

hodgehalsall

Cohabitation

**A Practical Guide to Your
Rights**



COHABITATION – A PRACTICAL GUIDE TO YOUR RIGHTS.

Many people mistakenly believe that a “common-law marriage” provides the same legal rights as those available to a married couple. This isn’t so and the status of a common-law marriage has not, in fact, existed in England and Wales since 1753. Outside of a formal civil partnership the actual legal rights available to cohabiting couples are minimal particularly by comparison with those that exist within marriage.

This guide provides information for cohabiting couples about issues affecting property, finance and children. In our opinion every cohabiting couple should seek legal advice and take formal steps to protect and preserve their respective interests in such matters rather than rely upon law which is ill equipped to deal with disputes which arise when cohabiting relationships break down.

In this guide we shall look at:-

- > Property ownership
- > Pension rights
- > Wills & death
- > Children



Please contact us to discuss any of these matters further (our contact details are at the end of this guide) or visit our website at www.hodgehalsall.co.uk.

PROPERTY OWNERSHIP

There are two types of property ownership – legal and beneficial ownership;

Legal ownership

If your name appears on the title deeds to the property you will have legal ownership.

Beneficial ownership

If property is held in the sole name of your partner but you are contributing or have contributed to the purchase price, mortgage or other payments directly in relation to the property you may have a beneficial interest under an implied trust and should take legal advice.

The title deeds to the property may show two names and indicate that it is jointly owned but the beneficial interest might be held in unequal shares because, for example, contributions to the property have been made unequally although simply because one partner contributes more to the purchase price does not automatically entitle that partner to a greater share in the property.

When a claim is made that the legal ownership of property does not reflect the true position, and no express written Declaration of Trust exists, two considerations can apply :-

- (i) has the non-legal owning cohabitee made a direct contribution to the deposit, purchase price or mortgage instalments? If so, this is usually enough to raise an inference that the non-legal owner has a beneficial interest in the property.
- (ii) has the non-legal owning cohabitee made indirect contributions to the purchase price or other payments relating to the property? Payments which can raise an inference of a beneficial interest include :-
 - meeting joint property expenses or when money has been paid into a joint account from which mortgage instalments have been made; and/or
 - expenditure/provision of labour on substantial improvements to the property

If a beneficial interest is made out in one of the above circumstances a court will assess the respective shares in the property of each partner by reference to the entire conduct of the relationship and might :-

- (a) award an equal split, if for example, evidence exists that other assets are held in joint names or finances are generally arranged on a joint basis; or
- (b) adjust the shares in the property taking into account other factors including domestic contributions and the raising of children.



Property owned in joint names can be held as either joint tenants or tenants in common:-

Joint tenants

When the property is held by two people as joint tenants both own the property in equal shares. Most married couples own property in this way. On the death of the first joint tenant, the survivor automatically becomes the sole owner of the property irrespective of the content of any Will made by the deceased joint tenant.

Tenants in common

When the property is held by two people as tenants in common each has a specified share in the property which may, or may not, be equal. The shares may often be specified in accordance with the party's contribution to the purchase price of the property. Where there is no declaration setting out the respective shares in the property the law presumes that those shares are equal. On the death of a tenant in common their share in the property will pass in accordance with the deceased's Will or, if none exists, under the rules of intestacy. Cohabitees who hold the property as tenants in common are strongly recommended to make a Will as under the intestacy rules property will pass to any surviving spouse, parents, children or other specified relatives and not to the cohabitee.

How courts' determine legal and beneficial ownership when disputes arise

The House of Lords decision in *Stack v Dowden* [2007] laid down the principle that where a property is jointly owned the question to be considered is :- “Did the parties intend their beneficial interests to be different from their legal interests?” and if they did “in what way and to what extent?”. Factors that may be relevant, in addition to financial contributions, in determining the intention of the parties at the date of purchase of the property include :-

- any advice or discussions at the time of the purchase which cast light on the intentions of the parties at that time;
- the reasons why the property was acquired in joint names;
- the purpose for which the property was acquired;
- the nature of the relationship between the parties;
- whether there were children of the relationship to whom both partners had responsibility to provide a home;
- how the purchase was financed, both initially and subsequently;
- how the parties arranged their finances, whether separately or together or by a combination of both;
- how the outgoings on the property and other household expenses were discharged.

