

## **The Cohabiting Family in 2011: English law post Jones v Kernott**

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The decision of the Supreme Court on 9 November 2011 in the case of Jones v Kernot has drawn attention yet again to the state of English law for those who cohabit instead of entering into marriage or civil partnership. It remains a precarious form of relationship because of the relatively high (and early) rate of breakdown in contrast to marriage, and because of the very unsatisfactory outcomes in law on the conclusion of a cohabitation relationship

The number of couples choosing to live together has dramatically increased in recent years - according to National Statistics around 2.2 million couples in the UK are cohabiting. Worryingly, research published in 2008 showed that 51% of people still believe that the 'common law marriage' exists; giving unmarried couples the same rights as married couples. As a result, there have been widespread calls for reform culminating in Law Commission recommendations and a Cohabitation Bill being introduced into Parliament in 2008. However, the Bill never made the statute books, the government has indicated it will not be bringing forward cohabitation law reform and the law remains both unclear and at odds with the public's perception.

Unlike when married couples split up, cohabiting couples have no right to any maintenance claim from the other. The determination of property rights is therefore left to the rather harsh and less flexible land law principles. Much will depend on how the couple chose to hold the property: jointly or in one party's sole name.

### **Jointly owned property**

If the correct procedures are followed when the property is purchased, the couple's intentions as to ownership will be, or at least should be, clearly demonstrated on the purchase documents (the Land Registry transfer) or in a declaration of trust. If however the parties have not declared their intention as to their beneficial interests, then land law and equity law principles apply. If they hold as "joint tenants" (a manner of owning property together) then it is presumed to be held equally, unless the contrary can clearly be shown as set out below

If the property is owned as "tenants in common" (the other method of holding property together) and there is no declaration of trust, then the presumption is that the parties own the property in equal shares. The onus is on the party who wishes to show that the beneficial ownership should be divided non-equally, as shown below. It is however worth noting the warning of the Supreme Court that this task of showing unequal ownership is not to be embarked upon lightly or with a high expectation of success.

### **Legal estate in one name only**

If the property is in the sole name of one cohabiting person but is a shared home, the presumption is that 'equity follows the law' and therefore that party also owns the entire beneficial interest. In this situation as well as when the equal joint ownership does not show the true intended ownership interests, the other party will have to establish a claim in equity: through a resulting trust, constructive trust, or by claiming under proprietary estoppel.

### **Resulting Trusts**

A resulting trust can be established by evidence that the other party contributed directly to the purchase price. Recent authorities however (Stack v Dowden, Jones v Kernott) have indicated that

in the domestic context resulting trusts are no longer the correct approach to establishing a claim in equity.

### Constructive Trusts

The Supreme Court in *Stack v Dowden* in 2007 made clear that for domestic couples, the constructive trust is the method by which the person who is not the legal owner should seek to demonstrate a claim to the property. For a constructive trust to come into existence a common intention to share ownership must be proved, along with the non legal owner acting in reliance to that shared intention to their detriment.

A common intention to share legal ownership can be established through either an express agreement or by inference from the parties' conduct. The Courts are likely to find express agreement where the legal owner gives their partner an 'excuse' as to why the legal ownership is not being shared on the title deeds at all or in joint names. Payment of the mortgage will often be enough to infer a common intention to share, as will financing improvements to the property. However, in general, contributions to household expenses and performing the tasks expected of a 'good wife' are unlikely to establish a common intention. Where the amount of the share can be determined by the words or conduct of the parties, then that is the shares that the Courts will attribute. Where it is clear that the parties did not intend an equal sharing ownership, but it is not possible to ascertain by direct evidence or inference what their actual intention was, the Supreme Court answer is that each party is entitled to such share as the Court considers fair.

### Proprietary Estoppel

The doctrine of proprietary estoppel can be used to grant a party an interest in a property held in the name of another. The three essential features that need to be established are (a) an assurance or promise of an interest in the property, (b) reliance on that assurance, and (c) detriment suffered as a result.

### **Jones v Kernott**

In the recent high profile case of *Jones v Kernott*, the family home was funded primarily by an endowment mortgage taken out in the parties' joint names. In 1993, after 8 years, Mr Kernott moved out of the home leaving Mrs Jones the responsibility for many years of paying the mortgage and other outgoings on the house as well as raising the children. In 2006 he began proceedings claiming his 50% interest in the property. The lead judgment given by Lady Hale and Lord Walker in the Supreme Court offered the following summary of the position in cases where the parties own the property jointly:

- (1) The starting point where a home is bought in joint names is that the home is owned jointly in equity also;
- (2) That presumption may be displaced by evidence that the common intention of the parties was that the property be held differently, either at the time of purchase or formed subsequently;
- (3) Common intention is to be deduced objectively from the parties conduct;
- (4) Where it is clear that the parties had a different intention, either at the outset or subsequently, but it is not possible to ascertain what that common intention was, the answer is that each party is entitled to such a share as the Court considers fair having regard to the whole course of dealings between them in relation to the property; and
- (5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the Court to decide what shares were either intended or fair.

As Lord Collins highlighted, it is perhaps not surprising that the decision in *Stack v Dowden* in 2007 gave rise to difficulties; it was made at a time when many chose to cohabit either before or instead of marriage, often without making any declarations as to their respective shares in any family home or other property and in the absence of Parliamentary reforms to the law. It is unfortunate however that although, as in 2007 in *Stack v Dowden*, the Supreme Court were unanimous in the result, they were divided in their reasoning.

The old adage that 'prevention is better than cure' has never been more appropriate in respect of cohabitation relationships. A declaration of trust, signed by both parties, will generally be conclusive evidence as to the intentions of the parties. Furthermore, the document can deal with matters such as outgoings and the circumstances in which a sale may or may not take place. It does not need to be a formal deed: a document stating intentions is good enough. At the same time those who cohabit should make a will to provide on their death for their cohabiting partner, and sign letters of wishes regarding their pensions and life policies. There are many steps which can be taken by those in a cohabitation relationship to avoid the uncertainty of the law if the relationship might come to an end and to provide on death.

At The International Family Law Group we act for many cohabiting couples at or near the beginning of their relationship to help establish their interests in family property and to protect their respective assets. We also act at a time of relationship breakdown to advise on entitlements in law and to encourage a settlement and avoid uncertainty and costs of litigation. Please contact us for more information or visit our website.

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