

Cohabitation

Overview

Couples who live together in committed relationships (**cohabitants**) often believe they have some form of legal status or protection. That belief is wholly wrong.

Despite what the general public still believe, there is no legal relationship in England and Wales of “common law” husband or wife. The same is true where same sex couples are concerned.

The stark reality is that cohabitants who have not entered into a legally-recognised relationship – either marriage or Civil Partnership – may have very few rights. It makes no difference that they may have lived together for many years. They still will not be entitled to the same protections that spouses or Civil Partners enjoy.

This factsheet looks at legal issues most relevant to cohabitants, identifies the rights they might have and explains how cohabitants can protect themselves.

Terminology

Joint tenancy is a mechanism for two (or more) people to share an interest in the same property. The owners are called joint tenants. Each joint tenant shares equal ownership of the property – one joint tenant cannot have a larger ownership than another. A key concept in joint tenancies is the **right of survivorship**. This means that if any one of the joint tenants dies, the remainder of the property transfers automatically to the survivor/s. The transfer happens because of how the property is owned. It happens even if the joint tenant provides for something different to happen with his or her property in a Will.

Tenancy in common is a mechanism for two (or more) people to share an interest in the same property. The owners are called tenants in common. Tenancies in common differ from joint tenancies in two key ways:

- tenants in common do not have to have equal ownership of the property. For example, one tenant in common can own 75% of the property, and the other the remaining 25%, and
- no right of survivorship applies to tenancies in common. So, if a tenant in common dies, his or her share of the property passes under the terms of any Will, or on the intestacy rules.

Legal ownership refers to how the legal title to property is held. It may refer to land or other property for which an ownership document is generated (for example, a car, shares, a bank account). The person (or people) named on the ownership document are the legal owners.

If you are not named on the legal title

In the absence of an express declaration in a deed or other document a beneficial interest may be acquired by way of a constructive or resulting trust. A beneficial interest may also be acquired if you have been promised an interest in the property and acted upon that promise to your detriment.

A resulting trust can be found to exist by reference to the contributions made to the property, either at the time of purchase or subsequently. Contributions can be either direct contribution to the purchase price or deposit or by being a party to the mortgage. The contributions will nearly always result in a corresponding beneficial interest, although cases of resulting trusts these days are quite rare.

A constructive trust can be implied if a common intention about the beneficial ownership either at the time of purchase or subsequently can be established. It is not necessary to have an explicit conversation about the beneficial ownership. The court will look at the conduct of each of the parties.



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Ownership of Land

As can be seen from the terminology above, the concepts that apply to co-ownership of property may become complicated. This is not a problem for those who are married or in Civil Partnerships: courts dealing with the financial fallout from the breakdown of a marriage or Civil Partnership are not limited to simply ascertaining the legal and beneficial ownership of property. A court in those situations can actively adjust ownership to ensure a fair outcome.

This power of adjustment is not available in disputes between cohabitants. Cohabitants must instead look to the concepts identified to see whether they have a claim in relation to property.

Often, cohabitants' most valuable asset will be the family home and other land they have bought together.

Where the land is in England and Wales, the first enquiry should be legal ownership. Is the property owned in joint names? If yes, is it owned as tenants in common or as joint tenants?

Beyond legal ownership, is there any declaration of trust? For properties bought after 1 April 1998, the transfer document (**Form TR1**) requires co-owners to describe the arrangement for beneficial ownership. This is a type of declaration of trust. If ownership is not dealt with on the Form TR1, there may be a separate document dealing with beneficial ownership. This may have been completed at the time the land was bought, or at some later date.

If there is a declaration of trust, then beneficial ownership is easy to establish. Unless there is something that might invalidate the declaration (such as fraud, duress or mistake), that is the start and end of the enquiry. The cohabitants will own the property in accordance with the declaration. A court will not allow cohabitants to go behind the beneficial ownership described in the declaration of trust.

In 2011, the Supreme Court decided a cohabitant case where there was no declaration of trust and established these principles for resolving disputes about land ownership in such cases.

