Common law spouse (cohabitation)

Latest Update
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This article looks at the position of cohabitants who are often referred to as "common law spouses".

Overview of Topic

1. The limited rights of cohabitants are considered.
2. The issues as to property, children and inheritance will be explored.

Key Acts

Trusts of Land and Appointment of Trustees Act 1996

Children Act 1989

Child Support Act 1991

Married Women's Property Act 1882

Matrimonial Proceedings and Property Act 1970


Land Registration Act 2002

Key Subordinate Legislation

None.
Key Quasi-legislation

None.

Key European Union Legislation

None.

Key Cases

Lloyds Bank Plc v Rosset [1991] 1 A.C. 107

Oxley v Hiscock [2004] EWCA Civ 546; [2005] Fam. 211

Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432


Gow v Grant [2012] UKSC 29; 2012 S.L.T. 829

Key Texts

None.

Discussion of Detail

1. Many people make references to cohabitants as "the common law wife" or "the common law husband". Such a person does not exist in law or otherwise. It is an urban myth. Cohabitants are adults who live together as man and wife (or as civil partners) but they have not married or they have not entered into a civil partnership. They, therefore, have no legal status as a couple.

2. Most importantly, when a cohabiting couple's relationship breaks down, they do not have any legal obligations as between each other in the way that married couples or civil partners have against each other by virtue of the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004. There are no composite statutory provisions to assist cohabiting couples in organising their property and financial matters out when their relationship ends. This can cause real difficulties for women who have had children with their partner and who
have given up work or their careers and have become financially independent upon the other partner. The financially independent partner has no obligations to maintain the other partner, often leaving her financially vulnerable both in terms of capital, accommodation and maintenance. There are no statutory means for one cohabitant to seek regular maintenance/periodical payments against the other. Even with obligations towards the children being met by one party, this may still leave the other party who cares for the children struggling to maintain a home and to provide for the children on a day to day basis.

3. If there are children, then the cohabitant with the care of the children can apply for maintenance from the other cohabitant under the Child Support Act 1991 (the 1991 Act) as amended unless the parties reach a private agreement of course (known as a family-based arrangement). The Child Support Agency will be the normal recourse for child maintenance.

4. If not received during the relationship, separated cohabitants may have to make claims for social security benefits and tax credits as a single person (with or without the care of children).

5. The Children Act 1989, s.15 and Sch.1 may be used to obtain financial relief in relation to children. The applicant can be a parent, a child’s guardian or special guardian or a person in whose favour a residence order for the child is in force (Sch.1, para.1(1)). The application must be made against the parent of the child, including a step-parent or a civil partner as long as the child is the child of the family. Children over the age of 18 years can also make an application against his parent provided that child is or will be receiving education, training or there is some special circumstances justifying an order (Sch.1, para.2(1)). An order can only be made if the parents of the child live in separate households (Sch.1, para.2(4)).

6. The court can make orders for periodical payments and secure periodical payments orders, lump sum payments, orders requiring settlement of property to be made for the benefit of the child which either parent is entitled to in possession or reversion or order the transfer of property. The orders can require the payments, settlements or transfers to be made to the applicant for the benefit of the child or to the child himself (Sch.1, para.1(2)). Interim periodical payments orders can be ordered which will cease when the application is finally determined (Sch.1, para.9). The court can make an order for periodical payment order even if the child and the caring parent or guardian lives abroad, provided the other parent lives in the jurisdiction of England and Wales and the order is made against that person within the jurisdiction (Sch.1, para.14).

7. As to periodical payments for the children or for their benefit, it is essential to bear in mind the CSA 1991 as amended by later acts which provides the main means of providing maintenance for children from absent parents. The court only has jurisdiction to deal with periodical payments for children in certain circumstances (s.8 of the 1991 Act).

8. Those circumstances include the following:

   a. the parties have reached an agreement as to the maintenance of a child and this is embodied in a consent order reflects as part of the financial proceedings in a divorce suit;

   b. the absent parent’s weekly wage is greater than the maximum figure under the CSA scheme and the court is satisfied that it is appropriate for the absent parent to make additional payments over and above that as assessed by the CSA;

   c. the child is or will receive instruction or training and the order is made solely for the purposes of meeting expenses incurred in such education or training; and
d. where the child is disabled and the order is made solely for the purpose of meeting some or all of any expenses attributable to the disability. Otherwise, the court should not use Sch.1 to circumvent the CSA system.

