

## Cohabitees - Your Rights

As many as 40% of all "permanent" couples now cohabit. One in four children is born outside marriage. Many cohabitees believe they have few or no legal rights and are confused about their legal standing. Although relationships outside marriage (including same sex relationships which have not been registered as a Civil Partnership) do not attract the same legal status afforded to married couples the law does now increasingly recognise cohabitee rights. The following guide is intended as a very brief overview of the law in this area. Every situation is different and every person needs individual advice tailored to their needs. It is often extremely difficult to remember all of the advice given, particularly in a first interview with one's solicitor and it is hoped that this brief summary may at least be a point of reference for anyone considering their position.

### FINANCIAL ISSUES

#### A. ON SEPARATION

Where a married couple divorce the courts are empowered to divide the couples' assets in a way that may be appropriate to meet their needs and the needs of any children. The courts now have certain powers on divorce to deal with pension assets as well. The courts have no powers to adjust assets as between separating cohabitees. Unlike in the United States of America there is no recognition of any claim by a common law "husband" or "wife" to financial provision from their former partner, arising solely as a result of their relationship.

Although the courts cannot adjust property rights between cohabitees, they can investigate and make a declaration of a person's rights. The most commonly sought declarations are in respect of a property which a couple have occupied during the course of their relationship.

#### Land and property

Where a house or indeed any land is jointly owned by two or more people, a "Trust of Land" automatically arises. Broadly this means that either co-owner may be able to apply to the Courts for an order that the property should be sold. The court has a discretion to postpone any sale if it believes a sale would defeat the purpose for which the property was bought. So, if you are living in a jointly owned property with children and your cohabitee has left, you may be able to remain at the property until the children finish their schooling, depending upon the amount of capital tied up in it. The court however might impose conditions about the payment of the outgoings upon the property pending any eventual sale. If you are in a relationship where there are no children it may be

difficult for you or your former partner (as appropriate) to object to a sale unless you or they can demonstrate a clear agreement that the property should not, for whatever reason, be sold.

#### "How do I know if land or property is jointly owned?"

(a) In many cases the ownership of land or property will be "registered" in joint names and a search at H.M. Land Registry will confirm this. It will also show if the owners have distinct and separate shares of the value of the property even if these shares have not been calculated precisely. Each person's share in the property may separately be recorded in a "Deed of Trust". Where land is unregistered the deeds will show whether it is jointly owned.

or

(b) Sometimes the legal ownership of a property may be registered in your partner's name. This does not mean that you do not have any claim to a share of it. You may be able to claim a share:

(i) if it was agreed with your partner when the property was purchased that you should have an interest in the property and, in reliance upon that expectation, you have somehow acted to your detriment or;

(ii) because you have made direct financial contributions towards the mortgage and other outgoings on the property, or by providing part of the deposit when the property was purchased, or by financing substantial improvements.

As a cohabitee you can seek a declaration through the courts that you have a share of or an interest in the property. The law in this area is fairly complex. Whether a claim to an interest can succeed inevitably turns upon the particular facts. Nearly every case is different and it is worthwhile taking legal advice on the merits of any claim.

Subject to satisfying legal and financial eligibility criteria, legal aid is available to pursue or indeed oppose, a claim to an interest in property. However there is no exemption to the Legal Services Commission's "clawback" for the repayment of costs if money or property is recovered or preserved by the case. This firm is now not able to deal with this type of matter under the Legal Aid Scheme.

## Other jointly owned property

The Courts also have the power to make declarations in relation to other jointly owned property, for example, insurance policies, antiques, jewellery etc. Obviously where the value of the property concerned is not great, it may be necessary to bring proceedings in the small claims court and it is usual for people to represent themselves when bringing such a claim. Subject to financial eligibility criteria, advice and assistance under the Public Funding Legal Help Scheme may be available, up to a limit initially of 2 hours. These costs may have to be repaid to the Legal Services Commission if any money or property is recovered or preserved. Again, this firm is not now able to deal with this type of matter under the Legal Help Scheme.

## The Married Womens Property Act 1882

This specific legislation is helpful for engaged couples, or those who have been engaged up to three years prior to the issue of an application to the court under the Act. The court cannot adjust or alter property rights but can declare what each persons rights are in relation to any property including land, shares and cash. If appropriate the court can order the sale of jointly owned items or order a person to account to the other for property of which they have had the benefit. The legislation is little used but an example of one area where the Act can provide assistance is to the Hindu, Jewish and other communities where dowries are still provided prior to a marriage. The Act provides a means of establishing ownership of the dowry particularly where a marriage has not taken place.

## B. ON DEATH

### (1) Pensions

Many occupational pension schemes make provision for the payment of an adult dependant's pension in the event of death after retirement if there is no legal widow/er at the date of death. Where death occurs during employment a lump sum may be payable and/or contributions to the pension refunded. Again these may be provided to a cohabitee upon a "nomination" under the scheme being made to the managers or trustees of the scheme. If you or your partner are a member of an occupational or private pension scheme, you should check the scheme rules carefully for details of the benefits that may be payable to a partner and/or dependent. The pension scheme trustees may decline to make any payment to a surviving partner unless financial dependency can be established at the time of the death of the scheme member. It is important that any nomination under a pension scheme is regularly kept up to date in the light of current relationships.

