purposes of the Family Law (Scotland) Act 1985

## A. INTRODUCTION

Gretton and Steven comment that “[t]he concept of ‘matrimonial property’ is of limited importance from a property law standpoint.”<sup>1</sup> Are the concepts of property law of equally limited importance when defining “matrimonial property” for the purposes of financial provision on divorce? The tension between the orthodoxies of property law and those of the financial provision regime were highlighted in *Grant v Grant*.<sup>2</sup> In this case, the Sheriff Appeal Court held that the date at which an asset was acquired can be the date of construction of family house, rather than the date of acquisition of the land on which it stands, which would have been the expected answer according to property doctrine. The decision raises significant issues regarding the relationship between property law and the provisions of the Family Law (Scotland) Act 1985. Does the statutory context justify departure from the long-established doctrine that the legal status of an accessory follows that of the principal? If the usual rules of property law do not apply, on what basis are decisions about the scope of “matrimonial property” to be made? Is fairness between the parties the only principle that matters?

## B. THE FACTS IN *GRANT*

*Grant* related to whether a house in Aberdeenshire fell to be treated as matrimonial property for the purposes of divorce. Section 10(4) of the Family Law (Scotland) Act 1985 (the “1985 Act”) provides that:

“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 furnishings for such home; or (b) during the marriage but before the relevant date....

---

<sup>1</sup> G L Gretton and A J M Steven, *Property, Trusts and Succession*, 3<sup>rd</sup> edn (2017), para 11.12.

<sup>2</sup> [2018] SAC (Civ) 4.

The land on which the house was built was acquired by one of the spouses in 1994. This was before an established relationship between the parties; on the face of it, therefore, the land fell outside the terms of section 10(4). Between 1996 and 1997 the parties constructed a house on the land, which they subsequently occupied together. Two children were born in 1998 and 2001 respectively. The parties married in 2003 but separated in 2008.

As there was enough evidence to suggest that the house had been constructed as a family home, the judgment turned on whether this intention applied when the property “was acquired”. Did the fact that, under the general principles of property law,<sup>3</sup> the house acceded to the land mean that the date of acquisition was the date at which the land was purchased? Or, for the purposes of the 1985 Act, could the date of acquisition be the date when the house was constructed?

### C. JUDGMENT

In line with the established principles of accession,<sup>4</sup> the house and land were held to form one single object of property.<sup>5</sup> However, rather than the date of acquisition of this asset being the date at which the land was acquired, the relevant date was held to be the point at which construction of the house was completed.<sup>6</sup> Sheriff Principal Turnbull rejected the suggestion that the applicable norms should be those of property law: “[t]he law of accession regulates ownership of the property in question; it does not affect whether or not that property is matrimonial property for the purposes of the 1985 Act.”<sup>7</sup> In the circumstances, the evidence indicated that the intentions of the parties at the time of construction were that the property should be used a family home.<sup>8</sup> The case was therefore remitted for proof to determine whether the house did, as a result, fall within the definition of matrimonial property set out in section 10(4) of the Act.

### D. ANALYSIS

---

<sup>3</sup> *Brand’s Trustees v Brand’s Trustees* (1876) 3 R (HL) 16; K G C Reid, “Property: Part 1 – General Law”, in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 18 (1993), para 578.

<sup>4</sup> See Reid, “Property” (n3), paras 574; 578.

<sup>5</sup> *Grant*, para 13.

<sup>6</sup> *Grant*, para 14.

<sup>7</sup> *Grant*, para 14.

<sup>8</sup> *Grant*, para 15.

*Grant* is likely to have significant implications where a couple construct a family home on land owned by one of the parties, and perhaps also in other contexts where non-matrimonial property is converted to domestic use. As well as the boundary between property and family law, the decision raises policy issues regarding the roles that should be attributed to intention and fairness when determining whether a family home should be brought within the scope of the regime governing financial provision on divorce.

In general, marriage does not alter proprietary rights.<sup>9</sup> It follows from this that the question of whether an object is matrimonial property for the purposes of the 1985 Act should be treated as separate from the question of ownership under the usual rules of property law.<sup>10</sup> As Griffiths *et al* explain, whether or not an asset is matrimonial property “does not change ownership.”<sup>11</sup> It might nevertheless be thought that the general principles of property law will determine if and how an asset has been “acquired” by the parties for the purposes of the financial provision regime. Under these principles, a building is an accessory to the land on which it is built.<sup>12</sup> As an accessory takes on the legal attributes of the principal,<sup>13</sup> the date of acquisition would be determined by the principal rather than the accessory. From the perspective of property law, the decision in *Grant* is thus difficult to reconcile with the fundamental principles of accession. One response would be to dismiss the issue as one of statutory construction that does not bear on questions of acquisition as a matter of property law. To the extent that this approach preserves the internal coherence of property rules, it is perhaps justified. However, coherence comes here at the expense of disjuncture between property and family law.

