Information

Wealth preservation/protecting assets

Protecting your assets pre or post marriage

Starting a relationship is a happy, exciting time, and as things progress and the relationship moves on, living together is generally a natural progression. Should you live with you partner before you marry or wait until after, it's not always a priority to discuss how you will divide up what you have if the relationship comes to an end.

In cases where both parties are in an equal financial position, it may seem less of a concern. However, there may be additional assets in the future, for example inheritance or gifts from family members and which those gifting want to remain with the person they are gifting it to, rather than seeing it divided up in the event the relationship comes to an end. Married or not, there can be an impact if you do not agree what will happen should you split up to protect any current or prospective assets.

Not married

It is now more usual that people live together before they are married and some people choose to stay unmarried as their relationship progresses and they raise a family together.

The media have generally been responsible for perpetuating the 'common law spouse' myth. There is no such thing and there never has been. In the event that a relationship breaks down and the parties have not married, any dispute about how the property should be divided up would centre on the ownership of the property. When it was purchased, how it was purchased and whether there was any subsequent agreement in relation to its ownership.

1 Property Ownership

There are different ways to purchase a property. One party may for all sorts of reasons purchase it in their sole name, despite it being intended as the home of both parties. More commonly, if you're buying together, you would purchase a property as joint tenants. This means that you own the property jointly and the right of survivorship applies. If one owner were to die, their share would pass to the survivor, regardless of their will. The other way to own a property jointly is as tenants in common. In that situation the right of survivorship does not apply and shares pass under the terms of your will in the event of death. The first consideration in any future dispute as to ownership, when parties are unmarried, is whose name is on the property title. Or as it used to be, whose name is on the deeds?

If a property is owned in one person's name, then the other party is going to have to try and prove their interest. This isn't easy and is expensive if not accepted by the other party.

If a property is owned in joint names, then the next question is how is it owned jointly? If one party put down the whole deposit, but it is owned as joint tenants, then it is incredibly hard to persuade a court in a dispute that they should recover that deposit, as by owning it as joint tenants it is inferred that the intention was that they would own the property equally.

If a property is owned jointly as tenants in common, then the shares of ownership are relevant. It is possible to hold the property in

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unequal shares, so if one party put down the deposit it might be agreed they would have the greater share.

A declaration of trust may also be in existence, confirming that whilst the title shows one thing, the intention of the parties was another.

In any dispute between an unmarried couple, intention is key to the courts. It is for this reason that the title to the property is the first consideration. What was the intention at the time of purchase?

In the South East, the property market remains expensive. Those looking to buy their first house may need some help from parents or family members to raise a deposit. Parents regularly help by providing a lump sum as a deposit. Therefore, those providing the deposit should consider whether they will want that money back? For example; if parents are gifting to a child who is buying with someone else they should consider whether they want the other party to benefit from that gift if the relationship subsequently breaks down? Is it in fact a gift or is it a loan? Clarity from the outset can, in the long run, avoid a lot of distress, and financial cost in legal argument.

2 Protection

How can a third party protect a loan/gift?

Parents helping a child to purchase a property with another have several options. If it's a gift, they can leave their child to do as they wish with the money; alternatively, they may suggest that the property is purchased in a different way. For example as tenants in common, to account for a greater contribution. Or a declaration of trust recording that the first X amount goes to the child whose parents have gifted the money.

If it is a loan, and the person gifting it expects repayment, then they could register a charge against the property. This would ensure that on the sale of the property the money would be repaid (providing there is sufficient equity). Intentions would be clear as the parties purchasing the property would need to agree to the registration of such a charge.

Alternatively, there could be a declaration of trust, recording the fact that monies were due back to those loaning it on the sale of the property and before the net proceeds are divided up.

Married

If parties are married then the title documents to the property are of less concern to the courts in the event of a relationship breakdown. In those circumstances, the court would be concerned with a number of other factors, including the needs of both parties which will "trump" contributions. Following a long marriage there would normally need to be a good reason to depart from an equal division of the assets. This can be very frustrating to hear if you are the party who has contributed a great deal financially, or that contribution has come from parents or by way of inheritance.

The best protection is a pre-nuptial agreement, entered into before the marriage. Whilst not binding per se in this country, they are being given more weight and it is certainly the case that it is better to have a pre-nuptial agreement, than not. Having said that, it is important that a court, should they need to consider an agreement,

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can see that both parties have understood what they are signing, that there has been full financial disclosure before entering into it, that it is not unduly unfair and that there has not been any duress to sign it. There will be other factors such as the length of the marriage and whether there are children to be considered (because the children of the family are always the court's first consideration on divorce).

A pre-nuptial agreement can be an effective way to protect inherited assets and gifts from parents. Alternatively, those 'loaning' monies to assist in the purchase of a property, could register a charge or enter into a loan agreement to protect the repayment in the event that a marriage breakdown.

Already married?

There are also situations where parties have been married and no nuptial agreement was entered into before the marriage. In those circumstances, it is still possible to enter into such an agreement, a post-nuptial agreement. Again the same principles apply as to the pre-nuptial agreement, but it is hard to argue duress as the parties are already married.

It is not uncommon for married couples who experience a, 'rough patch' to enter into a post nuptial agreement on reconciliation so that there is certainty as to what will happen in the event the marriage does come to an end.

The existence of such an agreement may prevent the demise of the marriage, and statistics have suggested that is the case, but ultimately if it does arise then there is less need for expensive legal arguments, as there is already an agreement in place as to how things should be resolved.

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This information sheet has been prepared to highlight some key issues relating to wealth preservation. 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 2021 and may be affected by subsequent changes in the law.

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