



## A GUIDE FOR UNMARRIED COUPLES

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the personal touch.

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“ Cohabiting couple families were the fastest growing family type between 1996 and 2016, more than doubling from 1.5 million families to 3.3 million families.”

# Important information

This booklet sets out the law and procedures, has some facts and some options for you to consider if you are not married. This booklet does not consider living arrangements for children. There is a separate guide that deals with those issues. This guide is intended as a general guide and to give you some idea of:

- **What the law is**
- **How long your case may take**
- **What your choices are**
- **What questions to ask your solicitor**
- **How costs are worked out.**

This booklet cannot be a comprehensive statement of the intricacies of law and practice nor can it take into account your personal circumstances. As such you should not rely on this booklet. We will be able to advise you on what the law and current practice is, how the law may affect you and your family, what you might expect from the law and what the costs may be.

“ Cohabiting couples had a separation rate five times that of married couples and a reconciliation rate that was one-third that of married couples. ”

# Introduction

**It is estimated that there are over three million unmarried couples living together in England and Wales. Many are confused by their legal standing particularly when their relationship comes to an end.**

## **What about common law marriage?**

There is no such thing as a common law marriage. Indeed many people mistakenly believe that after you have been living with someone for a couple of years then you automatically become common law husband and wife. This is however not the case. Unmarried couples have hardly any of the same rights as married couples.

## **Should I get married then?**

That depends on your own wishes. It is not necessary to get married. You can enter into formal agreements often called "Cohabitation Agreements" which set out what contributions will be made by you to the family home and what will happen in the event the relationship comes to an end. You also have various options if there is property involved, as to how it will be owned by you and/or your partner and to protect the other in the event of death you can make a Will.

## **Our relationship has ended, what are my obligations?**

This will depend on the individual circumstances of your relationship, the main issues being whether there are any property issues and children are involved. However, upon separation you do not have any legal duty to support your former partner.

## **What if we have children?**

If there are children involved, any issues as to where those children should live, what time they should spend with the other parent and Parental Responsibility are considered in more detail in our separate guide "Children Matters on Separation". Later in this guide consideration will be given to financial provision for children where the parents are unmarried and to child maintenance.

## **What if we have property?**

If you share a home with your ex-partner then what happens will depend on a number of factors. If the property is in your ex-partner's sole name then it might be difficult to make a claim or prove that you still have a right to live there. However your position may be stronger if you paid a contribution towards the purchase of the property or the deposit. However this is often a contentious issue and it is recommended you seek legal advice.

If you jointly own the property, then you will be entitled to remain living at the property though consideration has to be given as to how exactly you hold the property and who contributed what to the purchase of the property since that time. This issue will be explored in more detail later in this guide.

## **What happens if one of use dies?**

If your partner or ex-partner dies and they haven't left their property/share of the property or possessions to you then there is a strong chance you will get nothing. Your property and possessions will normally, in the absence of a Will, go to your next of kin. Again this issue will be considered in more detail later in this guide.

## Property issues

If when you and your partner separate and you cannot agree what is going to happen in relation to a property then an application can be made to the Court to determine your beneficial interest in the property and/or an order for sale of the property. An application is made under The Trusts of Land and Appointment of Trustees Act 1996 (TOLATA). If it is not practically possible for either you or your ex-partner to retain the property then you can ask the Court to grant an order for the sale of the property.

In the event that you believe you are entitled to a greater share of the equity in the property, over and above the 50% you are entitled to if you are a joint legal owner, you may make an application to the Court to determine your beneficial interest in the property. It will be necessary to produce good documentary evidence of higher contributions on your part, either in financial or practical terms, to substantiate your claim.

“ Almost two thirds (61%) of people do not have a Will. ”

### Property law

In order to decide whether someone (call him/her 'B') has a share in a property, the legal title to which is registered in the sole name of someone else (call him/her 'A'), there are two main legal concepts which are relevant.

