

Briefing for the Citizen Participation and Public Petitions Committee on petition [PE2124](#): Keep private and work place pensions out of divorce, lodged by Eliza Wyper

Brief overview of issues raised by the petition

The focus of the petition is on what should happen on divorce to a pension belonging to either spouse.

Under the current law, discussed in more detail below, one spouse's pension benefits can be treated as an asset to be considered on divorce. The petitioner would like to change the law to exclude pensions from being treated in this way.

While the petition focuses on pensions on divorce, the issue the petitioner raises also arises on the dissolution of a civil partnership.

The Family Law (Scotland) Act 1985

The statute which determines what happens to a couple's property and finances on divorce, or on dissolution of a civil partnership, is [the Family Law \(Scotland\) Act 1985](#) ('the 1985 Act'), as amended.

Court action and private negotiations

A court may be required to consider the division of the couple's property and finances and reach a decision on areas in dispute between a couple by applying the 1985 Act.

However, when their relationship ends, many couples privately reach a legally binding separation agreement about the terms of their divorce or dissolution. Where couples are seeking to reach agreement themselves, and both parties have access to legal advice, their respective solicitors will negotiate on behalf of the couple with reference to the principles set out in the 1985 Act.

Matrimonial or partnership property

A key concept in the 1985 Act is **matrimonial property** (in the context of marriage) or **partnership property** (in the context of a civil partnership). While the labels attached to the property are different between marriage and civil partnerships, the underlying legal concept is the same in both instances.

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

Matrimonial or partnership property is all property belonging to the two people, or **to either of them**, before the relevant date. The **relevant date** is the earlier of:

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

The general rule (subject to a specific exception relating to the family home) is that matrimonial or partnership property must be acquired during the marriage or civil partnership. Accordingly, pension benefits built up during the period of the marriage or civil partnership, but before the relevant date, are matrimonial or partnership property.

What happens to the couple's property and finances

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

The approach the courts must use

The court must consider a statutory two-stage test set out in the 1985 Act before deciding whether to make a court order relating to the couple's property and finances:

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

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

In terms of the individual principles, the starting point for any case relating to financial provision on divorce or dissolution is the first legislative principle. [This key principle says that the net value of a couple's matrimonial or partnership property must be shared fairly between them](#). Fair sharing is usually **equal sharing** unless special circumstances apply.

Court orders relating to the couple's property and finances

The court can make various court orders to give legal effect to a decision under the 1985 Act in an individual case.

One difficulty with pensions is that they are not capable of being realised immediately or at least that is often not the best financial approach.

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

However, [separately, there are also several specific orders in the 1985 Act, as amended, relating to pensions.](#)

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

The pension sharing order obliges the provider of a pension policy to transfer a proportion of the rights within a policy held by one spouse or civil partner to a policy in the name of the other spouse or civil partner. Essentially, it involves taking all or part of a spouse or civil partner's pension entitlement and separating it off into a distinct pension entitlement for the other spouse or civil partner. It is often used when the pension is the most valuable asset and the remaining matrimonial or partnership property is not valuable enough to offset it.

The policy impact of the petition

A pension can be a very significant asset falling into the category of matrimonial or partnership property. Consequently, the change proposed in the petition would represent a significant shift in the policy underpinning the current law.

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