

Be prepared

James Carroll and Hannah Minty set out best practice when drafting cohabitation agreements



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Family practitioners throughout the country breathed a collective sigh of relief on behalf of Patricia Jones when the Supreme Court ruled that the first instance decision of HHJ Dedman should be restored, awarding Ms Jones a 90% interest in the jointly-owned property for which she had been financially responsible during her 14-year period of separation from Mr Kernott.

But has this decision created more uncertainty and potential for litigation? With no sign of the much called for legislative reform in the foreseeable future, the importance of declarations of trust and cohabitation agreements has been thrown into sharp focus. With the myth of common law marriage still prevailing, it is perhaps a hope rather than an expectation within the legal professional that we will see an increase in the call for such agreements. But with the most recent Office of National Statistics research estimating that as many as one in six unmarried adults are now in a cohabiting relationship (*Population Trends*, Autumn 2011, ONS publication no. 145) there can be no doubt that the simple act of addressing financial issues at the outset of a couples' lives together, or upon life-changing events such as starting a family, could save future time, expense and heartache. What is more, failure by a solicitor to advise on the risks of purchasing a property or moving in together gives scope for a potential negligence claim.

Legal advice

The decision to purchase a property can often be the first time that many cohabiting couples will come into contact with a lawyer, normally a conveyancing specialist. Whether their attention is drawn to the need

to properly determine and record beneficial ownership as well as legal ownership depends in part on the skill and competence of their conveyancing solicitor. Consequently, many practitioners are familiar with drafting declarations of trust, or declarations of no interest, for couples who have taken the decision to live together. Whether this agreement is prepared by the conveyancer, the family lawyer or the private client lawyer depends on individual firm practice. Good practice suggests that input from all three would be beneficial.

Types of agreement

So what is the difference between a declaration of trust and a cohabitation agreement? A declaration of trust is a discrete document recording and regulating the beneficial ownership of a property, and is commonly used where the legal title is different to the beneficial title. In the absence of fraud, mistake or duress, an express declaration of trust is conclusive evidence of beneficial ownership unless such interests are subsequently varied. This can be a very useful document, given the presumption post-*Stack v Dowden* [2007] that beneficial ownership follows legal title and the need for the person arguing departure from this to prove their case.

A cohabitation agreement (sometimes called a living together agreement) is a flexible, bespoke agreement regulating cohabitation and, most commonly, the financial aspects of cohabitation. This can include the ownership of property, and a cohabitation agreement will often contain a declaration of trust, but it can stand without such a declaration and may simply contain provisions relating

to other financial aspects of a couple's relationship that they wish to regulate.

Section 53 of the Law of Property Act 1925 provides that no interest in land can be created or disposed of except by written document signed by the person creating/disposing of the interest, although this does not affect the creation or operation of resulting, implied or constructive

is at least likely to be a relevant and persuasive factor for the court. The existence of a cohabitation agreement could also avoid the need for property litigation on the death of a partner.

The status and content of a particular agreement will depend upon what it proposes to regulate, and how it has been negotiated. There is ample opportunity for one party to exploit a dominant

available, including the newly-revised Resolution publication 'Precedents for Cohabitation Agreements'. However, detailed instructions should be taken from the client before drafting a cohabitation agreement since each agreement will be tailored to the individual circumstances of that couple. Regard must also be had to death, trust and tax aspects of the agreement.

Broadly speaking, two principles may apply: the agreement may be drafted in such a way as to keep everything belonging to each of the couple separate, or so that the couple share assets and/or liabilities to one extent or another.

Obviously, as with other areas of family law, sharing doesn't necessarily mean equality and the parties are able to set out their own determination of what they agree. Consideration will need to be given to a number of other factors, including what is to happen in respect of property or liabilities acquired after the agreement, what the ongoing financial obligations of the parties is to be at the time of the agreement and how this may change in the future.

The main areas that are likely to be covered in a cohabitation agreement are:

Consideration should be given to the effect of any future legislative reform. Clients should be advised of the potential for such legislation to be retrospective.

trusts. An express declaration of trust must therefore be in writing. There is no such requirement in relation to a cohabitation agreement, although on a practical level it would be very difficult to prove the existence of an oral cohabitation agreement and this could not establish an interest in land (although it could give rise to a constructive or resulting trust argument, or proprietary estoppel).

Cohabitation agreements: the basics

A properly concluded cohabitation agreement will be binding, as confirmed in *Sutton v Mishcon de Reya and Gawor & Co* [2004], and as such a couple must be advised when entering into it that they are likely to be held to the terms of the agreement. A cohabitation agreement may be entered into by a couple at any time, in order to regulate their affairs during their relationship or recording the financial arrangements upon and after separation.

The purpose of a cohabitation agreement is to avoid litigation in the event that the cohabiting relationship breaks down in the future. This could either be in the form of proceedings under the Trusts of Land and Appointment of Trustees Act 1996 or Schedule 1 to the Children Act 1989 (ChA 1989). Following the principles applied by the court in *Morgan v Hill* [2006] it is questionable whether such an agreement would be binding on the court in the context of an application under Schedule 1, given the emphasis upon meeting the future financial needs of the child. However, the agreement would be binding as between the parties and the existence of the agreement

position and any suggestion of undue influence or duress would undermine the weight that a court would afford to the cohabitation agreement. To ensure that an agreement stands up to scrutiny practitioners should ensure that each party obtains independent legal advice and there is financial disclosure. These are not prerequisites and an agreement may be held to be binding without this having taken place, but taking such steps is likely to add weight to any argument as to the effect of the agreement.