### Resulting trust

The first is known as a 'resulting trust'. This arises when B has made a direct financial contribution to the purchase of the property in A's name, and there are no circumstances (e.g. an express or implied agreement) to show that the contribution was intended to be a gift or a loan. For this purpose we must look at how the cost was found and paid at the time of the purchase itself, and not for example, who paid the mortgage instalments later on. A resulting trust means that A holds either all or part of the property on trust for (i.e. for the benefit of) B.

### Constructive trust

If B did not make a direct financial contribution to the purchase of the property in A's name, the concept of resulting trust cannot apply. The second, more complex concept is known as 'constructive trust'. But there are two very different ways in which this can happen:

1. Where there is an express agreement, arrangement or understanding between A and B as to who should own what particular share in the property, or, at any rate, A promises B or induces B to believe that B will receive a share in the property. Such an agreement, arrangement, understanding or promise may be in a formal document or it could be confirmed by a statement only made orally and very imprecisely.

However, such an express agreement, arrangement, understanding or promise is not enough by itself, unless it is in writing and signed by A (this would then be called an

'express trust' rather than a 'constructive trust'). Except in that case it is also necessary for B (the person claiming a share in the property) to have acted to his or her detriment (disadvantage) or altered his or her position in reliance on that agreement, arrangement, understanding or promise.

2. Where there is no such express agreement, arrangement, understanding or promise the Court may in some cases regard the matter as if there had been one. Often the Court calls this 'imputing a common intention'. In order to do this, the Court looks at the conduct of A and B in relation to the property. If B contributed directly to the payment of mortgage instalments, or to payments for a substantial improvement to the property, the Court may infer that this must have been because there was a common intention to share the property. People do not usually pay other people's mortgages for nothing. But less important contributions, like contributing to household expenses, will not do, because there may be many reasons why people pay those, other than an intention on the part of A to give away a share in the property to B in return.

“The long-term rise in the percentage of births outside marriage or civil partnership has continued, with 47.7% of all babies born outside marriage or civil partnership in 2015.”

### Ascertaining the share

The major difference between the two types of trust - 'resulting' and 'constructive' - is that the concept of a resulting trust relies upon the precise share in the property usually being based on the amount of the direct capital contribution, proportionate to the purchase price, whereas under the concept of constructive trust, once it is established that either through 1. or 2. above the intention was for someone to share in a property then the Court will take into account a wider range of factors, not just the proportion of the contribution to the purchase price, in deciding what the amount of that share should be.

Both of you have a duty to give full and proper disclosure of your financial position so that a proper financial arrangement can be made. If you are unable to agree upon the sale of and division of the net proceeds then you will need to apply for an order determining what share you have in the property. Consideration will be given to:

1. What discussions took place prior to and during the purchase of the property with your ex-partner, including the dates, times, locations of any such discussions. Were any third parties present? If so, who?
2. Who paid for the deposit on the property? If it was borrowed, who was it from? If it was a gift, who was the money from and why was it given? If it was funded by savings, whose were they?
3. Who paid the legal fees, surveyor's fees and for any other purchase-related expenses, such as stamp duty? Was there any agreement in relation to those funds?

4. Who made the mortgage repayments, and from what funds were they paid, for example, your account, your ex-partner's or a joint account? If it was paid from a joint account, how was that funded? Who paid the other household expenses?
5. Were any structural repairs or alterations carried out, for example, an extension or a new roof? If so, who paid for them and from what funds? Were there any discussions between you as to the basis on which such payments would be made?
6. Who paid for other expenditure such as holidays, furniture, the children's clothing and equipment? What was the agreement between you?
7. Whether or not you were engaged at any time during your relationship is relevant.

# Financial provision for children

As a matter of family law, if you and your ex-partner have had a child/children together the Court can order payment of capital to cover limited past and current capital needs and towards the purchase of a property. The Court can also order a transfer and/or sale of a property to be used to house your child/children.

Where money is ordered to be paid to purchase a property or a property is to be transferred, then this can only be on the basis that the capital is in effect held on Trust for your child/children until they are aged 18 or 21.

