

Unmarried and Same Sex Couples

Let us dispel the myth; there is no such thing as a common law wife or husband. The concept was abandoned centuries ago. But increasing numbers of people are living together outside marriage, or (for gay couples) outside a civil partnership.

Cohabitation agreements

Cohabitees are not treated the same as married couples or civil partners, for most purposes. There are signs of change, for example in the case of *Mendoza (2002)*, the phrase "living with the tenant as his wife" in the Rent Act 1977 was held to mean the same as "as if she were his wife"; and this allowed the tenant's unmarried partner to succeed to an appropriate form of tenancy.

But at present, only married couples or civil partners benefit from the following:

- inheritance tax exemption on the death of one (not available where the recipient is non domiciled)
- a right to share in the partner's estate on his or her death without a will
- a right to share in the partner's assets on the breakup of the relationship
- pensions sharing or attachment rights

There are other examples of such discrimination. For these reasons, many unmarried couples and gay couples who do not want to commit to civil partnership are now avoiding problems later, by entering into "cohabitation agreements". The essentials of such an agreement are:

- a declaration as to the assets each owns at the commencement of the relationship
- a declaration as to how they will own future-acquired assets and income
- agreement as to what should happen if the relationship does not work out, or upon death
- what will happen if they marry or if a child is born (usually the agreement will automatically terminate on either eventuality).

Whilst it remains true that no such agreement can take away the right of either party to apply to the Court for an order affecting the interpretation or enforcement of the agreement, nevertheless such agreements are increasingly accepted by judges as enforceable against both parties, provided that:

- both parties have disclosed all their assets and income fully and honestly;
- both have received independent legal advice; and
- it is clear that the agreement does not reflect a poor, or unfair, bargain for one of them.

Pre-nuptial agreements

In just the same way, unmarried couples, whether gay or straight, who are planning their wedding are, more than ever, reaching agreement as to what should happen if the relationship fails. This is of particular significance where one of the couple has greater financial resources than the other. They cannot escape scrutiny by the Court in divorce proceedings, but again the existence of such an agreement will usually have a significant impact on the division of assets and income on divorce

Ownership of the home

Couples can choose either of:

- Beneficial joint tenancy; or
- Tenancy in common

Beneficial Joint Tenancy

This is the situation in which they quite simply own the property jointly, with the following consequences:

- The property cannot be sold without the informed signature of both owners.
- Neither of them can transfer his or her interest in the property outright to a third party during their lifetimes, or by will.
- Upon the death of either of them, the survivor owns the property outright, without regard to the terms of any will.

Tenancy In Common

In this case, the parties agree that they have separate shares in the property, probably a half share each but not necessarily. Generally, the agreement as to the actual shares will be incorporated in a Declaration of Trust. The result is that:

- Either of them can transfer their respective share in the property to a third party, either by way of sale or by gift during his or her lifetime.
- Either can give away his or her interest in the property by will, either to the other owner or to a third party.
- On the death of either, the property does not automatically transfer to the survivor, but the share of the one who died will be dealt with according to his or her will and could benefit a third party.

Gifts between them

Without tax reliefs available to married couples and civil partners, cohabiting couples must take care if one makes a **significant gift to the other** (whether of cash, or e.g. a share in their property). This can lead to an unexpected income tax charge for years to come, even though there is no extra income arising! Finance Act 2004 introduced the "Pre-Owned Assets" charge ('POAT'), which is complex and unpredictable. Please ask us if you need this clarified, and do so **before taking action** – after the event is usually too late.

Action points for unmarried couples, whether straight or gay

- ❑ When buying a **home**, choose either Beneficial joint tenancy or Tenancy in common carefully
- ❑ If one wishes to **increase the other's share** beyond his or her contribution, **before taking up occupation**, ask us first in case POAT might bite
- ❑ If one **moves in** with the other, this might be the time to consider whether he or she should own part of the home by a gift; there are specific exemptions for cohabitantes, from inheritance tax and POAT traps
- ❑ Protect each other against the death of one, through appropriate **wills**
- ❑ Take out **life assurance** written in trust for your partner, to avoid the harsh impact of inheritance tax
- ❑ Ensure that each has adequate **pension** provision, because it is not possible to share pension rights
- ❑ Record ownership of individual assets through appropriate **declarations of trust**, which must be by deed

For more information or advice
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