

Dispelling the Common Law Marriage Myth



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Part One: Introduction

Welcome to this leaflet:

The information in this site is for general guidance only. The application and impact of laws can widely vary based on the specific facts involved. Given the changing nature of laws, rules and regulations and the inherent hazards of electronic communication, there may be delays, omissions or inaccuracies in information contained in this site. The information should not be used as a substitute for consultation with professional legal or other competent advisers.

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Do any of the following apply to you?



Do you currently live with a partner?

Do you believe you are in a common law marriage?

Are you aware of you and your child's rights if the partnership was to end?

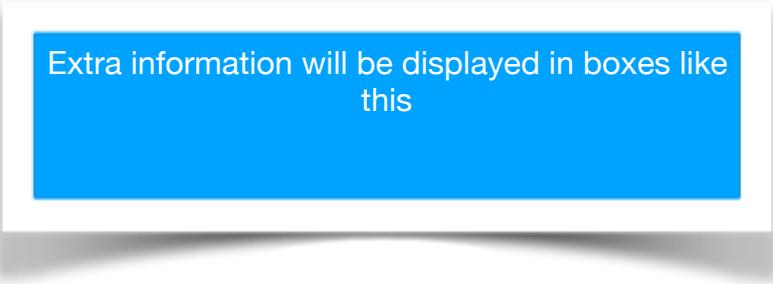
What if this leaflet was to tell you that in Scotland there is no such thing as common law marriage?

Laws are ever changing and we understand it can be difficult to understand legislation which applies to your circumstances. This leaflet has been put together to help you understand **The Family Law (Scotland) Act 2006** came into force on 4 May 2006 and sets out the rights of partners who live together. Family law sets out legal rules in relation to the responsibilities and rights between children and their parents and other people who have an interest in the children's welfare. There has been major changes in the way families are formed. Families now come in all shapes and sizes and the law has been updated to reflect this therefore this act was formed to:

- look after or safeguard the best interests of children
- promote and support the stability of the family
- Updating the law to reflect Scottish family life in Scotland
-

To help your understanding relevant statute will be this colour as well as the relevant section.

Third party organisations will be in this colour.



Extra information will be displayed in boxes like this

We are providing this information has been made available to you to allow you to understand your rights in regards to cohabitation. We understand that each family unit is comprised uniquely, therefore it may be hard to understand what rights are intended for you within the **Family Law (Scotland) Act 2006**. This Act sets out the rights for cohabitants in Scotland and there may be times such, as during a relationship's breakdown or death, where this Act may be referred to.

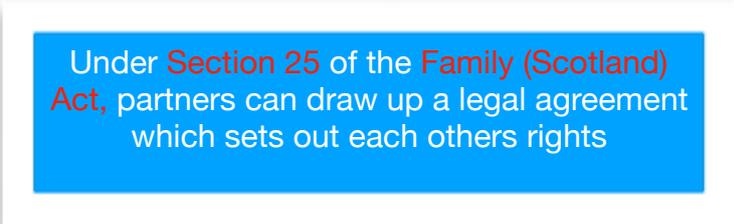
Section 25 of the act refers to cohabitants. What is a cohabitant? A cohabitant is someone who shares a living space with their partner and upon doing so will tend to have different rights from married couples. No matter how long the couple have lived together they do not have the same legal rights as married couples, however this 2006 Act has brought in legal rights which cohabitants did previously not have. These acts set out in the **Family Law (Scotland) Act 2006** provides legal protection to cohabitants.

A marriage requires certain legal requirements to be valid which then allows the couple to have rights they may previously did not have as cohabitants. A common misconception is that once a couple have lived together for a certain number of years they are married through common law. This is in fact does not now exist in Scotland and there are no laws surrounding common law marriage after the 2006 Act, only cohabitation. The guidance provided in this leaflet is only intended for use in Scotland. English and Welsh family law may differ, please refer to <https://www.citizensadvice.org.uk> for more information on family law in England and Wales. If you live in England or Wales and you are in need of a family law solicitor please refer to **The Law Society** at <http://www.lawsociety.org.uk>.