The Court has the power to make an order for child maintenance only where the amount of child maintenance is agreed, and in other very limited circumstances. Otherwise an application has to be made to the Child Support Agency to assess the amount of child maintenance.

## **Court's approach to claims pursuant to schedule 1 to the Children Act 1989**

The Court's have the jurisdiction to make orders in relation to capital and property for the benefit of children. You can bring a claim against your ex-partner, seeking the transfer and/or settlement of a property and/or a lump sum.

The factors which the Court must take into account are all the circumstances, including:

- (a) the income, earning capacity, property and other financial resources which each of you has or is likely to have in the foreseeable future**
- (b) the financial needs, obligations and responsibilities which each of you has or is likely to have in the foreseeable future**
- (c) the financial needs of your child/children**
- (d) the income, earning capacity (if any), property and other financial resources of your child/children**
- (e) any physical or mental disability of your child/children and**
- (f) the manner in which your child/children was being, or was expected to be, educated or trained.**

It would be very unusual for the Court to transfer a property outright to either of you for the benefit of your child/children. It is more likely that if the resources are available a lump sum order will be made which would be used to finance the purchase of a new property for your child/children to live in, or more usually, that a property is put in trust during your child/children's minority.

A lump sum, either to be used as described above, or to help your ex-partner to pay off debts or to reimburse specific costs, e.g. baby equipment, would not be repayable.

If there was an order that a property was put in trust for your child/children, it would only be for their minority, i.e. until they reached the age of 17 or finish in full-time secondary (or tertiary) education whichever was the later. There would be a trust deed setting out the precise terms of occupation. It is normal for the carer of the children to have the right to live in that property free of rent during that period. When the children reach the age of 17 or finish in full-time education the property would then be sold and the entire proceeds on sale (or proportion of the property that you had invested expressed as a percentage of that property) would be paid to who purchased the property.

## Child maintenance

**The majority of couples manage to agree the level of child support/maintenance payable by the parent who lives apart from the child (the non-resident parent) following divorce, dissolution or separation. If an agreement cannot be reached an application will need to be made to the Child Maintenance Service (CMS) or to a Court in certain circumstances.**

The CMS is a statutory service which is part of the Department for Work and Pensions. The role of the CMS is to ensure that parents who live apart from their children contribute to their upkeep by paying child support.

If the CMS becomes involved, it will use a standard computation to work out how much child support should be paid. The CMS can take legal action if payment is not made.

The CMS assessments are as follows for a non resident parent (NRP):

Where the non-resident parent's (NRP's) gross weekly income is up to £800:

- 1. for one child - 12% of the NRP's gross weekly income**
- 2. for two children - 16% of the NRP's gross weekly income**
- 3. for three or more children - 19% of the NRP's gross weekly income.**

Where the NRP's gross weekly income is £800.01 to £3,000:

- 1. for one child - 9% of the NRP's gross weekly income**
- 2. for two children - 12% of the NRP's gross weekly income**
- 3. for three or more children - 15% of the NRP's gross weekly income.**

If the child stays regularly overnight with the non resident parent, the child support payable will be reduced.



# Wills and death

No matter how long you have been with or have been living with your partner if they die without having made a Will you could lose out completely. If they have not made a Will, the Rules of Intestacy will apply. They are set out below.

## THE RULES OF INTESTACY

### SINGLE PEOPLE - England and Wales



However if you have been living together for two years immediately before the death of your partner you can apply for financial provision from the estate of your deceased partner without having to show that you were maintained by them before their death, but the extent of the dependence on them can be relevant as to how the Court will exercise its discretion. If you have not lived together for two years immediately before the death, then you can only claim if you were being wholly or partly maintained by your partner at the time of their death.

If you are separated from your husband/wife and living with a new partner, but do not have a will then your husband/wife's rights are not overridden and your partner could get nothing. We would refer to our separate guide to Wills on divorce.

As such, consideration should always be given to unmarried couples having a Will as it will ensure that you have control of how and to whom assets pass to on death.