The recent case of *Kernott v Jones* [2010] highlights what might be considered to be extreme unfairness in determining property shares. The case involved two cohabitees who bought a property in joint names for £30,000.00 as their family home in 1985 and separated in 1993. The woman remained in cohabitation and met all outgoings on the property and the man bought his own home elsewhere. In 2007, by which time the property had increased in value to £285,000.00 the woman claimed that she owned the entire beneficial interest in the property. It was conceded that, if the home had been sold in 1993, they would each have been entitled to a half share. The Judge awarded the woman a 90% share in the property and the man appealed that decision. The Court of Appeal allowed the appeal saying that the purchase as joint tenants suggested equality of ownership and there was no other evidence indicating that the parties had intended or agreed that the shares should be any different if they separated and only one of them remained in occupation. The point was made that “...courts are not concerned with fairness; when no express declaration of each party’s share

exists they will look for the reality of ownership via an inferred common intention". The decision highlights the risk of cohabitees buying a property jointly and failing to contemplate the possibility of a later break up of the relationship and how their interests in the property are to be determined in such an event.

Even where property is jointly owned disputes about the size of share that each person is entitled to are common particularly when cohabitees separate. Simply because one party has contributed more to the purchase price will not automatically entitle that person to a greater share in the property.

Shutting the stable door before the horse has bolted

If you are buying a property with your partner we recommend you discuss with us whether you should hold the property as joint tenants or tenants in common and whether a Declaration of Trust and/or Cohabitation Agreement should be prepared to record the basis upon which you are to own the property and what is to happen in the event that your relationship breaks down.

If you already own property jointly with your partner and are unsure as to the way in which it is held please ask and we should be able to identify the type of ownership and advise you upon any changes that may be appropriate in your circumstances.



PENSION RIGHTS

Most pension schemes make provision for death in service benefits or widow's pensions to spouses and dependant children on the death of the pension scheme member. Such schemes may not recognize cohabiters. You should clarify with the provider of the pension scheme whether it makes provision for your cohabitee in the event of your death and if the pension scheme is willing to be flexible you will need to make arrangements to nominate your cohabitee as the beneficiary of your policy.

Unlike the situation for a married couple cohabiters have no rights under the state pension scheme to survivor's benefits.

Civil Partnerships

Since December 2005 the Civil Partnerships Act 2004 has allowed same sex couples to register their partnership and thereby gain certain rights and obligations similar to those that exist (although not exactly the same) in marriage.

Where a civil partnership has not been registered the problems associated with cohabiting heterosexual couples will apply equally to same sex couples.

WILLS AND DEATH

No matter how long you may have cohabited with your partner if he or she dies without having made a Will you could lose out completely. By comparison, in the case of a married couple with no children the entire estate (up to certain limits) would automatically pass to the surviving spouse. If one cohabitee dies intestate (without having made a Will) the other has no automatic right to receive anything under the laws of intestacy. If cohabitation has continued for more than two years immediately before the death of one partner, the survivor can apply for financial provision from the estate of the deceased partner without having to show that he or she was maintained by the deceased immediately before the death but the extent of dependence on the deceased partner can be relevant to how the court may exercise its discretion. Cohabiters who have not lived together for two years immediately before the death can claim against the estate of the deceased only if they were being wholly or partly maintained by the deceased at the time of death.

If you are separated from your husband or wife but have not divorced and are living with a new partner your spouse's rights on death are not overridden and should you die, your new partner could be left with nothing. Even if property is held in the names of both partners as tenants in common the situation may arise that whoever inherits your partner's share of the property may try to force a sale or charge rent to allow you to remain in occupation. In our experience, families do not always act as you might hope they will where money is involved.

