

Introduction

The Family Law (Scotland) Act 2006 includes measures to limit, in certain circumstances, the occupancy rights of non-entitled spouses (**see definition of “Non-Entitled Spouse” below**) in the matrimonial home

- **Entitled spouse**- the married person who is the sole owner, a joint owner, the sole tenant or joint tenant of the matrimonial home.
- **Non-entitled spouse**- the married person who is not an owner, joint owner, tenant or joint tenant of the matrimonial home.

Non- Entitled Spouse’s right to live in the matrimonial home.

If after 4 May 2006, a non- entitled spouse has not lived with the entitled spouse for a continuous period of up to two years and has not occupied the matrimonial home during those two years, the non-entitled spouse will then lose their occupancy rights to the matrimonial home. If this happens, the non-entitled spouse will **not** have the right to apply to the court to have their occupancy rights enforced

Non- Entitled Spouse’s right on proposed sale of the matrimonial home.

There are further problems for the non-entitled spouse who loses their occupancy rights, as they also lose their right to protection if the other spouse wants to sell the house against their wishes. Normally, the non-entitled spouse’s occupancy rights are protected where they do not give their consent to a sale, as the other spouse cannot simply go ahead regardless and sell the property. The other spouse would have to apply to the court for permission to sell the house, which the court can refuse to give in certain circumstances.

After 4 May 2006, if the entitled spouse stops living in the house and then afterwards, the non-entitled spouse also stops living there **for a continuous period of two years**, the non-entitled spouse will lose their protection under the Matrimonial Homes Act. This means that they will again lose their occupancy rights, and the sale can go ahead without their agreement. Again, if this happens, the non-entitled spouse will **not** have the right to apply to the court to have their occupancy rights enforced.

However, the non-entitled spouse can prevent this from happening. If, at any time during the two year periods mentioned above, the non-entitled spouse starts legal action to have the court: -

- declare, protect or enforce their right to live in the matrimonial home
- prevent the other spouse removing their personal or matrimonial property from the home ;or
- applies to the court for an Exclusion order

then the two year penalty stops, until the court action is finally completed.

It is important that if the non-entitled spouse has not been living in the matrimonial home, they should be made aware of this two-year period as they may require legal advice to protect their occupancy rights.

Sale of the matrimonial home without the non-entitled spouse's consent

As is mentioned above, under the Matrimonial Homes Act, where an entitled spouse wishes to sell the matrimonial home and the other spouse, who is a non-entitled spouse, does not agree to the sale, the entitled spouse can go to court to force the sale. The court can, in certain circumstances, agree that the legal requirement to obtain the non-entitled spouse's permission to the sale is not needed, for instance, if they consider that the non-entitled spouse is being unreasonable, and can authorise the sale to go ahead.

The provisions in the Family Law (Scotland) Act 2006 have added further conditions which the court will have to consider before making an order authorising the sale. The court can only make this order where either: -

- a) negotiations for the sale have not started; or
- b) negotiations for the sale have started but a price for the property has not been agreed.

What the court can do

If the court agrees that the sale can go ahead without the non-entitled spouse's permission, they can give instructions to the other spouse as to what the selling price for the property must be and can also set a deadline for the completion of the sale.

If the court refuses to grant an order under this section, they could then make a different order, requiring the non-entitled spouse to make payment to the other spouse for the privilege of remaining in the matrimonial home, or could impose other conditions.

Mortgaging the matrimonial home without the non-entitled spouse's consent

The court can also agree to the other spouse creating a secured loan, like a mortgage, over the property, without the consent of the non-entitled spouse. If the court allows this, again, there are new conditions attached to the court granting permission, and the court can specify the amount of the loan and the date by which the transition must be finalised.

Declarations for buyers of matrimonial property

Anyone buying property that could be a matrimonial home should always ask for written proof from the entitled spouse that there is no un-entitled spouse with rights to occupy the house. Under the Matrimonial Homes Act, the entitled spouse had to give the buyer a formal, sworn and witnessed declaration that the property was not a matrimonial home over which the seller's spouse had occupancy rights. The law on this has changed and now, the spouse selling the property only needs to provide the buyer with a simple written declaration to this effect.

Definition of "matrimonial home"

Section 9 of the Act states that where the tenancy of a matrimonial home has been transferred from one spouse to the other and it becomes the other spouse's separate residence, it should no longer be regarded as the matrimonial home.