

The “common law marriage” myth

A commonly held misconception is that cohabitants have the same, or similar status to married couples when they separate. This is not the case. Simply living with another person does not allow you to make any financial claims of any nature, including claims in respect of property owned in their name, or any other financial claim.

I have separated from my partner. Can I make any financial claims against the property?

This is approached differently depending on whether your name is on the Title Deeds or not.

If your name is on the Title Deeds

If your name is on the Title Deeds there are two ways of owning property jointly, as Joint Tenants, or as Tenants in Common. If you own a property with your ex partner as Joint Tenants, you will have no other option but to divide the equity in your property equally, by either the remaining party raising a sufficient lump sum, or by the property being sold.

In most cases we will be able to tell you how you own the property with your ex partner once we have made enquiries with the Land Registry, although some properties are still unregistered if they have been in the same ownership for many years. If you own the property as Tenants in Common, the Land Registry should be able to tell us how you agreed the net equity would be divided in the event of a sale. There is usually an agreement in place where one of you has made a larger financial contribution to the purchase of the property and you want this to be reflected in the event of the property being sold.

If your name is not on the Title Deeds

In the event that your ex partner owns the property in his or her sole name, we will need to assess whether you may have a financial claim against the property under the provisions of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA). We would need to undertake a certain amount of work and investigations before we can give you advice on your chances of success in proceeding with such a claim.

Section 14 of TOLATA states that, if you are able to establish that you have a financial interest in the property, you may make an application for an Order under that section. The Court has the power to make a declaration regarding the nature or extent of your financial interest in the property, and has the power to order a sale. Section 15 of the Act summarises the issues the Court will need to consider when determining an application under Section 14. The issues are as follows:

- a. The intention of the parties;
- b. The purposes for which the property is held;
- c. The welfare of any minor who occupies or might reasonably be expected to occupy the property;
- d. The interests of any secured creditor or beneficiary;

If the property is owned in your ex partner's sole name, it will be necessary for us to determine whether you have "*established a trust*." There are three types of trust, express trusts, constructive trusts and resulting trusts. The question that needs to be addressed where property is owned in your ex partner's name is; was it intended that the beneficial ownership of the property was to be shared. If so, what are the proportions of ownership?

Resulting Trusts

This type of trust arises where the property is owned in your ex partner's sole name and you have made a *direct financial contribution* to the property (for example, contributing to the purchase price, making direct payments to the mortgage). In such circumstances, unless your ex partner can demonstrate a clear intention to the contrary, you will be entitled to a financial interest in the property which is proportionate to the amount you contributed. Contributing to the household outgoings, or paying money each month to your ex partner will not on its own be sufficient to establish a resulting trust. Making a loan or gift to your ex partner will also not on its own be sufficient.

Constructive Trust

This arises where there is evidence that, at the time the house was acquired (or sometimes at a later date), you and your ex partner had a common intention that the property should be jointly owned. The common intention can be express (directly agreed verbally or in writing) or implied (by conduct). In order to establish this, you must also have acted in reliance on that assumption, to your detriment. A common intention can be established by:

- a. Express discussions between you and your ex partner;
- b. By drawing inferences from the conduct of you and your ex partner. (This again would arise if you made a *direct financial contribution* to the property, as referred to above or paid or substantial improvements).

The second stage of the test is that you have acted on reliance of the assumption to your detriment. For example, if you spent money on the property before you had any discussions with your ex partner regarding ownership, you would not be able to establish a constructive trust in relation to the monies you had spent prior to those discussions taking place.

Proprietary Estoppel

A further way to establish any interest is to prove to the Court that you acted to your detriment. The reliance of a promise, for example, if you gave up a council house tenancy in return for a promise that you would have a share in the property.

Can I enter into a Cohabitation Agreement?

It is possible for you to enter into a Cohabitation Agreement with your present or ex partner at any time

before, during or at the end of your relationship. We can draft the agreement for you, which is signed by you both and forms a legally binding contract between you. The Agreement can specify how your property is to be dealt with in the event of your separation.

Schedule 1 of the Children Act 1989

If you and your ex partner have children together, it is in certain circumstances possible for you to make an application under Schedule 1 for an Order for financial provision for your child, including Orders for payment of school fees and capital provision. In making an application under the act for capital (i.e property/ lump sums) the aim of the Court is to make financial provision for your child only whilst they remain dependant. For example, if you were seeking an Order to ensure that your property is not sold or transferred, it is likely that a sale or transfer would simply be delayed until your child is no longer dependant (i.e he or she is over 18 and has completed full time education).

In practice, an application under TOLATA would generally be pursued before an application under the Children Act would be considered.

In summary, the law relating to cohabitation disputes over property is very complex.