A Will allows you to:

- **Provide for your surviving partner and whoever else you want to benefit from your assets**
- **Appoint who you want to deal with your affairs in the event of your death**
- **Provide for your children, if any, by setting up trusts to look after their financial needs**
- **Minimise and restrict tax liabilities**
- **Provide for claims that may be made if you have more than one family**
- **Make provision for the handover of any business.**

“ Over three-quarters (77%) of parents with children under the age of five have not made a Will. ”

## Property and death

What happens to any property you and your partner have on death depends how that property is owned. If it is held in your sole name then it will be dealt with in accordance with your Will or in the absence of a Will in accordance with the Rules of Intestacy as set out above.

If however you own the property jointly it will depend if you own the property as joint tenants or tenants in common.

If you are unsure as to whether you are a joint tenant or a tenant in common, provided the property in question is registered with the Land Registry, as the majority of properties are, then you can clarify this by getting copies of the Land Registry records for the property which will show how it is held.

This is important, as if a joint tenant dies their share passes automatically to the other joint tenant. This happens even if they have made a Will that leaves their share to someone else.

However a tenant in common is free to leave their share of the property to whoever they wish when they die. If they do not have a Will then the property will pass in accordance with the Rules of Intestacy as set out above.

If you are a joint tenant but you do not want your partner or in the event of separating, your ex-partner, to get your share in the event of your death then you can “sever” the joint tenancy. This has the effect of changing the joint tenancy into a tenancy in common. This is done by serving a “notice of severance” on the other joint tenant. You do not need their consent to sever the joint tenancy nor do you need the consent of the mortgage company, if any. As you then become a tenant in common you are free to leave your share of the property to whoever you wish.

## Inheritance Tax

While married couples and those who are in a civil partnership can join together their two tax free allowances to create a single allowance of £650,000, this opportunity is not available to a couple simply living together. Your estate should you die will be liable to Inheritance Tax (currently 40% on assets in excess of £325,000) which could have significant impact on the financial situation of your surviving partner.

From April 2017 people who own a home will get an additional tax-free allowance. It be introduced over four years, worth:

- **£100,000 in 2017-18**
- **£125,000 in 2018-19**
- **£150,000 in 2019-20**
- **£175,000 in 2020-21**

This means a new total allowance for property owners will eventually be worth £500,000.

“ Nearly half of those aged between 55 and 64 have not made a Will (46%). ”

# Cohabitation agreements

A cohabitation agreement is a form of legal agreement reached between a couple who have chosen to live together. It normally contains provision for a couple who want to live together in order to protect themselves from unnecessary costs and litigation should their cohabitation break down. You can in a cohabitation agreement set out your property rights and what arrangements might be made for mutual financial support, such as dealing with debt and caring for children.

## Should I have a cohabitation agreement?

Entering into a cohabitation agreement is a difficult issue. To many they are comparable to Pre-nuptial agreements and setting out what is to happen if the relationship breaks down is not a great way to start a relationship. However a cohabitation agreement can if anything be a way of strengthening a relationship. It is a way of defining who is responsible for what and can prevent arguments in the future. It also gives you an opportunity of looking at some of the key issues in your lives together.

## What can it cover?

It can cover almost anything, but normally it focuses on financial issues. It can include what rights you each have in relation to the family home you live in and any other properties, who owns what assets, who pays for things such as the mortgage and the utilities bills and other expenses that you will have while you live together such as holidays. It can set out what the financial arrangements will be if the relationship breaks down. It can also deal with issues relating to children.

It is unusual to include provision for things such as who will be responsible for doing the housework or similar issues, as this is more to do with behaviour and it would be difficult to draft an agreement in such a way so that something like this would actually be enforceable. You should be able to deal with yourself without the need for legal advice.

## Should I have a formal cohabitation agreement?

Yes, as having a formal agreement makes sure that all issues that need to be addressed are and also leaves less scope for dispute in the future.

