

THE MYTH OF “THE COMMON LAW SPOUSE”

Despite general public perception, there is no such thing as a “common law spouse”. If you live together with your partner but are not married or have formed a civil partnership, then your rights and obligations relating to the property, children and maintenance are very different compared to couples who have undertaken a formal ceremony. This can often lead to situations which may seem unfair.

Society has changed extensively over the years and the trend is that more and more couples are living together. According to the National Statistics Office, between 1996 and 2004, the number of cohabiting couple families increased by over 50%. The Civil Partnership Act, which came into force in December 2005, has enabled same sex couples to register their relationship and create what is known as a formal Civil Partnership (See Civil Partnership Section). Civil Partnership brings with it certain rights which are similar to those of a married couple. However, what about those who live together but are neither married nor have entered into a Civil Partnership.

The law as it currently stands, often leads to injustices for such cohabiting couples when they subsequently separate or should their partner die, compared with the rights afforded to a spouse or a civil partner. Instead, disputes arising between cohabitants involve couples’ property/trust law which often results in significant legal costs and is inadequate when dealing with the dynamics of a separating couple. For instance, the Court has to look at factors such as the common intention of the parties and their contributions.

Unfortunately a cohabitant who contributes to the home by looking after the children of the relationship is unlikely to be able to claim an interest in the family home for this reason alone if it is registered in their partner’s sole name and in the absence of the owning cohabitant telling the other that half the home belongs to them. This is not the case where the couples are married or are civil partners as the Judge would have a wide discretion to be able to take into account the fairness and reasonableness of the couple’s situation when deciding on an appropriate financial settlement.

The law affecting co-habitees is thus a highly complicated area and it is important that you seek legal advice when contemplating moving in with your partner and as soon as difficulties arise.

The law relating to children is also different for co-habitees. A mother always has Parental Responsibility for a child but this is not true for fathers.

A father who is not married to the mother of his child has very different rights from his married counterparts. Unmarried fathers do not automatically receive parental responsibility and it can only be obtained in one of the following ways:

- If the birth is registered after 1st December 2003, by the father signing the birth register.
- The father entering into a parental responsibility agreement with the mother of the child.
- The father applying to Court for a Parental Responsibility Order and
- The father marrying the mother of the child.

If a father does not have parental responsibility, only the mother will have the right to decide where the child shall be educated, consent to medical treatment or appoint a guardian. This does not mean that the father is completely cut off because he can still apply to the Court as a parent if he is unhappy about any aspect of the child's upbringing (See Children Act Proceedings Fact section). Nevertheless it is still advisable to acquire Parental Responsibility as soon as possible.

However, a father will remain obligated to pay child maintenance and will remain eligible for assessment by the Child Support Agency (more commonly known as the CSA) whether or not they have parental responsibility for your child.

The same cannot be said in respect of monthly financial support for a co-habitee. Unlike married couples and civil partners, there are no legal provisions obligating someone to pay maintenance to their co-habitee if they go their separate ways. Further your co-habitee will not be your next of kin under the intestacy rules, (the rules applied to your property on your death) so the making of a will is crucial if you wish to avoid this.

The law is now under review by the Law Commission where the potential financial

hardship suffered by cohabitants or their children upon separation or death is being considered. It is very much hoped that there will be reform in the near future which will provide a range of remedies for cohabiting couples upon separation, enabling the courts to consider orders such as lump sum payments, transfer of properties, pension orders and possibly even maintenance.

In the meantime, Cohabitation Agreements are becoming more popular with couples in order to address financial issues. Although there are no guarantees that a Cohabitation Agreement will be binding should the parties later separate, if certain safeguards are followed such as both parties taking independent legal advice and provide full details of their respective financial positions, it should carry more weight should it have to be relied upon. Some may view such a document as depressingly unromantic but it is a sensible approach to take as it will flag up those areas that need to be addressed to protect one another as much as possible and detail each party's intentions and expectation at a time when they are not in conflict.

Whilst we await reform of the law, the preparation of a Cohabitation Agreement may prove for some to be a wise and sensible course of action.

**To talk to a family lawyer about your own personal circumstances call:
01908 577680 for a £85 fixed fee appointment**