

A guide to cohabitation and your rights



Winckworth
Sherwood



Winckworth Sherwood Family Guide

This guide is intended to provide an overview of the legal issues surrounding cohabitation and includes:

- what issues cohabitants may face upon separation
- a summary of your legal rights as a cohabitant
- practical steps you can take to protect yourself

If you would like to discuss anything raised in this guide, our experienced family law team is here to help. Their contact details can be found on the final page.

For more information, please visit wslaw.co.uk/family.

WS

Since the early 1970s, there has been a gradual long-term decline in marriage rates. In contrast, the number of cohabitants continues to rise and they are the fastest growing family type in the UK, having doubled in the last 20 years. Today, cohabiting couples represent around 1 in every 5 families in the UK.

Although nearly half of adults in England and Wales believe in the concept of 'common law marriage', the truth is that it does not exist. This means that when cohabiting couples separate, they do not enjoy the same legal rights as married couples and are left with little financial protection.

The result of this is that even if the couple have been in a cohabiting relationship for decades, have raised children and given up careers to do so, they cannot benefit from the same financial protections that marriage offers and one party could be left vulnerable.

This guide only considers the financial implications of cohabitants separating. These are distinct from making an agreement about appropriate care arrangements for any children. You can contact us for a copy of our guide on this area, which all members of our team are experienced to advise on.

WHAT ABOUT A CIVIL PARTNERSHIP?

Some cohabitants chose not to get married as they do not feel that marriage is the right path for them. In which case, it might be worth considering whether a civil partnership would be a better fit. Particularly as entering into a civil partnership gives civil partners similar rights and protections to a marriage but does not have the same historical and religious connotations that makes marriage unattractive for some. Opposite-sex couples have been able to enter into civil partnerships since 31 December 2019, and it has been available to same-sex couples since 2004.

Your legal rights: Property

If you and your partner own or live in a property together and decided to separate, what happens to that property is generally governed by property and trust law and what is recorded on the title deeds to that property and in any accompanying declaration of trust.

PROPERTY OWNERSHIP

Property may be owned in one party's sole name, or in joint names as either joint tenants or tenants in common.

Owning a property as joint tenants means that the property belongs to both owners jointly:

1. You have equal rights to the whole property;
2. The property automatically goes to the other owner if you die (the right of survivorship); and
3. You cannot pass on your ownership of the property in your Will.

On the other hand, owning a property as tenants in common means that while the property is still jointly owned, it is owned in specific shares which could be equal or unequal. As tenants in common:

1. You own different and distinct shares of the property;
2. The property does not automatically go to the other owner if you die; and
3. You can pass on your share of the property in your Will.

Often people will choose to hold property as tenants in common where they have invested unequal amounts of capital in it, for example, where only one party contributes to the deposit.

You can find out how you own property by looking at a copy of the register of title from the Land Registry.

PROPERTY OWNERSHIP: TRUSTS

If you do not legally own the property that has been your family home (i.e. your name is not on the title deeds), you may be able to establish that you have a beneficial interest in it by successfully arguing that a common intention constructive trust has arisen.

The party claiming that the trust has arisen will need to show that:

1. There was an agreement between them and the legal owner that they should have a beneficial interest in the property; and
2. They have acted to their detriment in reliance on this common intention.

It may also be possible for a cohabitant to establish beneficial rights in a property through the equitable doctrine of proprietary estoppel, which is not covered in this guide.

A note of caution: it can be very costly to bring a claim to court to establish a beneficial interest in property (or to defend a claim that an ex-partner has brought) and they can also be risky claims to run as the unsuccessful party could end up having to pay the other party's costs, as well as their own.

WHY YOU MAY BE AT RISK AS A COHABITANT

As it is property law that governs what happens to a property upon a separation, it does not take into account any other contributions made to the relationship – financial or otherwise – and is irrespective of the parties' respective incomes and whether they will be left with enough money to rehouse. This is in contrast to what happens when married couples divorce, where although the starting point is a 50:50 division of the assets, this can be departed from to meet needs.