This leaflet aims to help your understanding of the **Family Law (Scotland) Act** to ensure the right decisions are made for your family which is why we will discuss property rights, parental rights and rights upon death as well as giving advice when a relationship ends.

If there was a requirement for a cohabiting couple to seek legal action or guidance for any of the reasons outlined in this leaflet there are a number of considerations that the court will ascertain to establish the nature of the relationship and if there has been cohabitation. **Section 25** of the **Family (Scotland) Act** sets this out as:

- The length of time the partners have been living together
- The nature of the relationship and,
- The nature of the way that money is handled whilst together.



Under **Section 25** of the **Family (Scotland) Act**, partners can draw up a legal agreement which sets out each others rights

It does not matter whether either party is married to another person.

Cohabitants can be any gender living together as long as they are living as though they were a married couple, however no marriage has been carried out to make them so.

The courts have a wide discretion to decide if a couple can be classed as cohabitants. It will all come down to circumstances which is a question of fact which will be important discussing legalities.

The court may take a number of things into consideration. They will look at the nature of the relationship and the length of time they have lived together. Did they share finances whilst living together? Are they seen as a couple by those who know them? What was their sexual relations? How did they emotionally support each other?

There is no fixed period before a couple could be considered to be cohabiting. A short period may be admissible, however the longer the relationship continues the more likely that cohabitation is established.

Throughout this leaflet we will discuss the legalities of cohabitation in relation to parental rights, property rights, domestic abuse and death.

This information leaflet is for information purposes only. We would strongly advise that you should seek detailed advice from a solicitor about your circumstances. We provide advice on how to achieve that under Part Seven Resources.

Part One: Parental Rights and Responsibilities

Family law covers parental rights and responsibilities. These rights and responsibilities go hand in hand with one another, as set out in the **Children (Scotland) Act 1995 section 1 and 2**. As someone who is a parent it follows that there will be parental rights. You also have the responsibility to ensure that the environment that a child is growing up in is safe and healthy. This means that a child must be provided with needs such as food, shelter and safety, until that responsibility is no longer yours. Whilst the child is under your responsibility you have certain rights which allow you to care for the child. Whilst the child is under your care you have certain rights which allow you to care for the child.

Parents have a number of rights and responsibilities until a child is 16 at which point, dependant on whether the child is still in education, some rights will extend until the child is 18 and some rights even until the age of 25. Each circumstance is unique and is taken into account in legal proceedings to decide the appropriate outcome. It is the person who has parent rights and responsibilities who will act on the child's behalf in court.

Section 3 of the **Children (Scotland) Act 1995** sets out who has parental rights and responsibilities:

- you are named on the child's birth certificate
- you are married to the child's mother
- the court has awarded rights to you
- the mother has agreed to give them with both signing a Parental Rights and Responsibilities agreement
- you marry the child's mother after the birth of the child

More than one person can be granted parental rights and responsibilities through methods such as being awarded such rights in court or signing the Parental Rights and Responsibilities agreement. If more than one person is awarded rights then they must consult others with the same rights on major decisions with regards to the child. Major decisions include education, healthcare and leaving the country.

In each case where there is a dispute regarding parental rights and responsibilities the court will ensure the best decision is made for the child and may also hear the child's preferences. For more information on this topic contact the **Citizens Advice Bureau** at <https://www.citizensadvice.org.uk>.

Part Two: [Property Rights](#)

Rights in regards to tenancy differ on the type of tenancy you have. These rights are set out in [Section 6 of the Family \(Scotland\) Act 2006](#). A Scottish secured tenancy is when a person is renting from the local authority or council and an assured tenancy is a private let.



When an occupant of a secured tenancy passes away the cohabitant will inherit the tenancy upon death if it is the only property they have been living in for 6 months prior to the original tenants death.

If the couple decide they no longer wish to live together, if the cohabitant has lived in the property for 6 months prior to the relationship ending the landlord can transfer the tenancy to their name and give the leaving party alternative accommodation.

With an assured tenancy the cohabitant can be living in the house immediately upon their partners death and gain the tenancy.