We consider it absolutely essential for unmarried cohabitants to make a Will to ensure that they control how and to whom any assets they own pass on death.



Making a Will enables you to choose precisely how your property and possessions should be dealt with in the event of your death allowing peace of mind by knowing that your affairs are in order. A Will allows you to :-

- provide for your surviving partner and whomsoever else you would like to benefit from any other assets that you own
- minimise and restrict tax liabilities;
- appoint your own choice of executor(s) to deal with your estate after death;
- create trusts for your children, giving instructions as to who will care for them and providing a framework for looking after their financial needs until they are sufficiently mature to do so themselves;
- give particular gifts or sums of money to specific individuals of your choice;
- benefit charities if you think it appropriate;

- make provision for the continuation and handover of your business;
- give due consideration to claims on your estate from first and second families;

Inheritance Tax

Married couples or those in a civil partnership can join together their two tax free allowances to create a single allowance of £650,000.00. This opportunity is not available to cohabitants. The Estate of a cohabitee will be liable to inheritance tax (currently at 40% on assets in excess of £325,000.00) which may have a significant impact on the financial situation of the survivor. Some tax planning opportunities may exist for cohabitants and please ask us for further information if you feel you may have a potential liability to inheritance tax.



CHILDREN

Parental responsibility

All mothers, whether married or unmarried, automatically have parental responsibility for any child born to them. Fathers married to the mother of the child when the child was born also automatically have parental responsibility. Unmarried fathers, in the case of children born after 1st December 2003 automatically have parental responsibility if they are named on the birth certificate and register the birth with the mother. For any child born before 1st December 2003 out of marriage only the mother automatically has parental responsibility.

Parental responsibility consists of “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”. This includes rights to discipline a child, determine its religion and consent to medical treatment.

Difficulties that may arise for fathers where the mother has sole parental responsibility include :-

- the mother being able to take the child abroad without the consent of the father. An unmarried father may be able to make application to the Court to prevent his child being removed from the UK without his consent.
- a mother can choose the name given to a child born to cohabiting parents. This may be an emotive issue where, following the break-up of a relationship, the mother changes the name of the child. It is possible for a father to resist such a change through the Court.
- parental responsibility may also be a factor in adoption proceedings whether instigated through the local authority or by step-parents.

It is possible to obtain parental responsibility during a cohabitant relationship if it does not already exist by :-

- agreement with the child’s mother. Both cohabitants need to execute a Parental Responsibility agreement in a prescribed form and register it with the local family court.
- court order if the consent of the mother is not forthcoming.
- marrying the mother of your child by which you will automatically obtain parental responsibility.

Residence and/or contact with children

If cohabitants separate and cannot agree arrangements for residence of and contact with any children of the relationship an application may be made to the Court to determine the issue. A Court is unlikely to refuse to allow any contact between a child and its non-resident parent, irrespective of marital status, unless exceptional circumstances apply.

Maintenance

Both parents in a cohabitant relationship have an obligation to support their children. Unlike the breakdown of a marriage cohabitantes cannot claim maintenance from a former partner if the relationship ends. Even where cohabitantes have resided together for many years and one is completely financially dependent upon the other there is no right to seek financial support when the relationship ends. You may consider it appropriate to include such a provision within any cohabitation agreement but without that provision no right to maintenance exists.



Avoiding the wrong outcome

In our experience many cohabittees arrange their property and finances in a casual manner. As a consequence breakdown of a cohabitant's relationship can be fraught with difficulties. Many of these problems can be avoided by seeking legal advice at the appropriate time and particularly :-

- before cohabiting or buying property together;
- by having a declaration of trust drawn up setting out how you intend to hold your shares in any property and how changing circumstances can be taken into account;
- by preparing a cohabitation agreement to deal with other assets owned and to make provision in respect of children and maintenance;
- by making Wills to ensure that your wishes are followed upon your death;

Please contact us to discuss any of the issues raised in this guide. Our contact details can be found below.



Hodge Halsall Contacts

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