

Citizen Participation and Public Petitions Committee
Wednesday 5 February 2025
2nd Meeting, 2025 (Session 6)

PE2124: Keep private and work place pensions out of divorce

Introduction

Petitioner Eliza Wyper

Petition summary Calling on the Scottish Parliament to urge the Scottish Government to change the law to no longer consider private and workplace pensions to be a part of matrimonial property.

Webpage <https://petitions.parliament.scot/petitions/PE2124>

1. This is a new petition that was lodged on 5 November 2024.
2. A full summary of this petition and its aims can be found at **Annexe A**.
3. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe B**.
4. Every petition collects signatures while it remains under consideration. At the time of writing, 22 signatures have been received on this petition.
5. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered.
6. The Committee has received submissions from the Minister for Victims and Community Safety, and the Petitioner, which are set out in **Annexe C** of this paper.

Action

7. The Committee is invited to consider what action it wishes to take.

Clerks to the Committee
January 2025

Annexe A: Summary of petition

PE2124: Keep private and work place pensions out of divorce

Petitioner

Eliza Wyper

Date Lodged

5 November 2024

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to change the law to no longer consider private and workplace pensions to be a part of matrimonial property.

Background information

I believe the state pension is on its way to being abolished, and not everyone wants to sign a prenuptial agreement or force their future spouse to sign it.

With the state pension age rising, it is looking likely that a young person is not going to receive a state pension, or retiring in their 90's. Workplaces automatically enrol people into workplace pensions, which are only paid by employees. No contribution is made by the partner. Young people as they get older will be relying on workplace or private pensions to be able to retire or take early retirement. If they marry and have a marital breakdown their spouse is automatically entitled to 50% of this unless there is matrimonial property for offsetting. Matrimonial property is considered as both individuals contribute to that. Why is a pension considered to be matrimonial property when only one person contributes to this?

Annexe B: SPICe briefing on PE2124



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.

Sarah Harvie-Clark
Senior Researcher

17 December 2024

The purpose of this briefing is to provide a brief overview of issues raised by the petition. SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at spice@parliament.scot

Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

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Annexe C: Written submissions

Minister for Victims and Community Safety written submission, 6 December 2024

PE2124/A: Keep private and work place pensions out of divorce

Thank you for your email dated 5 November 2024 requesting the Scottish Government's views on the action called for in Petition PE2124: Keep private and work place pensions out of divorce.

The petition is asking the Scottish Parliament to call on the Scottish Government to introduce legislation that would stop an individual's private and work-place pensions being considered as matrimonial property during divorce proceedings.

This letter specifically refers to divorce. However, the legislation on financial provision when a civil partnership is dissolved is on the same lines and the same considerations would apply.

When a couple divorces in Scotland, the assets acquired during the relationship or before the marriage for use as a family home, whether owned jointly or as individuals, are treated as "matrimonial property." This is then divided between the couple in line with a number of principles laid down in the [Family Law \(Scotland\) Act 1985](#).

There is provision in the 1985 Act that the value of pension benefits accrued during the duration of the marriage is part of the "matrimonial property" and may therefore be split between separating spouses.

As part of the financial settlement, the court can make a Pension Sharing Order which will grant an individual a share of their former spouse's pension. The Scottish Government understands it is more common in practice for the pension to be included as part of "matrimonial property" but not actually be shared: so, for example, one spouse may keep the house and the other may keep the pension.

The Scottish Government does not support the aims of this petition. A pension can be a significant asset and including it as part of "matrimonial property" helps ensure that all relevant assets are taken into account. The petitioner says no contribution is made by the partner to the pension. However, if, for example, one spouse goes out to work whilst the other stays at home (or works part time) to care for the children or other family members, then there is an indirect contribution.

Taking pensions out of the "matrimonial property" regime could be disadvantageous to women. The Scottish Government has published analysis from the [Wealth and Assets Survey](#), which is conducted by the Office for National Statistics. This shows that 71% of men had private pension wealth in 2018-2020, whereas only 66% of women did.

The UK Government [reported in 2023](#) that there is a gender pension gap of 35% between men and women. This is the difference between male and female median pension wealth at the normal minimum pension age of 55 and is based on data from 2018 to 2020.

Although financial provision on divorce is a devolved matter, pensions are generally reserved. The [Scottish Public Pensions Agency](#), a Scottish Government agency, manages public sector pensions in some areas (such as the Police, Fire, Teachers, Local Government and the NHS Schemes) but private sector pensions, the State Pension and other public sector pensions (such as civil service pensions) are reserved. The main legislation on pension sharing (the [Welfare Reform and Pensions Act 1999](#)) is UK legislation. (There are separate provisions within the 1999 Act which take account of the different rules on financial provision on divorce applying in Scotland. The 1999 Act amended the Family Law (Scotland) Act 1985).

Therefore, any changes to the legislation on pension sharing on divorce would need to be discussed with the UK Government (e.g. the Department for Work and Pensions) and there would be considerable reserved implications. However, as indicated above, we do not consider changes along the lines of those suggested by the petitioner should be made.

Yours sincerely,

SIQBHIAN BROWN

Petitioner written submission, 9 December 2024

PE2124/B: Keep private and work place pensions out of divorce

I understand the points that have been made in the letter, but I still disagree with them.

In regards to a spouse staying at home to look after the children, I firmly believe that is the choice of that person in the relationship. There are plenty of jobs out there that would work around partners' shifts and children.

The Scottish Government are also considering allowing children from 9 months 15 hours free childcare, and during this time the main caregiver could be working and contributing to their own pension, instead of relying on their partner.

Also with the way the current climate is going a state pension is not going to exist in the near future, people are then relying on their private/work place pensions to retire. Let's say the unfortunate hits and they find themselves divorcing their spouse, and they are then losing a portion of that pension, they are then not able to retire comfortably. If their spouse has opted out of a work place pension and there is no matrimonial property, that spouse can claim 50% of their pension, which results in unfairness, especially if the spouse is in a high paying job, and claiming against the person on the low paying job.

When women choose to stay home with their kids and not bringing in any income it is then up to the man to pay for all the bills, mortgage/rent, so he is solely contributing to the house. Yes, the women are making sure the children are okay and are looked after, but they are not bringing in anything to contribute to the marital property. This is my point for removing private/workplace pensions. I understand there are prenuptial agreements in place, but not everyone thinks that their marriage will end in divorce.

I would like more data made available on this issue for the Committee to consider, such as how many –

1. men have opted to stay at home with children
2. women have gone back to work early, or while their children are still young
3. men have had to lose a portion of their pension when there are no marital assets
4. women have lost a portion of their pension when there are no marital assets.