### (2) Inheritance

As a cohabitee it is essential that you make provision for your partner in your Will if you want him/her to be provided for financially in the event of your death. If you die "intestate", that is to say, without having made a Will, your estate will be divided according to intestacy rules. Your estate is likely to be divided amongst certain of your family

(your spouse being the largest beneficiary) and in the event you have no family may even revert to the Crown. Cohabitees do not benefit automatically under the intestacy rules. The intestacy laws will not recognise a separation between spouses or a registered Civil Partner as sufficient to disqualify him/her from the potential benefit. Only a divorce or dissolution would achieve this.

## The Inheritance (Provision for Family and Dependants) Act 1975

If your partner dies intestate or his/her Will fails to make any or adequate provision for you, you may be able to bring a claim under the above Act for reasonable financial provision but you have to have been living together for at least 2 years before death and be dependent upon the deceased. The 1975 Act is no substitute for a properly drawn and regularly updated Will. Proceedings under the Act are inevitably expensive, protracted and stressful whereas the cost of making a Will is by comparison inexpensive. Remember that marriage or registration of a Civil Partnership will automatically invalidate an earlier Will unless that Will was written specifically in anticipation of the marriage/Civil Partnership.

## CHILDREN

There is little distinction drawn between married and unmarried couples.

Where you separate from your partner and cannot agree the arrangements for your children, it may ultimately be necessary to seek the intervention of the courts.

There are four types of Court Order namely:

- Residence Order
- Contact Order
- Prohibited Steps Order
- Specific Issue Order

The Residence and Contact Orders are hopefully self explanatory; they provide for the arrangements as to where, or with whom the children are to live, and the degree of contact with the parent no longer living with them. Prohibited Steps Orders are Orders of the Court preventing acts taking place, for example the removal of a child from the country. A Specific Issue Order may be directed to something such as education or religious upbringing or some other particular point concerning the child's welfare.

Where the parents of children are married whether before or after the birth of the children both have parental responsibility for their children. An unmarried father does not have parental responsibility for his children of that union unless:

- a) he and the mother sign a parental responsibility agreement which can then be registered at the Principal Registry of the Family Division in London,; or
- b) he applies for and is granted parental responsibility by a Court; or

c) he is registered as the child's father, such registration having taken place on or after 1<sup>st</sup> December 2003,

Parental responsibility is almost incapable of definition. In the Children Act it is said to mean "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". By way of example it gives the right to be involved in any major decisions regarding medical treatment, education and religious upbringing. A child cannot be adopted without the consent of all those with parental responsibility and if a child's mother wishes to change his/her surname, she cannot do so without the consent of the child's father if he has parental responsibility.

### **Financial Issues and children**

All parents have an obligation to maintain their children. Since the Child Support Act 1991 the Courts no longer have jurisdiction to deal with maintenance for children unless there is an existing Court Order as at April 1993 when the CSA will only be involved if the parent with the care of the children claims Family Credit and Income Support. Parents may reach an agreement between themselves about maintenance but that agreement, if entered into after 5th April 1993, will not prevent the Child Support Agency from becoming involved if there is a further dispute.

The Child Support Agency makes no distinction between married and unmarried parents of children. A parent's liability is not dependent upon his or her marital status.

The Child Support Agency does not however have jurisdiction if one or other of the parents lives outside England and Wales or if there is any further financial provision that is needed, for example school fees or a lump sum for the children, in which case the Courts continue to be involved. The Courts are empowered to order that a "trust" of capital or property should be created (or "settled") for the benefit of children. This is more likely where the parents are wealthy and in exceptional cases can include the provision of a home for the children and their parent. The courts are specifically precluded from making financial provision for cohabitants, as opposed to the children themselves. Generally any capital or property which is "settled" on children will revert to the parent providing it, usually when the children finish their full time education.

### **INJUNCTIONS**

The courts are also able to intervene in cases of domestic disturbance to prevent the use or threat of violence whether this is directed to the other cohabitee, relative living in the same property or a child. The Courts' emergency powers to grant restraining orders may result in a violent person being obliged as a result of their conduct to leave the home which they occupied.

The court's powers to grant injunctions extends to those in same sex relationships. In cases of extreme violence the courts can attach a power of arrest to an injunction order which enables the

police to arrest someone they have reasonable suspicion to believe is breaching the provisions of an Injunction Order. An abusive partner may be obliged to move out of a property even if the partner who remains does not have a share of the ownership or value of the property. Although such an order will be limited in duration it will give the victims of abuse an opportunity to make alternative accommodation arrangements. The Court may make orders for the payment of bills during a period of occupation of this nature.

This information sheet has been prepared to highlight some key issues relating to cohabitee's rights. It is intended to be for general guidance only and is not a substitute for specific advice. It is based upon our understanding of the legal position as at November 2003 and may be affected by subsequent changes in the law.

Should you need to discuss in greater detail your rights and liabilities as a cohabitee please contact any one of the solicitors below.

Barbara Wright	<a href="mailto:barbara.wright@ts-p.co.uk">barbara.wright@ts-p.co.uk</a>
Sarah Judd	<a href="mailto:sarah.judd@ts-p.co.uk">sarah.judd@ts-p.co.uk</a>
Kate Gage	<a href="mailto:kate.gage@ts-p.co.uk">kate.gage@ts-p.co.uk</a>
Desmond O'Donnell	<a href="mailto:desmond.odonnell@ts-p.co.uk">desmond.odonnell@ts-p.co.uk</a>
Joanna Pratt	<a href="mailto:joanna.pratt@ts-p.co.uk">joanna.pratt@ts-p.co.uk</a>
Sarah Keily	<a href="mailto:sarah.keily@ts-p.co.uk">sarah.keily@ts-p.co.uk</a>