If you separate from your partner whilst living with them you may have to apply to the court for occupancy rights. Although you have lived in the property with your ex partner you do not have the automatic right to live there, otherwise known as occupancy rights. At first the court may grant occupancy rights for 6 months, however this period can then be extended.

If you live in a property with an abusive partner and the relationship has broken down, you can apply to the court to exclude the other person from the property even if they are the owner of the property

When a Cohabitants Relationship ends: The 2006 Act outlines a number of new rights that cohabitant couples have when the relationship comes to an end. All rights mentioned here must be applied for within 6 months after the relationship comes to an end.

- Under **Section 28** of the **Family (Scotland) Act** a person may apply to court for financial allowance if the relationship has caused this person to be at a financial disadvantage, such as giving up work to care for a child/children. Items in the household bought during the time the couple have lived together must be shared, and if unable to come to an agreement joint ownership will be assumed.
- Monetary support for any children shared.
- Upon one partner's death, the other has the right to apply to the court for an award from the estate.



Cohabitants' Rights Upon Death

It is important to write a will to ensure that your estate is divided in the way which you would want upon your death. If no will is made then your partner may have to leave the property they resided in with you and apply for an award from the estate. Applying for an award from the estate is a lengthy and possibly traumatic process which can be avoided if a will is already in place.

If your partner has passed away without leaving a will then the process to claim for an award of the estate is set out in **Section 29** of the **Family (Scotland) Act 2006**. The court will assess the relationship and award what they deem reasonable. This must be applied for within a period of 6 months after your partners death. If you are unsure what to do next when applying for an award from the estate then please contact a solicitor for further information, you can find a solicitor which will suit your needs in the **Law Society of Scotland** at <https://www.lawscot.org.uk>.

When applying to for an award of the estate you must apply to the Court of Session in the sheriff court where the deceased lived on the date of death.

Part Three: Domestic Abuse

There may be times where a relationship has ended due to one party being emotionally or physically abusive towards the other. Each year around 2 million people in the UK suffer from domestic abuse. Abuse comes many forms and these include financial, sexual, physical, emotional and coercion. It is a pattern of behaviour displayed by a partner or ex partner which is degrading and threatening. This behaviour can escalate to include violence and can also be sexually violent. This violence can result in a loss of life and no kind of abuse is more serious than the other. Anyone no matter sexuality, gender, race or ethnicity can suffer from domestic abuse, however domestic abuse is overwhelmingly suffered by women and perpetrated by men.

Often when we consider domestic abuse we think that domestic abuse is primarily physical violence. Domestic abuse is in fact much more than this as abusive behaviour can be perpetrated in all the ways mentioned earlier to induce fear and distress. [The Domestic Abuse \(Scotland\) Act 2011](#) states that this behaviour is characterised by behaviour which results in harassment of a partner. In 2018 the law on domestic abuse will be updated in the form of the [Domestic Abuse \(Scotland\) Act 2018](#). The definition for domestic abuse is set out in [section one](#) of the [Domestic Abuse \(Scotland\) Act 2018](#) which states that it is when a partner or ex partner's behaviour causes physical or psychological fear, including fear, alarm or distress. It is important that if you fear for your well being and safety that you are aware that this act states that domestic abuse is a prosecutable crime under [section 9](#) which states that committing domestic abuse is punishable by a fine and/or imprisonment.



If you are suffering from continuous harassment and it is causing you fear or alarm you can apply to the court for an interdict against your partner. If an interdict is broken the harasser can face a fine or a prison sentence. However this may not be a sufficient deterrent.

Interdicts are used to stop unlawful behaviour. Unlawful behaviour is not illegal however it is behaviour which infringes on your rights. Interdicts can ban your partner from coming within a certain distance of you work or your child's school. An interdict can also protect your belongings and property by stopping your partner from removing things from your home. Threatening or alarming behaviour such as emotional or psychical assault is blocked which can be used to stop behaviour which causes you or your children alarm or distress. If you wish for further information on this then you should consult a solicitor.