- The starting point is that beneficial ownership follows legal ownership. So, cohabitants who are tenants in common will be presumed to beneficially own the property in the same proportions as the legal ownership. Cohabitants who are joint tenants will be presumed to beneficially own the property in equal shares.
- That starting point can be displaced by showing that the cohabitants had a different intention, either when they bought the land or which they arrived at later, about beneficial ownership;

- The cohabitants' common intention is to be deduced objectively from how they behaved: it was important to look to how each party interpreted and understood the intentions of the other because of their words and conduct;
- In relationships where the common intention was clear, the court could impose either a resulting or constructive trust to give effect to that intention. This was the case even if it meant the beneficial ownership was different to the legal ownership;
- In situations where either:
 - The cohabitants did not intend joint beneficial ownership of the land at the outset, or
 - Had changed their original intention

But it was not possible to ascertain precisely enough their common intention about beneficial ownership, the court could decide what share was fair. The court would impose a resulting or constructive trust accordingly. In deciding, the court would have regard to the whole course of dealing between them in relation to the property.

Where land is owned outside of England and Wales, the situation becomes more complicated. The general rule is that, where there is a dispute about land, it should be settled in the country where the land is owned. But this in itself gives rise to problems. For example, many Continental legal systems do not recognise the concept of beneficial ownership. For them, legal ownership is the start and the end of the enquiry. Some countries do not permit two people jointly to own property, and so it might be legally owned by one cohabitant only for this reason. Declarations of trust, if they exist at all, may be far less common in relation to land owned overseas.

Whether a cohabitant has any claim in relation to land bought abroad will depend on the legal system in the country where the land is owned. If a court in that country decided a cohabitant had no claim in relation to the land, an English court would not be entitled to review that decision, no matter how unfair it seemed. Nor could an English Judge give a cohabitant a greater share of property in this country by way of compensation.

The English court's role in these cases is to establish beneficial ownership. Once established, the Judge is not entitled to alter the ownership. This remains the case even if fairness requires an adjustment. For example, if one cohabitant had assets that significantly exceeded their needs, whilst the other had only limited assets, a court here still could not tinker with how the land was owned to achieve a fairer outcome.

If one cohabitant owns land absolutely – both legally and beneficially – then the other cohabitant has no claim to it at all.

Ownership of Other Property

Common examples are bank and building society accounts, shares, vehicles, and endowment policies. Principles of joint tenancy and tenancy in common apply to property other than land.

Declarations of trust are possible in relation to property other than land, but are uncommon.

The principles that apply to establish who beneficially owns land also apply to help resolve who beneficially owns other property. So:

- A declaration of trust will almost always be conclusive;
- Where there is no declaration of trust, beneficial ownership is presumed to follow the legal title;
- This presumption can be avoided if it is shown the cohabitants intended something different, either when the property was acquired or subsequently. In such cases, beneficial ownership will follow the parties intentions, under a resulting or constructive trust. If those intentions were unclear, then the court could decide what share was fair, taking into account the whole course of dealing between the couple about the asset.

It will rarely be cost-effective to bring court proceedings to resolve questions of ownership to property other than land. In most cases, the expense of the proceedings will quickly outstrip the value of the property.

Where the property is outside of England and Wales, the issues described above in relation to disputes about land apply. The rules might be slightly more relaxed, depending on the type of property, so as to enable a court in this country to resolve a dispute about ownership.

As above, if one party owns property absolutely – both legally and beneficially – then the other has no claim to it at all.

Where cohabitants have joint debts, they are **jointly and severally** liable for them. This means that the person or organisation owed the money – **the creditor** – is entitled to go after either or both of them for repayment. The creditor can choose who it thinks it will be easier to get the money back from. It is then a question for the cohabitants to resolve between themselves whether one owes the other money for a joint debt repaid to a creditor.

Debts in the name of one cohabitant only will remain their responsibility after the end of the relationship.

Maintenance

Cohabitants have no right to be maintained by each other. It makes no difference that they might have lived together for many years. So, a cohabitant who separates will have no claim against his or her former partner to help meet living costs. There is no power to order maintenance to ensure a fair outcome, or to ensure a cohabitant is not left in dire need.

This compares starkly to the claims for maintenance that couples who have married or entered into a Civil Partnership have, if their relationship ends.

What is said above about maintenance applies only to claims between cohabitants. Where there are children, maintenance claims for the children's benefit will usually be possible. A cohabitant might benefit indirectly from such financial support. For example, there are some situations where the court will order one parent to provide a home for a child until the child is independent. This could provide the parent with whom the child lives – a former cohabitant – a place to live until the child is an adult. However, the former cohabitant will not own the property and would be required to leave it when the child no longer needs it as a home.

For more details, see our **Children – The range of court orders factsheet** (under the heading Order for financial provision for a child).