9. When it comes to property and particularly the home of the cohabitants and their children, there is again no statutory framework to help them reach decisions as to the property ownership arising from their cohabitation. Cohabitants have to turn to property and trusts law to determine their interests in property and to determine whether or not that property should be sold or not. Decisions as to the cohabitants’ home or other property that they might own jointly or otherwise can be made by the court through an application under s.14 of the Trusts of Land and Appointment of Trustees Act 1996 (the 1996 Act). Within such applications, the following matters of property and trusts law will arise: express declaration of trusts, constructive trusts, resulting trusts and proprietary estoppel.

10. There have been many cases decided by the courts over the years in relation to cohabiting parties or co-owners of homes and other properties but some of the key cases are: Lloyds Bank Plc v Rosset [1991] 1 A.C. 107, Oxley v Hiscock [2004] EWCA Civ 546; [2005] Fam. 211, Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432 and Jones v Kernott [2011] UKSC 53; [2012] 1 A.C. 776. What is clear from all the long list of reported cases is that, when cohabitants move in together and in particular when they buy property together to be their joint home, express and clear agreements preferably set out in deeds of declarations setting out their respective legal and beneficial ownership in such property should be made. Failure to do so will result in costly legal disputes if the cohabitants eventually separate and in particular, if a cohabitant not named as a legal property owner has made some contributions to the property. Problems arise when separating cohabitants argue as to whether or not there was an agreement between them that the non-legal owner was or was intended to be a beneficial owner of the property. The non-legal owner of the property will be very vulnerable upon relationship breakdown.

11. Proceedings under s.14 of the 1996 Act can be brought by a cohabitant in which he or she will ask the court to declare the nature and extent of his or her beneficial ownership of the property in question. The applicant can also ask the court to order the sale of the property or to postpone the sale of the property until a date in the future, such as when the youngest child of family reaches 18 years or completes full time education. The cohabitant who has moved out of the property may be able to obtain occupation rent from the cohabitant that has remained living in the property. The cohabitant who has stayed in the property may be able to claim credit from the outgoing cohabitant for the payments of the mortgage or other capital expenditure made on behalf of the other cohabitant.

12. Cohabitants who have become engaged to be married can look to s.17 of Married Women’s Property Act 1882 (the 1882 Act) and s.37 of the Matrimonial Proceddings and Property Act 1970 (the 1970 Act) by virtue of the Law Reform (Miscellaneous Provisions) Act 1970 (LR(MP)A 1970). The 1882 Act enables the court to decide any question between a husband and wife as to the title to or possession of a property and make such orders as the court thinks fit. The 1970 Act states that where a husband or wife contributes in money or money’s worth to the improvement of real or personal property in which either has a beneficial interest, if the contribution is substantial then subject to any agreement to the contrary, such person making the contribution shall be treated as having acquired a share or an increased share in the property by virtue of the contribution.

13. The LR(MP)A 1970 extends these provisions under the 1970 and 1882 Act to those who were engaged and whose engagement had been terminated before the marriage. In cohabitant cases, therefore, it is always important to check if the couple were engaged since these acts may be used alongside the 1996 Act. There is a three-year time limit after the end of the engagement within which to bring a claim under these acts.
14. When cohabitants separate and they cannot agree the beneficial ownership of the home, the main claim to assert property rights will be under s.14 of the 1996 Act. However, if there are children living in the home, the caring cohabitant is well advised to bring an application under Children Act 1989, s.15 and Sch.1, at the same time, orders under which might help to bolster the carer’s interests in the home at least whilst the children remain dependent upon her. Such an application can either be heard with the 1996 claim or the applications can be consolidated. If there was engagement, the 1970 and 1882 Acts should also be pleaded to enable as many possible bases for the determination of the beneficial interests.

15. In the event of cohabitants separating, there may a need to deal with some interim matters urgently. If the couple were joint beneficial owners of a property, then a notice of severance needs to be served on the other cohabitant immediately to prevent the right of survivorship applying if one of the cohabitants dies before the arrangements as to the property has been finalised. A cohabitant who is not a legal owner but who has or may have a beneficial interest in the property should register a restriction with HM Land Registry pursuant to the Land Registration Act 2002 (Form RX1) (see the Land Registry Practice Guide 24: Private Trusts of Land (2009)). If necessary, consider an application for occupation orders under the Family Law Act 1996. The cohabitant who seeks to claim a beneficial interest in the property will need to gather documentary evidence of contributions made and the financial arrangements of the parties during the relationship. A copy of the conveyancing file when the property was purchased should be sought at an early stage. The mortgage lender should be informed that there is a dispute as to the ownership of the property: this may assist in preventing one party drawing down on the mortgage and thereby creating a greater debt secured on the property and reducing its net equity.