The judgment reflects the important role played by fairness and equality under the 1985 Act.<sup>14</sup> On one hand, the question of whether an object is matrimonial property is distinct from the question of how its value should be shared between the parties. However, the very purpose of determining an object to be matrimonial property is to ensure that such

---

<sup>9</sup> K McK Norrie, “Child and Family Law”, in *The Laws of Scotland: Stair Memorial Encyclopaedia* Reissue (2004), para 652; E Clive, *The Law of Husband and Wife in Scotland*, 4<sup>th</sup> edn (1997), para 14-019.

<sup>10</sup> Norrie, “Child and Family Law” (n 9), para 652.

<sup>11</sup> A Griffiths, J Fotheringham and F McCarthy, *Family Law*, 4<sup>th</sup> edn (2015), para 13.11.

<sup>12</sup> *Brand’s Trustees v Brand’s Trustees* (1876) 3 R (HL) 16; Reid, “Property” (n3), paras 574 and 578.

<sup>13</sup> Reid, “Property” (n3), para 574.

<sup>14</sup> On the historical background to the current regime, see Norrie, “Child and Family Law” (n 9), paras 644-645; Clive (n 9), ch 14.

property is shared fairly between the parties on divorce.<sup>15</sup> Fairness is therefore inevitably an important consideration when deciding whether an object falls within the scope of matrimonial property. In *Grant*, Sheriff Principal Turnbull comments that the concept of matrimonial property “exists to give effect to those parts of the Act which deal with financial provision.”<sup>16</sup> In some ways then, the question of whether an asset is matrimonial property is secondary to the question of what is just in the context of the parties’ overall relationship.<sup>17</sup> It is consistent with the need to ensure fairness that the family home, likely to be the parties’ principal asset, should be brought within the scope of financial provision calculations.

In this respect the decision is indicative of the special status afforded to family homes, which are “closely associated with the parties’ joint family life”.<sup>18</sup> Money which is not matrimonial property (for example an inheritance) will become matrimonial property if used to purchase a family home, whether or not the purchase is prior to marriage.<sup>19</sup> Indeed, the use of the property as a family home may justify equal sharing of its value between the parties despite the source of the funds used to acquire it.<sup>20</sup> As Lord MacFadyen put it in *Cunningham v Cunningham*,<sup>21</sup> such funds are “devoted in a particularly clear way to matrimonial purposes, and the source of the funds so used is in my view less important than it would be in the case of other types of matrimonial property.”<sup>22</sup>

Clarity and certainty are also important elements of fairness, however, and the decision in *Grant* does raise questions as to exactly how the date of acquisition should be determined. The 1985 Act does not define the term “acquired”, but it would be natural to assume that it might refer to acquisition of rights to the asset under the rules of property law. If property rules do not govern the dates at which matrimonial assets are acquired or transferred, what is the source of the alternative regime? The date of acquisition suggested by the Sheriff Principal is the date “when the house was completed”.<sup>23</sup> It seems likely that this might sometimes be complex to assess, particularly in the context of ongoing work and

---

<sup>15</sup> Ibid, and see section 9(1)(a) of the 1985 Act.

<sup>16</sup> *Grant*, para 9.

<sup>17</sup> See, for example, *Willson v Willson* [2008] CSOH 161, at para 50 per Lord Drummond Young.

<sup>18</sup> Clive (n 9), para 24-025.

<sup>19</sup> See Norrie, “Child and Family Law” (n 9), para 658.

<sup>20</sup> The source of the funds or assets used to acquire matrimonial property is one of the justifications for departure from the principle of equal sharing under s 10(6)(b) of the 1985 Act.

<sup>21</sup> 2001 Fam LR 12.

<sup>22</sup> *Cunningham* (n 21) at para 25.

<sup>23</sup> *Grant*, para 14.

improvements or changes in intention. This may create difficulties for practitioners when advising clients who wish to protect assets from the matrimonial property regime.<sup>24</sup>

*Grant* also raises broader policy questions regarding the situation where any non-matrimonial dwelling is converted to use as a family home. Cases such as *Maclellan v Maclellan*,<sup>25</sup> in which a croft that had not been acquired for use as a matrimonial home was held not to be matrimonial property, suggest that a change of intention in itself is not enough to bring a home within the scope of the statute. This view is supported by Professor Meston, who suggests that intention at the time of the acquisition is the crucial factor, whether or not these intentions change.<sup>26</sup> There is, however, a contrasting, if possibly erroneous, line of reasoning evident in cases such as *Buczynska*.<sup>27</sup> Griffiths and others have pointed to the hardship that may be caused by failing to take account of changed intentions;<sup>28</sup> in this respect the decision in *Grant* can be seen as favouring a more flexible approach.