There is also a risk that if one party dies and they are the sole owner of the property, or it is owned as tenants in common and the deceased has not left the property or their share of it to the surviving partner in their will, that they may be asked to leave their home by the deceased's beneficiaries.

On the flip side, you may also be at risk if you own a property and have asked your partner to move in or if you buy a property with a partner, but you contribute most of the capital, since, depending on the circumstances, your ex-partner may seek to establish that they have a beneficial interest in your property.

Your legal rights: Financial support after separation

If you are cohabiting and you separate, you are not entitled to ongoing financial support in the same way that married ex-spouses might be.

Where cohabitants have children, they can turn at first instance to the Child Maintenance Service ("CMS") to help them work out what monthly financial support is needed to provide for those children moving forwards.

THE CHILD MAINTENANCE SERVICE

The CMS administers the statutory child maintenance scheme which covers the payment of a child's living costs when that child does not live in a household with both of their parents.

Child maintenance can be paid whether the child's parents were married, living together as cohabitants or were never in a relationship. This is because the state considers that both parents are responsible for the costs of raising their children, even if the paying parent does not see those children.

You can apply for child maintenance if:

- 1 Your child is under 16 (or under 20 and in full-time education up to and including A-Levels);
- 2 You live in the UK; and
- 3 You are the child's parent, guardian or grandparent with main day-to-day care of the child.

The CMS website provides guidance on child maintenance as well as a calculator to help parents work out the amount of child maintenance to be paid, which is calculated in accordance with a specific formula. The paying parents income and number of nights that the child spends with them will both affect the amount of maintenance payable.

If parents share care for their child equally, there will be no liability for child maintenance.

SCHEDULE 1 OF THE CHILDREN ACT 1989

When unmarried parents separate, although the Child Maintenance Service has primary jurisdiction for assessing and enforcing child maintenance, the court also has powers to make financial provision under Schedule 1 of the Children Act 1989.

Under Schedule 1, the court can make various orders for the benefit of children, including periodical payments where the paying party's income exceeds the gross annual maximum that the CMS can deal with, as well as unlimited lump sum orders, for things such as housing and a car. However, its powers are more limited in nature than those claims available following a divorce and the party seeking financial provision will need to consider how they will fund their legal costs for bringing an application, although those costs can, in certain cases, be recovered from the paying party at the end of proceedings.



How can you protect yourself?

Nobody wants to contemplate a future where their relationship breaks down, but there are some protections you can put in place to ensure that in the event that it does, you are financially secure.

If neither marriage or civil partnership is an option for you and your partner, there are other ways to ensure that you are protected:

- 1** Cohabitation agreement – this can contain as much or as little detail as you like, as the agreement will be tailored to your particular circumstances. For example, it can set out your joint intentions for what would happen to your property in the event that you separate and what would happen to the outgoings on the same. Cohabitation agreements can also cover your wider financial arrangements, arrangements for your children's care and whether one of you will provide any ongoing financial support to the other. However, there are certain elements that a cohabitation agreement cannot cover, for example you cannot agree to share a pension, so they are limited in scope and may not be appropriate in all cases.
- 2** Declaration of Trust – if you and your partner own a property, you should give serious thought to entering into a declaration of trust which will set out exactly how you
- own that property and your agreement about what should happen to it in the event that you split up. This is particularly useful if you are not contributing equal shares to the purchase, as it can record exactly what your respective contributions were and what your agreement is as to what you should both get back if you split up.
- 3** Will – if one partner in an unmarried couple dies, the other does not have an automatic right to inherit in the same way that married couples do. This puts the surviving partner at risk if they owned a home together as tenants in common (i.e. in separate, distinct shares) or if the deceased owned the home in their sole name. Without a will, the deceased's estate will be divided in accordance with the intestacy rules and it could mean that the surviving partner must leave their home and has no right to any sale proceeds.

All of our team are able to talk you through your options to ensure that you put in place the protections that will best suit your family.

Frequently asked questions

If we split up, what will happen to our pet?