Claims in the event of death

One area where cohabitants enjoy some limited protection is in the event of the death of a partner. The rules about intestacy do not allow for a cohabitant to receive his or her partner's property. However, there is a class of claim that can be brought to ensure fairness where a person has died (**the deceased**) without making appropriate provision for his or her family and dependents. These claims can be brought irrespective of whether the deceased died intestate or left a Will. A cohabitant who lived with the deceased may be entitled to bring a claim for financial provision from the estate. They might do this by showing that they:

- were financially dependent on the deceased, and / or
- lived with the deceased for the whole two years immediately before they died, in the same household.

The amount the surviving cohabitant might receive from the deceased's estate will depend on (amongst other matters) the size of the estate, the cohabitant's needs and the needs of any other beneficiary of the estate.

Likewise in relation to fatal accidents: the Fatal Accidents Act 1976 entitles a cohabitant who has lived in the same household as the deceased for at least two years before the date of death to bring a claim.

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In both cases, the cohabitation must be ongoing at the date of death. A former cohabitant would not be entitled to make a claim (unless he or she could show there was ongoing financial support being provided by the deceased).

As described above, special rules apply where cohabitants are joint tenants of land or property. On the death of one joint tenant, the survivor will automatically receive their share of the property. This happens even if the deceased is intestate or leaves a Will that claims to leave the jointly-owned asset to somebody else. This is because of the right of survivorship applies to take property owned as joint tenants out of the deceased's estate.

How cohabitants can protect themselves

If you are cohabiting, or considering it, you should turn your mind to the following matters:

1. How is any property – land and other assets – currently owned? It is important to consider both legal and beneficial ownership.
2. How is it intended any future property – land and other assets – will be owned? Will property be owned as joint tenants or tenants in common? If the latter, will your shares be in proportion with contribution to the purchase price, or in some other proportion?
3. If property is held as joint tenants, would it be more appropriate to hold as tenants in common? Does the right of survivorship in relation to joint tenancies give effect to what you and your partner want to happen? If not, consider **severing** the joint tenancy. A joint tenancy may be severed with or without the other owner's agreement.

If a joint tenancy is severed, it converts into a tenancy in common with each having an equal interest.
4. Review your estate planning. If you do not have a Will, consider making one. Whilst cohabitants can claim (as set out above) in the event of their partner's death to obtain reasonable provision, this can prove a lengthy and expensive process. It is far better to grapple with estate planning now, rather than to have to respond to improper planning after a partner has died.
5. Consider executing a declaration of trust that confirms your beneficial ownership of property, if different to legal ownership. If ownership is agreed, a declaration of trust executed now avoids protracted and costly arguments in the future if the relationship breaks down.
5. If you own property – land and other assets – abroad, take advice from a local expert about questions of ownership and inheritance. If you are planning on buying property abroad, take this advice before you buy. Find out whether there are any local requirements regarding legal ownership, whether property can be co-owned, whether declarations of trust are recognised, what happens if one co-owner dies, and similar questions.
7. Keep records of significant payments made for the acquisition, maintenance and improvement of assets, particularly land. If property is owned jointly, but one partner pays for absolutely everything, it **might** be possible to argue that the payments reflect your intentions about beneficial ownership. Records of significant financial contributions might prove vital to the success of this argument.

1. Consider having a **Cohabitation Agreement**. This advice stands whether you are considering cohabiting or are already in a relationship. A Cohabitation Agreement can record details like: who owns what at the start of the relationship; how any property acquired during the relationship will be owned (legally and beneficially); who will be responsible for mortgage and other property costs, and so on. The detail included in a Cohabitation Agreement can be tailored to your individual needs and circumstances.

A Cohabitation Agreement can also provide a framework for what will happen if the relationship breaks down. It can deal with how equity in property will be divided, provide for maintenance payments (whilst there is no right to maintenance from cohabitation itself, a properly-prepared Cohabitation Agreement can give rise to a contractual right to maintenance), and specify who will be liable for joint debts.

2. Review any declarations of trust or Cohabitation Agreement when circumstances change. For example, make sure these documents still reflect what you want to happen after you and / or your partner has a windfall (such as lottery win or inheritance), suffers a serious accident that limits earning capacity, changes employment, or has a child. Make any updates required to ensure these documents reflect your changing intentions throughout your life together. .
3. If you are not the legal owner of land in England and Wales, but are a beneficial owner, you might be able to have your interest noted by the Land Registry. This will put others on notice of your interest and give you a degree of protection if your partner tries to deal with the property – sell it or mortgage it – without your knowledge.



You can enter into a Living Together Agreement to specify how the house and other assets will be dealt with.



Please feel free to discuss your own position and concerns. Contact your nearest office on:

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