There are many advice agencies available if you are suffering from domestic abuse. Please contact Women's Aid at <http://www.glasgowwomensaid.org.uk> or <http://www.nationaldomesticviolencehelpline.org.uk> . Other advice agencies will be listed in the resources page. If you are concerned about your partners behaviour then please contact Police Scotland on 101 for a non emergency and 999 for an emergency

If you are living with an abusive partner and share the tenancy with them then you can apply to the court to remove them from the property. If they are not named as a tenant or named on the mortgage or deeds of the property then please consult a solicitor.

The Disclosure Scheme for Domestic Abuse Scotland allows the police to share information of a person who has been abusive to partners in the past to potential victims. If you fear that your partner or someone you know may be at risk of domestic abuse you can contact Police Scotland and gain access to abuse history.

Domestic Abuse and Victims from Abroad

If you have left your country to join a spouse in the UK and are suffering from domestic abuse you can apply to UK Visas and Immigration for settled status or indefinite leave to remain. If your application is completed and successful you will then be granted 3 months limited leave and at this point you may apply for welfare benefits and local authority housing until a decision is made on your application. For more information on this please refer to the [UK government website](https://www.gov.uk/browse/visas-immigration) at <https://www.gov.uk/browse/visas-immigration>.

Offences Relating to Domestic Abuse

Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 states that threatening or abusive behaviour which causes fear or alarm is an offence. This behaviour can be a single incident or a number of incidents resulting in harassment. Under section 38 threatening or abusive behaviour is punishable by a fine and/or prison sentence.

Under **Section 39** of the **Criminal Justice and Licensing (Scotland) Act 2010** stalking is a prosecutable crime. Section 39 defines stalking as taking part in behaviour which would cause another person fear or alarm, the persistent behaviour described is as follows:

- Following.
- Contacting.
- Publishing materials about another person.
- Monitoring a person's electronic communication such as email ect.
- Watching or spying.
- Entering premises.
- Loitering.
- Interfering with property.
- Giving unwanted materials to a person.

Stalking is punishable by fine and/or imprisonment.

Stalking and Domestic Abuse are illegal punishable crimes and you should contact Police Scotland if you have suffered any of the behaviours mentioned in this section of the leaflet.

Part Four: Protected Characteristics

As mentioned earlier each family is compromised uniquely and sometimes advice given needs to be more specified. Some advice may be required to relate to the protected characteristics set out in the [Equality Act 2010](#). This act protects those with certain characteristics from harassment, discrimination or victimisation as a result of having one or more of the characteristics outline in the act. The protected characteristics are set out in [section 4](#) of this act and are as follows:

- age: person or persons of a particular age group
- disability: has a physical or mental impairment which impacts day to day activities.
- gender reassignment: the person is undergoing or has carried out the process of reassigning their gender by means of surgery or hormone treatment.
- marriage and civil partnership: a person who is legally married or in a civil partnership
- race: ethnicity, nationality and colour of a person
- religion or belief: a person's philosophical beliefs and the religion they follow. This also protects lack of belief and religion.
- sex: whether a person is male or female
- sexual orientation: a person's sexual preference whether it be towards those of the same or different gender.

[Section 13](#) of the [Equality Act](#) protects against direct discrimination. Direct discrimination is when you are treated differently or worse due to any of the characteristics listed in the [Equality Act 2010](#). Direct discrimination can come in many forms such as racial segregation or an employer dismissing an employee as a result of that person having one or more of the protected characteristics.

[Section 19](#) of the act protects again indirect discrimination. Indirect discrimination is when a policy or rule is in place which puts someone or a group of people with a protected characteristic at a disadvantage and there is no reason for it.

If you need further advice in relation to protected characteristics and other things related to this leaflet please speak with [Citizens Advice](https://www.citizensadvice.org.uk) <https://www.citizensadvice.org.uk>. or [Disability Scotland](http://disabilityequality.scot) <http://disabilityequality.scot>. Further advice agencies related to protected characteristics are provided in [Part seven](#).

Part Five: [Mediation and Legal Aid](#)

When a relationship ends it is understandably sometimes difficult for communication to be efficient and effective depends on the circumstances in which the couple separate. There are agencies which can help channel communication in a way that resolves legal issues and acts as a third party to ensure conversations are useful and result in the best outcome for the family.