There is no specific legislation governing the status of cohabitation agreements. Such agreements are governed by the ordinary principles of contract law, which require the following:

- Intention to create legal relations – this should be clearly recorded in the agreement.
- Consideration – in order to have effect as a contract there must be consideration on both sides. To prevent future arguments about the absence of consideration it is recommended that the agreement is contained in a deed.
- Certainty – the terms and obligations on the parties need to be clear.

Unlike the debate with pre- and post-nuptial agreements, there is no public policy bar to cohabitation agreements ousting the jurisdiction of the court.

Contents of a cohabitation agreement

There are a number of useful precedents for cohabitation agreements

The family home and other real property

- defining the parties' contributions towards and shares in any property;
- ascertaining how this will change in the future in the event of a change in their financial circumstances;
- ongoing financial contributions towards the property and outgoings; and
- determining what is to happen to any property in the event of separation, particularly in circumstances where there are children.

Financial support post-separation

- Maintenance for any children, although practitioners should advise clients that it is not possible to prevent either parent from applying to C-MEC for a maintenance assessment and the court also retains the power to make awards under Schedule 1 to the ChA 1989.
- Maintenance for the former partner – there is currently no statutory provision requiring a cohabitee to provide financial support to their former partner in their own right upon separation. Consequently, the potential to make such provision

is one of the most useful aspects of a cohabitation agreement, when acting for the financially weaker party, particularly linking such provision to property and mortgage obligations. Consideration will need to be given to the term and the method of calculating any such financial support.

Joint bank accounts, liabilities and credit cards

- contributions to a joint account or joint credit card and how these funds are to be used;
- ownership of items purchased from funds from a joint account/credit card and what should happen to them in the event of separation;
- what should happen in respect of any funds remaining in a joint account in the event of separation; and
- what the position will be in respect of any separate or joint liabilities (existing and future) both during the relationship and in the event of separation, while ensuring the client is aware of the principles of joint and several liability.

Cars, chattels and other personal property

- how should such purchases be funded and how should ownership be determined;
- will there be an opportunity for one party to 'buy out' the other party upon separation and how is this to work; and
- who will be responsible for any ongoing costs.

Business interests

- The position in relation to any present or future separate or joint business interests, including, if the couple intend to operate any form of joint venture, whether or not a partnership agreement is advisable.

Other provisions

Ideally, a cohabitation agreement should be confined to matters of property and money. There may be other areas that a couple wish to agree upon at the time of drafting an agreement, such as their future intentions in relation to marriage, children, travel, employment or even retirement. While it may be beneficial for these issues, and their potential impact upon the relationship, to be considered at the outset, consideration should always be given to the effect

upon the agreement. The inclusion of unenforceable provisions may lead the court to conclude that the couple did not intend to create legal relations and the agreement may fail. This may be particularly important if the cohabitation agreement contains a declaration of trust and hence there is a desire to avoid arguments as to whether or not all of the terms of the agreement were complied with. In any event, it is advisable to always include a severance clause in any cohabitation agreement.

Other provisions that it may be advisable to include, if appropriate, when drafting a cohabitation agreement are:

- confirmation of independent legal advice, intention to create legal relations, full and frank disclosure and no undue pressure;
- confidentiality;
- provision upon death;
- nomination of pension and death-in-service benefits;
- provision in the event of illness, incapacity, redundancy or other life events;
- termination of the agreement, and the impact of marriage, or relationship breakdown;
- how any dispute in relation to the agreement will be resolved;
- how the costs of the agreement are to be met; and
- a certificate signed by each solicitor confirming that legal advice was provided on the effect of the agreement.

It may be advisable to seek advice upon the tax implications of any agreement before it is entered into. It is also recommended that any cohabitation agreement is reviewed regularly to ensure that it remains relevant to the couples' circumstances, and that it is consistent with any subsequent declarations of trust or business venture agreements.

What not to include

The terms of the agreement must not be contrary to public policy. In *Sutton*, an agreement regulating property and financial arrangements was found to be unenforceable on the basis that the primary purpose of the agreement was to regulate the parties' sexual relationship.

It is preferable to avoid seeking to regulate the minutiae of daily

cohabitation arrangements, particularly so if such intentions may not, in reality, be implemented (eg sharing of domestic chores). Such arrangements could be recorded in a separate agreement, but it should be clear on the face of it that this does not affect the operation of the cohabitation agreement.

Practical guidance when preparing a cohabitation agreement

When advising upon cohabitation agreements it is recommended that you are clear with your client as to the binding nature of a declaration of trust, whether contained in a cohabitation agreement or in a separate document. Be sure that you and your client have worked through the details of the agreement before finalising it. The intention is to avoid disputes and an agreement that is not completely clear as to how shares are to be calculated is likely to cause a serious dispute. Consideration should also be given to the effect of any future legislative reform in this area. It is difficult to say what change may come or when, but clients should at least be advised of the potential for such legislation to be retrospective and to impact upon any existing agreement that they have so that they can take appropriate legal advice at that time.

It is important to advise the parties that neither a cohabitation agreement nor a declaration of trust will be binding in the event of a future marriage or civil partnership, and, in the event that they wish to record and regulate their financial arrangements and responsibilities at that time, they must enter into a pre-nuptial or pre-registration agreement.

There are also a number of additional practical steps that should not be overlooked at the time of entering into a cohabitation agreement. These include the benefits of both parties drawing up or revising any existing wills, and ensuring that any pension nominations or death-in-service benefit nominations are up-to-date. ■

Morgan v Hill
[2006] EWCA Civ 1602
Stack v Dowden
[2007] UKHL 17
Sutton v Mishcon de Reya and Gawor & Co
[2003] EWHC 3166 (Ch)