

Scottish laws regarding financial settlement after divorce

While both Scottish and English family law systems address divorce and financial settlements, there are notable differences between the two jurisdictions. Here are some key points of comparison between Scottish and English laws regarding the ways and means of settling financial settlements after divorce:

How is divorce different in Scotland?

As family law is a devolved matter in the United Kingdom, Scottish family law remains distinct from the rest of the UK, and the legal system follows the principles of Scots law. Financial settlements after divorce in Scotland are typically determined by the Family Law (Scotland) Act 1985 and subsequent amendments.

The grounds for divorce are the same in Scotland and England, except that Scottish couples need to evidence the reason for the breakdown for the divorce to be pronounced. Those reasons are:

- Adultery.
- Unreasonable behaviour (i.e., one of the spouses behaved in such a manner that the other party cannot live with them).
- The couple has not cohabited for a year (with the other party's consent) or for two years (no consent required).

The need to prove one of the grounds also means that a divorce can be contested in Scotland whilst in England it cannot since the introduction of no-fault divorces in 2022.

In England, a simple declaration of breakdown is sufficient, as a divorce has become a simple administrative procedure. The procedure is also distinct from the post-divorce financial settlement, while in Scotland, such procedures are concurrent and connected. In other words, in Scotland, the law creates a clean break and financial matters are resolved at the same time as the divorce (the principle of clean break is also found in English law, but it is applied less assiduously).

It is important to note that proof of unreasonable behaviour or adultery will not automatically result in financial compensation. Nowadays, the attribution of fault is a means of justifying a divorce.

Finally, under Scots law, the most important is the date of separation, which is the date when the couple began to live separately, either under the same roof or in different properties. In England, the date is the date of the divorce.

Timing

According to the Family Law (Scotland) Act 1985 and the Family Law (Scotland) Act 2006, a spouse cannot seek financial settlements after the decree of divorce has been made (also called ancillary relief).

All financial arrangements must be resolved before the spouses are divorced.

In England, the spouse has the option of returning to court to negotiate a financial settlement post-divorce.

Matrimonial property regime

Scotland follows a system of "matrimonial property" which includes those assets acquired during the marriage but not wealth created during the marriage, regardless of individual ownership if such property was used as a family home. Assets owned before the marriage or via gift by third parties or inherited during the marriage or after the date of separation are not included in the matrimonial pot. However, life policies, pensions or business interests can be included as well as debt acquired during the marriage can be regarded as matrimonial properties.

Scot law places the emphasis on the fair sharing of matrimonial property which often results in equal sharing.

The court has, however, several tools at its disposal such as the transferring of ownership. The outcome will, therefore, depend on the divorce proceedings and be decided on a case-by-case basis, similar to England.

England operates under the principle of "ancillary relief". Courts consider a wide range of factors, including the financial needs and contributions of each party, in determining a fair settlement. The matrimonial pot is composed of assets of any kind brought into the marriage, such as properties owned prior to the marriage, third-party gifts, inheritance, pensions, life policies, and business assets.

Equitable distribution

In Scotland, the equitable distribution of matrimonial property and finances often means a 50/50 split. Such a split can vary based on the specific circumstances of the case such as:

- If either of the individuals is unable to work.
- If one spouse is a primary caregiver and is, therefore, unable to work.
- An unequal division of assets is essential for the well-being of the children involved.

Moreover, potential future inheritances as well as future earnings are taken into consideration in the settlement in England, but not in Scotland.

Maintenance (or Aliment in Scotland)

The principle of clean break means that maintenance will only be awarded if the provision of assets is inappropriate or insufficient. The court will consider some factors such as the earning capacity, the standard of living during the marriage, and respective financial needs. However, there will be a need for an exceptionally convincing argument to persuade the court that such an award is necessary. For instance, the age of the partner might play a role. So, if one partner would receive a house and a large sum of money from the divorce, the chances of receiving ongoing maintenance will be slim to none. Finally, if an aliment is awarded it would be for a maximum of three years post-divorce.

English courts are more willing to grant ongoing maintenance post-divorce after considering similar factors. The maintenance can be for an indefinite period. London has, in fact, become the capital of divorce due to the generosity of English courts towards maintenance.

Children's interest

Both consider the welfare of any children as a primary consideration when making financial provision orders. A court might split the assets differently to allow the primary carer and the child to live in the family home so as not to disrupt the child's routine.

Pension sharing

Pensions are dealt with differently in Scotland and England. In Scotland, the pensions taken into consideration are only those built up during the marriage, but not those previously built up by the pension holder. In England, the pensions considered in a divorce are those built up both before and during the marriage. Moreover, there is a possibility to divide the pensions in such a way as to equalize the income they will produce, which can help to provide better financial security for the party with the lowest pension.

Moreover, in Scotland, the division of pension assets is part of the financial settlement, while in England, there is a need for a pension-sharing order. In Scotland, a spouse will receive a percentage of the pension to be transferred as a lump sum, even if the person has not yet access to this pension as it is treated as a capital asset.

We can help...

Each divorce case is unique, and the outcome of financial settlements can vary based on the specific circumstances of the individuals involved. For financial settlements, the two legal systems are very different which can result in a great disparity in what a spouse can expect to receive. It is therefore of crucial importance to consult a solicitor before the separation to understand the consequences of establishing authority in one or the other jurisdiction. In Scotland, the clean break principle (i.e., the division of all assets acquired from the date of marriage up to the date of separation) can influence the outcome, especially for the party with the greatest assets. In England, all assets – both pre and post-marriage – are considered, and even potential future inheritances are considered. Legal advice from a family law solicitor is crucial for those going through a divorce to understand their respective rights and obligations.

