

COHABITATION

Introduction

Cohabitation has become more and more common in recent years. The number of couples cohabiting continues to rise. Couples choose to cohabit without knowing that they face a very different result on the breakdown of their relationship than married couples. Cohabitation is generally defined as any couple who live together in a sexual relationship who are neither married or in a civil partnership.

The myth of the ‘common law marriage’ is still a widely held belief among some people despite the fact that this has no basis in law. About 53% of those who cohabit believe that by living together for a period of time they essentially have an interest in their partner’s property and are protected in the same way as a married couple. However 40% of those who cohabit know that there are much reduced rights and entitlements. This is a very stark difference, and might be one cohabitant believing they have rights against their partner whereas the partner knows that they are safe from any claims. This can lead to very considerable frustrations and major disputes at the time of relationship breakdown. Couples and individuals can have a much more predictable outcome if they get advice on the law and take certain steps to set out their financial arrangements.

This is of special importance as statistics of social trends show that cohabitations are invariably much shorter than marriage, creating greater likelihood that any children will be raised by one parent alone and creating much greater financial hardships than on divorce. These can be remedied by certain agreed steps in advance.

This iGuide sets out a summary of the law and some practical measures. In summary, England has no cohabitation law. There are few automatic rights arising from a cohabitation relationship. The law has had to borrow from Chancery and trust principles to produce as good and fair an outcome as possible. This can often produce seemingly unjust results.

Property - Housing

The law relating to the property where the couple lived causes the vast majority of the problems on cohabitation breakdown. If the property is in the name of one cohabitant, there is a real risk that the other can be left homeless with no claims. The rules relating to property of cohabitants comes from trust law. If one cohabitant is not a registered owner, they can only gain an interest in the property through (i) a constructive trust, (ii) a resulting trust or (iii) proprietary estoppel.

(i) A constructive trust arises where there is clear and direct evidence of an intention to share the interest in the property. This does not have to be in writing and the court can draw an intention from something one person may have said to the other during the romantic relationship e.g. “Darling, this half is yours”. The person who is not registered on the title of the property must show that they relied on this agreement to their detriment and the person with ownership of the property must have benefitted in some way.

(ii) A resulting trust occurs where the court can infer an interest of one of the parties through their actions. This will only occur where there has been direct financial contribution to the property either in terms of building work or contribution to the purchase price and the only possible explanation is that they intended to gain an interest in the property.

(iii) Proprietary estoppel arises where the person who is not registered on the title believes that they have an interest in the property and relies on this to their detriment. The registered owner may be stopped by the court from preventing the other party from having an interest.

Given the difficulty and expense in establishing an interest in the home it is important for cohabiting couples that both are registered on the title to their property. This can be done through a simple trust deed and other transfer documents at the time of purchase. It can include land registry documents. A property can be held by two people as joint tenants or as tenants in common. This has nothing to do with a tenancy or rental agreement! If joint tenants, the property passes automatically to the survivor on the death of the first. If tenants in common, the property passes according to the respective interests in property which may be equal or unequal.

Other Possessions

Other assets that were bought or acquired by one cohabitant in their name will belong to them unless the other cohabitant can show that it was a gift or they had made some contribution. If equal money has been put in to the asset then it will be owned equally irrespective of whose name it is in.

Maintenance

While married couples can be supported by maintenance, periodical payments, from one spouse to the other, cohabiting couples do not have this entitlement. If one cohabitant has no income and have been acting as home-maker in the relationship, they will nevertheless be expected to support themselves on the relationship breakdown. The only contribution that is considered important to the relationship is actual financial contribution. Other support and contribution such as looking after the children and house is not sufficient in law to give rise to a claim.

Children

There are lesser differences with marriage in relation to the children of a cohabitation relationship. Parental responsibility gives parents important rights and duties relating to decisions regarding the child. These include the right to take the child abroad and decisions regarding education and medical treatment. Unmarried fathers do not automatically acquire parental responsibility, unlike married fathers. However parental responsibility can be achieved by registering the father's name on the birth certificate of the child after 1 December, 2003. Fathers who were registered before 1 December 2003 do not automatically require parental responsibility. Parental Responsibility can also be obtained by having a written agreement between the mother and the father (see iFLG guide on parental responsibility for more details) or by getting a parental responsibility order from the court. Sometimes fathers have been living with their child and perhaps caring for them day to day then find on relationship breakdown that they do not have the same rights as the mother. It is important for fathers to familiarize themselves with the law and take steps to obtain parental responsibility if they do not already have it.

