



## THE COMMON LAW WIFE: FACT OR FAIRYTALE?

Do you know how long it takes to become a common law wife? Is it (a) six months, (b) two years or (c) five years? The answer is (d) none of the above. It is a commonly perceived myth that there is such a thing as the common law wife. In truth, cohabiting couples have very little protection when it comes to relationship breakdown. With the marriage rates declining and the cohabitation rates increasing the myth of the common law wife is serving to leave a significant number in our society vulnerable and surprised that the law does not offer them similar protection to their married counterparts.

As the law stands married couples enjoy superior rights over property, pensions and inheritance. On marriage breakdown the court has the power to redistribute property and finances but the court has no such power to do so on the breakdown of a relationship between cohabitants. A cohabitant can only turn to contract, property or trust law for help. Pursuing claims in these areas is complex, uncertain, unpredictable and most of all expensive.

### Is the law going to change?

In a culture of ever increasing divorce rates opponents see greater equality for cohabitants as the final nail in the coffin for marriage.

However, there is change on the way. The Law Commission's report of 31 July is a welcome development. The report proposes that cohabiting couples should have limited financial claims against each other on separation, provided they have lived together for a minimum period of time (either two to five years) or have had a child together. To recognise that some couples will wish to regulate their own affairs, couples should be allowed to opt out of the new regime. The new financial rights would entitle the couple to financial relief to redress any imbalance caused by their relationship. This might be payment to reflect the impact on a mother's earning capacity if she has stayed at home to care for the children, or to reflect capital payments made by one partner to the other's mortgage. Unfortunately, the proposals are not law, nor is any legislation currently envisaged.

## **How can I protect myself?**

It is often only on death or relationship breakdown that couples realise there is a problem. Until the law does change what can you do to protect yourself? Although the protection is limited you can take preventative measures by making a Cohabitation Agreement, a Deed of Trust in relation to property ownership, a Parental Responsibility Agreement and Wills.

### **Cohabitation Agreement**

A cohabitation agreement is a contract which will set out not only how a couple's existing finances will be run but how to arrange a fair division of any joint assets on the breakdown of the relationship. People shy away from the idea of making a cohabitation agreement because thinking about the ending of a relationship seems to run contrary to the idea of love and commitment. However, with the lack of protection that the law gives to cohabiting couples it is a sensible and recommended precaution. It is also simpler to resolve matters whilst partners are on good terms rather than when they are faced with the emotion of a break-up. In order to gain protection the contract has to be in a legally enforceable format. The parties should get legal advice and should restrict the contract to financial and property matters.

### **Ownership of Property - Deed of Trust**

The most valuable asset that the cohabiting couple is likely to have is the house. It is far preferable to sort out the ownership when purchasing the property. Please see our briefing note entitled 'Purchasing a Property Together' for further information.

The way in which the property is to be owned should be stated in the Contract, Transfer Deed and possibly also a further Deed of Trust. Not only can a Deed of Trust state the shares in which the property is owned it can also state the purpose that the property will have such as a home for the couple, an investment or a home for the children. In doing so this reduces the likelihood of arguments if the relationship fails.

### **Parental Responsibility Agreement**

It is not only in the areas of finances and property that the cohabiting couple need protection. An unmarried father does not have automatic parental responsibility in comparison with a married father who will automatically receive it. Parental Responsibility includes amongst other things the ability to take decisions determining religion, education and consent to medical treatment. Schools, medical and other authorities may refuse to recognise a request for information from a parent, who to their knowledge does not have parental responsibility. An unmarried father can obtain parental responsibility by having his name on the child's birth certificate, by obtaining a court order or by entering into a parental responsibility agreement with the mother. The agreement must be in a particular format and be registered at court.

## **Wills**

It is essential that cohabitants make wills to protect their partner in the event of death, otherwise there is little protection on the death of a partner. A cohabitant's only recourse is to make an application to the court for reasonable financial provision if they have been living in the same household as their partner for two years preceding death and have been living as husband and wife.

## **Conclusion**

As can be seen the common law wife still remains a fairytale. In fact the concept of the common law wife was abolished in 1753 when Lord Hardwicke introduced only one form of legally recognised relationship: marriage. The law now recognises civil partnerships which bestow many of the same rights upon the civil partners, as spouses within marriage. When the law will change to afford more protection to cohabitants is uncertain. Therefore if you are in a cohabiting relationship it is essential to consider creating protection for yourself in case of a relationship breakdown because the law as it stands now will offer you little protection.

Should you have any concerns or queries about any aspect of the information contained in this briefing note, please contact Nicola Harries in the Family Department on 01483 302264.

*This information is necessarily brief and is not intended to be an exhaustive statement of the law. It is essential that professional advice is sought before any decision is taken*