Sometimes when emotions are still raw it can be difficult to allocate times when a child may get to spend time with each half of the family, this is why it is important if you are finding communications have broken down to contact a family mediator as a relationship ending should prioritise the child. You can find a mediator using the [Scottish Mediation Service](https://www.scottishmediation.org.uk) at <https://www.scottishmediation.org.uk>.



In some cases mediation may not be an option or may have been exhausted.

Please note in relation to any legal matters you may be entitled to legal aid which is when the government will cover the cost of a solicitor in regards to Scots law. A solicitor can tell you whether you are entitled to legal aid as it is income base and intended for families who may not be able to afford a solicitor but are in need of legal advice. The [Scottish Legal Aid Board](https://www.slabb.org.uk) provides information regarding legal aid <https://www.slabb.org.uk>.

To apply for legal aid you first have to find a solicitor who practises legal aid work. Once you have found a solicitor they can tell you whether some or all of your legal costs can be covered by the government in the form of legal aid. It is important to explore all your options for legal advice as some may be more suited or cheaper than others.

The type of legal aid that you apply for will be dependant on the type of legal assistance required. You can speak with your solicitor to determine which type of legal aid to apply for. Legal aid covers the following:

- advice and assistance: when a solicitor provides options and information on your rights or helps in paperwork or negotiations
- civil case: help with divorce, child custody issues or help with debt
- children's hearing: you have been asked to attend a hearing to sort out a problem in relation to a child/young person.
- criminal case: you are defending yourself from an accusation of a crime.

Part Six: [FAQ](#)

The following are commonly asked questions and examples:

1. I sold my house to move in with my partner. That meant I have to rely on him. We used the money from my house sale to go on holiday. We used the remainder of the money to pay off the mortgage in our property which was in his name. I want to leave. I have no money.

You are now worse off. You can make a claim for a financial award from your ex partner for the amount you have lost at the expense of the relationship. Each application will depend on the facts and circumstances. You need to contact a solicitor for detailed advice. I assume that you did not sign any agreement before you sold your house or started to live with him.

2. I have recently left my partner after his obsessive behaviour began to get worse? I have seen him near my work and I am scared of him. What can I do?

If his behaviour is criminal you should report him to the police. This would be if he is displaying threatening or abusive behaviour.

You can also apply for an interdict which stops him from contacting you or going to places that you frequent such as your workplace. A solicitor can help you apply to a court for an interdict.

3. I have recently left my partner and I am unsure whether I am entitled to money for our children together. We are not married however we lived together before our children were born up until recently.

If your ex-partner is registered as the father of your children together then you are entitled to financial support for your children. If he is not registered as the father then you can consult a solicitor for further information as you can apply to the court for financial support under the [Family Law \(Scotland\) Act 2006](#).

4. I have an interdict against my ex-partner, last week my child told me that he saw my ex-partner near his school, what do I do next?

This would depend on what type of interdict you have in place as some interdicts can result in arrest if they are broken, If you are unsure what type of interdict you have in place please contact a solicitor for more information.

Part 7: Resources

Legal advice:

Citizens Advice <https://www.citizensadvice.org.uk>

Law Society of Scotland <https://www.lawscot.org.uk>

Shelter Scotland https://scotland.shelter.org.uk/get_advice

Money Advice Scotland <http://www.moneyadvicescotland.org.uk/find-adviser>

Domestic Abuse Helplines:

National Domestic Abuse Helpline <http://www.nationaldomesticviolencehelpline.org.uk>

Scottish Women's aid <http://womensaid.scot>

Protected Characteristics Organisations:

Karma Nirvana <https://www.karmanirvana.org.uk>

Disability Equality Scotland <http://disabilityequality.scot>

Age Scotland <https://www.ageuk.org.uk/scotland/>

Jewish Care Scotland <http://www.jcarescot.org.uk>

LGBT Foundation <https://lgbt.foundation>

Mind <https://www.mind.org.uk>