16. Cohabitants who live together are also vulnerable if one of the dies. If the deceased cohabitant dies without leaving a valid will, the rules of intestacy under the Administration of Estate Act 1925 (the 1925 Act) apply to the distribution of his estate. The remaining cohabitant is not one of the potential beneficiaries that can inherit under such rules. If the deceased cohabitant has made a will, it may not necessarily provide any or any sufficient legacy to the cohabitant. The cohabitant can, in either case, pursue a claim for reasonable financial provision under s.1 of the Inheritance (Provision for Family and Dependents) Act 1975 (the 1975 Act) provided that during the whole period of 2 years immediately before the date when the deceased died, the cohabitant was living in the same household as the deceased and as the wife, husband or civil partner of the deceased (ss.1(1A) and 1(1B)). An application must be brought within 6 months after the grant of probate or the letters of administration although an extension of time can be applied for (s.4). When a cohabitant dies, and it is believed that there is a will, the surviving spouse should apply for a standing charge at the relevant Probate District Registry so that he or she will be informed when probate or letters of administration is granted to the appointed executor or to a relative.

17. The cohabitant can only claim for financial provision as it would be reasonable in all the circumstances of the case the applying cohabitant to receive for his or her maintenance (s.1(2)(b)). The court must consider the various factors in s.3 of the 1975 Act along with the age of the applicant, the length of cohabitation and the contribution made by the applicant to the welfare of the deceased’s family including the contribution made by looking after the home and caring for the family.

18. The court can make various financial awards against the estate of the deceased including periodical payments order, lump sum order, an order transferring property in the estate to the applicant, an order for a settlement for the benefit of the applicant in respect of property in the estate and an order for the acquisition out of property in the estate and transfer property so acquired to the applicant (s.2(1)). Future maintenance may be met with a lump sum in which regular maintenance is capitalised. Occupation of the deceased's property might be met by a tenancy for life, a tenancy at a particular or low rent or an outright lump sum to enable the applicant to purchase a more suitable property.
19. The court can also make an interim order where a sum or sums of money are paid by the estate to the applicant if:

a. the applicant is in immediate need of financial assistance and

b. there is property forming part of the estate which is or can be made available to meet the need of the applicant.

20. Such sums can be paid at such intervals as the court thinks fit. Such an interim order can continue until the court makes the final orders under the application (s.5).

Analysis

KEY AREAS OF COMPLEXITY OR UNCERTAINTY

1. Until there is legislation to provide a statutory framework to deal with cohabitants’ property and finances when their relationships break down, they will have to rely on a variety of piecemeal legislation and legal principles in property and trusts law with some assistance from the Children Act 1989 if there are children in the relationship.

2. The Law Commission produced a report dated 31 July 2007, "Cohabitation: the financial Consequence of relationship breakdown" Law Com 307. It made various recommendations for legislation that would assist cohabitants to some extent to achieve some financial provision upon their relationship ending. Lord Lester of Herne Hill has introduced private members’ bills with the aim of creating legislation in line with the Law Commission’s recommendations but to date, there has been no constructive progress in the legislature. In October 2012, Lord Herne introduced the Inheritance (Cohabitants) Bill in the House of Lords whereby new rights for a particular class of cohabitants on intestacy would be created with the extension of existing rights to make statutory claims for financial provision. The Bill prosed that cohabitants of 5 years would have a right to inherit under the intestacy rules and if there was a child, the period of 5 years would become 2 years but only if the child lived with the couple when the deceased died. This Bill was endorsed by the Law Commission but again, the Bill has failed to make its way on to the statute books.

LATEST DEVELOPMENTS

1. In the case of Gow v Grant [2012] UKSC 29; 2012 S.L.T. 829, Baroness Hale of Richmond expressed criticism towards the Government for not adopting the recommendations of the Law Commissions report dated 31 July 2007 to give cohabitants a right to claim for financial remedy after relationship breakdown. The appeal was a Scottish case whereby the applicant cohabitant was able to rely on the Family Law (Scotland) Act 2006 for a financial award from her former cohabitant without having to rely on property and trusts law.

POSSIBLE FUTURE DEVELOPMENTS

1. It is unlikely that the Government will give the time and attention to the issue of cohabitants in the foreseeable future.

HUMAN RIGHTS
None.

EUROPEAN UNION ASPECTS

None.

Further Reading