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Safety net

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With the cohabitant population set to grow further and no change in the law in sight, Therese Nichols reviews the advice lawyers should give to unmarried couples

The law as it stands offers piecemeal and limited protection to couples who cohabit. This is a well-known fact to those of us in the legal profession. However, a great deal of ignorance still pervades the cohabiting population, especially in the strongly held myth of common law husband and wife.

Any casual enquiry on the Office for National Statistics' website under 'the cohabitation population' will show that both the number and proportion of never-married adults who are cohabiting has increased between 1992 and 2007. In 2007 an estimated 4.5 million adults were cohabiting. This is compared with an estimated 2.7 million in 1992. In relation to cohabitation figures as a whole, 73 per cent of cohabiting adults have never married and most of the remainder, 23 per cent, are divorced.

The proportion of the adult population of England and Wales who are married is projected to fall over the next 25 years from 2008 to 2033, from 49 per cent to 42 per cent. The proportion of adults who have never married is projected to increase in the same period from 35 per cent to 43 per cent.

Is the government intending to change the law? In its 2007 report *Cohabitation: The Financial Consequences of Relationship Breakdown* the Law Commission concluded that cohabitants should not be given the same rights as married couples or civil partners. However, it recommended the law must change and proposed that couples who had children together or who had lived together for a minimum period, possibly between two and five years, would be eligible to apply to the court for a financial remedy. Awards would be based solely on contributions made to the relationship. Couples would have the choice to opt out of the scheme. Despite these recommendations, however, there will be no reform to the law during the current parliament.

The courts offer small solace to separating couples. The starting point is that where property is held jointly the beneficial interests follow the legal interests, without any declaration of trust to the contrary. However, in the two most recent cases to consider the issue – *Stack v Dowden* in 2007 and *Jones v Kernott* in 2011 – the Supreme Court redistributed the beneficial shares unequally despite joint ownership. In both cases this was justified on the facts. Ms Dowden received 65 per cent and Mr Stack 35 per cent. The Supreme Court reinstated the original county court decision for Ms Jones and awarded her 90 per cent and Mr Kernott ten per cent. However, clients need to be aware that such uncertainty and cost is avoidable provided they are given the appropriate advice at the right time, be that at the beginning of their cohabitation or when entering a legal transaction.

Wide scope

The following points are not exhaustive but if followed should provide unmarried couples with legal protection. They are relevant to lawyers acting across the complete private client spectrum, from a couple who want to purchase a property as first-time buyers, to a client who has just divorced from a long marriage and intends to cohabit.

The critical point is not to hide the following advice in the third page of a long client care letter that the client is unlikely to read or recognise as important. Make all this clear. Tell the client. Provide good, clear and understandable information. Cards or leaflets are helpful. Confirm what you advised the client in writing and, finally, repeat yourself.

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Be certain to record on file your client's full instructions on each aspect of your advice. This is especially important where, despite your strong pleas, they have decided to ignore your advice on all of the following issues and jump without a parachute. Your partners will thank you for it should the matter reappear down the road as a potential negligence claim.

Property

Explore the intentions of unmarried couples buying a property or enquiring about property ownership. Highlight the differences between joint tenants and tenants in common. Record all advice and the intentions of the couple in an attendance note.

Unmarried couples should execute a declaration of trust at the time of purchase. There is no substitute for this. The deed should state: the parties' intentions; the purchase price and purchase costs; how much is provided from mortgage and/or capital; who provided the capital and in what proportions; how the property is to be held legally and beneficially; in what shares; what will be the trigger events for sale and who gets what in the event of sale.

Independent advice

Both parties should take separate and independent legal advice. If they object to the time or costs involved remember to point out the alternative that faces them if they fall out and have no recorded agreement. Remind them about the fate of Ms Jones/Dowden and Mr Kernott/Stack and that the costs now will be microscopic in comparison to the potential costs later.

Protecting assets

Clients should be advised that if they have assets prior to the relationship, a divorce settlement or inherited property for example, or if they plan to have children together and not marry, that they should enter a cohabitation contract.

This will be helpful for the parties to set out what they intend to do during their relationship regarding contributions and what happens to the children and property in the event of separation.

Cohabitation contract

If you are acting in a property transaction for an unmarried couple, advise your clients to take separate and independent legal advice regarding a cohabitation contract. If they are your divorce client you can act for them regarding their new relationship. They will need to give full and frank disclosure, and evidence of this should be included in the contract which should be under deed. A piece of paper drawn up between them might be evidence of their intentions but won't be legally binding in the event of future dispute. The contract is much wider than a declaration of trust relating to one property. It can cover all other areas a declaration cannot, such as: personal property; joint accounts and credit cards; mortgage and life policies; motor vehicles; collections; gifts; hire purchase or other finance; business interests; payment of living expenses; pension and death in service benefits and, in the event of differences or separation, dispute resolution.

Children

Remind any cohabiting couple that if they intend to have children and not marry only the mother will automatically have parental responsibility. The father will obtain parental responsibility if he is named on the child's birth certificate (for births after 1 December 2003) with the mother's agreement or the birth is re-registered. If the father does not re-register or this is not possible both parents can enter a parental responsibility agreement. The couple should also consider the appointment of guardians for the children in their wills in the event of death. The couple should be aware of the legal consequences in relation to the children if they are not intending to marry.

Tax and trusts

It is essential that cohabiting clients are advised to make a will. Cohabitants cannot currently benefit under the Intestacy Rules no matter how long they have lived together and even if they have had children.

Making a will is the simplest way an unmarried couple can protect each other and also hold their property as beneficial joint tenants so that the survivor automatically inherits the entire property. Where there is no will the law will only recognise the inheritance claims of a cohabitant survivor if he or she has lived in the same household of the deceased as a dependant for at least the whole of two years preceding the death of the deceased (Inheritance (Provision for Families and Dependents) Act 1975 I(PFD)A).

The Law Commission consultation paper in 2009 and supplementary consultation exercise in summer 2011 (final report on intestacy and family provision claims on death published 14 December 2011) recommended that if a couple have been living together for two years before

death or had a child together then the survivor should be treated in the same way as a surviving spouse under the Intestacy Rules. Also recommended is the abolition of the duration requirement under an I(PFD)A claim where the applicant has had a child with the deceased and if the couple were cohabiting at the date of death. Such recommendations are embodied in a draft Inheritance (Cohabitants) Bill. However, this is not yet law and is small comfort for clients and their children who are left unexpectedly without any, or proper, financial provision. This is especially as the surviving cohabitant will not be entitled to the private or state pension of the deceased.

Clients should also be advised on the tax consequences of remaining unmarried when their partner dies. There is no equivalent to the spousal exemption for them on inheritance tax on any gifts made within seven years of the deceased's death. Again this can be covered by an appropriate insurance policy. Here again provision in a will can save the day or even nomination of the survivor to receive any death in service benefits of the deceased.

Postscript:

Therese Nichols is a partner at Russell-Cooke, a family specialist and an accredited mediator (www.russell-cooke.co.uk)

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