## Is a cohabitation agreement legally binding?

A cohabitation agreement is in effect a contract between you and your partner. It will be binding provided it was made with the intention of being so. Most cohabitation agreements will specify this. It should be set out in clear precise English so that there is no doubt as to what you and your partner are agreeing to. You and your partner should also seek independent legal advice and consideration should be given as to whether there is a need for you and your partner to provide financial disclosure to each other. The agreement should also be witnessed by an independent adult witness.

However an agreement may not be binding if it is thought to be unfair.

“ A study commissioned by the family solicitors' pressure group 'Resolution' found that nearly half of members of the public aged between 18-34 believe that cohabiting couples have the same legal rights as their married counterparts. ”

## The future – Cohabitation Rights Bill

The Cohabitation Rights Bill aims to provide basic protection for cohabitants and the bill, if passed, will be welcome news for long-term cohabitants.

It aims to establish a framework of rights and responsibilities and provide basic protection for cohabitants, although not affording the same level of protection available to married couples.

The proposed legislation will allow cohabiting couples with children, or those without children who have cohabited for two years or more, the right to apply for a Financial Settlement Order. An applicant will need to show that he or she has suffered either an economic disadvantage or that their partner has retained a benefit as a result of a qualifying contribution they have made.

An applicant must show they have made a qualifying contribution to the family. This does not have to be financial and includes “other contributions” which benefit the parties or the family in other ways, such as contributing to their general welfare.

In order to make its assessment, the Court must have regard to the following discretionary factors which will assist it in determining applications:

- **Welfare of any minor who is a child of either of the parties**
- **Income, earning capacity, property and other financial resources of the parties or what they are likely to have in the foreseeable future (including pension eligibility)**
- **Financial needs and obligations of the parties**
- **Welfare of any child who lives or might live with either party**
- **Conduct of the parties (if inequitable to disregard) and**
- **Circumstances of the qualifying contribution (in particular where the respondent can show that the applicant’s contribution was made despite the respondent’s express disagreement).**

The bill aims to produce a clean break between the parties and affords no real scope for imposing continuing obligations on unmarried couples, other than where there is an economic disadvantage that cannot be discharged immediately. In those circumstances, the Court may order that the liability or disadvantage is to be shared equally between the parties. The orders available to the Court also envisage a clean break (e.g. lump sum payments, transfers of property and sale of property). The only element of on-going obligation envisaged by the bill is a lump sum(s) paid in instalments, interim lump sum payments and lump sums by way of pension attachment.

It has been suggested that the bill appears to aim to put parties in the position they would have been had the cohabitation not occurred.

The bill, if passed, makes provision for willing cohabitants who have actively decided not to get married as, an opt-out is available.

The bill is currently only in its early stages and is a long way from becoming law.

## Costs

The most frequent question asked is “how much is this going to cost me?” At Wellers Law Group we are open and upfront about our fees. Our hourly rates vary from £200-300 per hour and our fees are based on how much time is spent on a case.

Many people are tempted to instruct the cheapest solicitor, but when in life has the cheapest been what is best for you? Our rates are very competitive given our level of experience and in this area of law.

We do offer an initial reduced rate consultation for £100 plus VAT which covers a one hour meeting.

We can give you some general guidance as to fees. If you and your partner have to go to Court in relation to the ownership/division of property then your costs could be in region of £10-15,000 plus VAT. If you and your partner have to go to Court over the financial provision for a child then your costs will be similar. If both of these matters are going to Court then the Court will consolidate them and deal with them at the same time.

A cohabitation agreement normally costs in the region of £2,500 plus VAT but can be more depending on exactly what needs to be included in it.

We will provide you with regular bills so that you do not find yourself in the position of having to pay sporadic large bills. These bills on average will be for a few hundred pounds which we believe to be much more manageable than larger ad hoc payments. In addition should you wish you can set a limit on the amount of your fees and we will advise you as soon as it appears that the limit may be exceeded and will not exceed that limit without your consent.

**To find out more please check out our website [www.wellerslawgroup.com](http://www.wellerslawgroup.com) or to arrange a reduced rate consultation please call us on 0208 464 4242 for our Bromley team or 01483 284567 for our Surrey team.**



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