An alternative strategy, which might have avoided some of the doctrinal contradictions raised above, would have been to rely on the special rules in sections 9(1)(b) to 9(1)(e) of the 1985 Act to ensure fairness between the parties. Even where a family home falls outwith the definition of “matrimonial property”, and hence does not require to be shared fairly under section 9(1)(a), it would still be open to the court to make an order in respect of the property under sections 9(1)(b) to (e) of the Act. These subsections allow the court to, respectively, reflect any economic advantage or disadvantage; share the economic burden of caring for children; enable one party to adjust to the loss of the other’s financial support and alleviate any serious financial hardship resulting from the divorce.<sup>29</sup> Critically, the court must consider the overall financial position of the parties, taking into account assets which are not matrimonial property.<sup>30</sup> Thus, where one party had contributed financially to

---

<sup>24</sup> On this point see A Maitles, “Family briefing: how do the matrimonial property rules apply to a family home built on land acquired by one party before the relationship began?” (2018) 63(5) *Journal of the Law Society of Scotland* 28.

<sup>25</sup> See also *Ranaldi v Ranaldi* 1994 SLT (Sh Ct) 25

<sup>26</sup> M C Meston, “Matrimonial Property and the Family Home” 1993 SLT (News) 62, at 62-63.

<sup>27</sup> *Buczynska v Buczynski* 1989 SLT 558. For criticism, see Clive (n 9), para 24-025 at fn 70; Griffiths *et al.* (n 11), para 13-16.

<sup>28</sup> Griffiths *et al.* (n 11) para 13-16. As Thomson points out, the present rules may neglect the significance of long periods of cohabitation before marriage: J Thomson, *Family Law in Scotland*, 7<sup>th</sup> edn (2014), 159.

<sup>29</sup> On the relationship between these principles, see Norrie, “Child and Family Law” (n 9), paras 651.

<sup>30</sup> As Norrie comments, this provision may be particularly helpful where there are substantial assets but no “matrimonial property”: Norrie, “Child and Family Law” (n 9), para 664.

the construction of a house on land owned by the other, an award under s9(1)(b) could address any economic disadvantage by redistributing the value of the property, notwithstanding that it was not “matrimonial property”. Any claims made under sections 9(1)(c) to 9(1)(e) could also be met from the value of an asset which was not matrimonial property. It is not, therefore, necessary to adjust the rules of accession in order to achieve fairness in financial provision.

### E. CONCLUSIONS

It is, in many ways, surprising that reference to an asset being “acquired” in matrimonial property legislation, and, by implication, other statutory contexts, does not necessarily relate to the asset being acquired for the purposes of property law. It may be easy for property lawyers to dismiss *Grant* as relevant only to the specific statutory regime surrounding the 1985 Act. However, broader questions remain regarding the relationship between property and family law. Is there now a separate body of rules regulating acquisition and transfer for the purposes of family law? In terms of accession, can an accessory, in some contexts, determine the date when the principal is acquired? If this is only true for the purposes of the 1985 Act, at what point does the exception start to erode the rule?

From the point of view of family law, the decision in *Grant* affirms the importance of flexibility and attentiveness to individual circumstances. It highlights the likelihood that the 1985 Act will be interpreted in a purposive manner to bring assets within the scope of the financial provision regime, especially where there is an intention to create a family home. It also reopens a debate regarding the treatment of pre-matrimonial assets on divorce, particularly where there have been long periods of cohabitation prior to marriage. There is a strong argument that a family home should always be treated as “matrimonial property”, leaving cases where it would be unfair for its value to be equally divided to be covered by the special rules in sections 9(1)(b) to 9(1)(e) of the 1985 Act. This would, however, require amendment to the statute. The issue might usefully be considered by the Scottish Law Commission as part of its upcoming review of family law.<sup>31</sup> Failing such reform, however, it would be preferable for the courts to address unfairness in financial provision using their powers in sections 9(1)(b) to 9(1)(e), leaving fundamental property principles intact. In the

---

<sup>31</sup> Scottish Law Commission, *Tenth Programme of Law Reform* (Scot Law Com No 250, 2018).

meantime, *Grant* prioritises justice in the circumstances, with all the ambiguity and potential inconsistency that such an approach implies.

*Bonnie Holligan*  
*University of Sussex*