Under the law of England and Wales, a pet is classed as property. Therefore, who gets to keep it may simply come down to ownership i.e. whose money was used to fund the purchase. Who has financially maintained the pet, by paying for the vet's bills, pet insurance or everyday expenses, such as food, may also be determinative where there is a dispute as to ownership.

I'm renting a property with my ex, who pays the rent now that we've split up?

This will simply come down to whose name is on the lease. If your name is on it, you will be liable to pay rent even if you have moved out and it is your ex who remains living at the property. You should check the terms of your lease carefully, as there may be a break or termination clause that allows you to end the lease early or transfer it to your ex's name.

What will happen to our joint bank accounts?

Technically joint bank accounts are joint property and so the money within them should be split 50:50. You should let your bank know as soon as possible that you and your partner have split up. If you don't, and your partner runs up debts on the account, as your name is also on the account, you could be asked to repay what they owe if they refuse to.

Are there inheritance tax benefits to being married?

Yes! Transfers between married couples and civil partners are not usually subject to inheritance tax, so if the first partner to die leaves their entire estate to the other, no tax will be payable. This does not extend to cohabitants. On top of this, when the second partner dies, they inherit any unused nil-rate band from their partner. Again, this benefit does not extend to cohabitants.

Review of the law

In 2007, the Law Commission recommended reform of the law in this area but the Government announced in 2011 that they would not be taking those recommendations forward. Although in 2018 the Government said it would revisit these proposals, there has been no action in this area since and there is no sign of any reform on the horizon.

Many family lawyers and members of the judiciary feel that reform in this area is long overdue, and that something must be done to tackle the inequality that cohabitants face when compared to their married counterparts. Despite there being a campaign for change, until such time as there is parliamentary appetite to tackle this difficult issue, cohabitants will remain at risk when their relationships break down.

Conclusion

The lack of legal protection that cohabitants have worries family lawyers because the financially weaker party to a cohabiting relationship is far more vulnerable than their married counterparts would be if their relationship were to come to an end. What is even more concerning is that a huge proportion of cohabiting couples have no idea about their lack of legal rights because they believe that they will be protected under common law marriage. But there are some simple steps that cohabitants can take to protect themselves, and until and unless there is a review of the law in this area, it is worth understanding what rights you do have and taking steps to protect them.

Key contacts



SARAH INGRAM

Partner

+44 (0)20 7593 5071

singram@wslaw.co.uk

Sarah is a partner in Winckworth Sherwood's Family Team. She advises on divorce, complex financial disputes, pre and post nuptial agreements, cohabitation, children (including residence and contact disputes, assisted reproduction and surrogacy issues, Schedule 1 Children Act and child abduction cases) and Inheritance Act claims.



HUGH MACDOUGALD

Partner

+44 (0)207 593 5149

hmacdougald@wslaw.co.uk

Hugh heads the Private Client team and specialises in estate planning, capital preservation, private and charitable trust administration, family equity issues, resolution of disputes over wills and trusts, capital tax advice and compliance, probate and related residential property services.



TIM SNAITH

Partner

+44 (0)207 593 5147

tsnaith@wslaw.co.uk

Tim is a Partner in Winckworth Sherwood's Private Client team. He regularly advises on trusts, estates and succession planning, including the many tax issues that arise with the same and the problems presented by the loss of mental capacity.



Our Family Team is part of Winckworth Sherwood's **Private Business and Wealth** group, which provide a range of legal services to support individuals and their business interests, including:

- Tax and estate planning
- Succession planning
- Probate
- Trust management
- Family law
- Philanthropy
- Family office services
- Employment
- Commercial and residential real estate
- Dispute resolution
- Reputation management
- Cyber security
- Data protection
- Corporate and transactional advice

“This team always provides its clients with a first class service. Every solicitor I have worked with in this Firm has an impressive knowledge of the law and a flexibility of approach to suit each client. The excellent advice from the outset ensures that clients have balanced expectations and faith in their legal representatives”

THE LEGAL 500 UK 2022

WS