Unmarried parents have recourse to the courts for issues of contact and residence and other aspects of child arrangements, if there cannot be any agreement, in the same way as married couples.

Schedule 1 Children Act 1989 allows the court to settle property for the benefit of a child on his/her minority. This can mean taking the property from the person who is the owner and transferring it to the other party for the benefit of any children. The court can also provide for certain lump sums and periodical payments to be made to the parent who cares for the children. The property is invariably transferred back when the child is perhaps 18 or 21. In the meantime however the primary residential parent would have been able to live in the property with the child.

Unless the father resides or works abroad, child support can be provided by a court order if there is consent otherwise by C-MEC, the successor to the Child Support Agency. See our separate fact sheet.

Rights on Death of a Partner

When someone who is cohabiting dies, the other does not have automatic entitlements to the other's property. Instead on intestacy (when there is no will) the property will automatically pass to the next of kin. This can seriously disadvantage the surviving cohabitant.

A surviving cohabitant can make a claim against the other's estate under the Inheritance (Provision for Family and Dependants) Act 1975. The claimant needs to have cohabited for two years prior to the death or have been completely or partially dependant on their cohabitant before death. This is usually requires they were financially reliant upon them. The outcome of these proceedings is by no means certain or clear.

It is extremely important that cohabitants make wills to provide for the other in the event of death. This is particularly the case where there are children of the relationship.

Cohabitation Agreements and other remedies

Couples who choose to cohabit can prevent much of the uncertainty and potential unfairness which can arise at the end of the relationship by entering into cohabitation agreements and taking other steps. These agreements are legal documents signed by each of the parties.

Cohabitants are strongly recommended to enter into these agreements because although they are not always considered binding by the court they can be a very good indicator of the intentions of the parties. The more formal and certain the agreement, the more likely it is that the court will be persuaded to uphold it.

Both cohabitants should seek independent legal advice before entering into the agreement and should be aware of the financial position of their partner. The agreement should be in writing and should be witnessed. Every attempt should be made to ensure that the agreement is clear and unambiguous. The courts will not give effect to an agreement that does not have clear terms.

Cohabitation agreements can cover all major assets and arrangements on the breakdown of the relationship e.g. real property, bank accounts, maintenance as well as intentions in respect of arrangements for any children. The agreement can also cover what happens on the death of one of the parties however cohabitants are strongly advised to make a will to support their agreement. For real property, a simple trust deed can be drawn up by property lawyers to make it clear who owns what share. Letters of wishes, nominations and assignments should be drawn up to provide for pension policies, death in service benefits, life policies and similar.

There are very many steps which can be taken by a cohabiting couple to create certainty and clarity for what would happen if the relationship were to end including on death. These steps can dramatically reduce or minimise the likelihood of dispute and litigation, to save costs and provide comfort and assurance for the future. Not doing so is likely to create frustrations, claims and disputes at a later date.

Reform?

The Law Commission has already identified this area as being appropriate for reform, making recommendations in July 2007. It was adamant that any cohabitation law should strongly be seen to be

very different to marriage. Many in society, including a considerable number who cohabit are opposed to identical due and obligations as applied to those who are married.

Judges have often highlighted the problems which lack of knowledge causes on the break-up of cohabiting partners. The current trust and contract law is inevitably not sensitive to or appropriate for the issues that arise in a family relationship between cohabitants.

Those intending to cohabit or those already cohabiting are strongly recommended to make cohabitation agreements and take all other appropriate steps, as set out in this iGuide to benefit their relationship and safeguard their position. Please contact iFLG for more information.

This iGuide is for information only and is a specialist legal advice should always be taken, often urgently. For further details contact The International Family Law Group at 020 3178 5668 and www.iflg.uk.com.
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