



COHABITATION – LAW AND PROCEDURE

In most situations, the home is the largest asset that most people will ever own and causes the most difficulties when a relationship breaks down. In matrimonial law, which applies to married couples, there is the advantage of the Section 25 criteria under the Matrimonial Causes Act 1973, which assists the Court in determining who ought to own it; not who actually owns it. The reverse applies to cohabitants or former cohabitants to whom matrimonial law does not apply and therefore, principles of property law must be used to determine who actually owns it and not who ought to, although once this is established the Court has a wide discretion to make adjustments in certain circumstances.

There are two very different areas of law, which may apply to your case:

Property Law

In order to decide whether someone (call him/her “B”) has a share in a property, the legal title which is registered in the sole name of someone else (call him/her “A”), there are two main legal concepts which are relevant:-

Resulting Trust

The first is known as a “resulting trust”. This arises when B has made a direct financial contribution to the purchase of the property in A’s name, and there are no circumstances (e.g. an express or implied agreement) to show that the contribution was intended to be a gift or a loan. For this purpose, we must look at how the price was found and paid at the

time of the purchase itself, and not at, for example, who paid the mortgage instalments later on. A resulting trust means that A holds either all or part of the property on trust for (i.e. for the benefit of) B. The question of the size of B's share under a resulting trust will be dealt with later on in the information sheet.

Constructive Trust

If B did not make a direct financial contribution to the purchase of the property in A's name, the concept of resulting trust cannot apply. The second, more complex concept is known as "constructive trust". But there are two very different ways in which this can happen. They are:

1. Where there is an express agreement, arrangement or understanding between A and B as to who should own what particular share in the property, or, at any rate, A promises B or induces B to believe that B will receive a share in the property. Such an agreement, arrangement, understanding or promise may be in a formal document or it could be confirmed by a statement only made orally and very imprecisely.

However, such an express agreement, arrangement, understanding or promise is not enough by itself, unless it is in writing and signed by A (this would then be called an "express trust" rather than a "constructive trust"). Except in that case, it is also necessary for B (the person claiming a share in the property) to have acted to his or her detriment (disadvantage) or altered his or her position in reliance on that agreement, arrangement, understanding or promise.

2. Where there is no such express agreement, arrangement, understanding or promise, the Court may, in some cases, regard the matter as if there had been one. Often, the Court calls this "imputing a common intention". In order to do this, the Court looks at the conduct of A and B in relation to the property. If B contributed directly to the payment of mortgage instalments, or to payments for a substantial

improvement to the property, the Court may infer that this must have been because there was a common intention to share the property. People do not usually pay other people's mortgages for nothing. But less important contributions, like contributing to household expenses, will not do, because there may be many reasons why people pay those, other than an intention on the part of A to give away a share in the property to B in return.

Ascertaining the Share

The major difference between the two types of trust – resulting and constructive – is that the concept of a resulting trust relies upon the precise share in the property usually being based on the amount of the direct capital contribution, proportionate to the purchase price. In other words, the parties should share in the equity of the property in accordance with their contributions. However, under the concept of constructive trust, once it is established that either through 1. or 2. above, the intention was for someone to share in a property, then the court will take into account a wider range of factors, not just the proportion of the contribution to the purchase price, in deciding what the amount of that share should be.

Applications to the Court dealing with the above are typically made under the Trusts of Land And Appointment of Trustees Act 1996.

Family Law

As a matter of family law, because you and your [former] partner have had children together, the Court can order payment of capital to cover limited past and current capital needs and towards the purchase of a property. The Court can also order a transfer and/or sale of a property to be used to house the children. Such Orders are made under Schedule 1 of the Children Act 1989.

Where money is ordered to be paid to purchase a property or a property is to be transferred, then this can only be on the basis that the capital is in effect held on trust for the children until they are aged 18 or 21, when the capital will revert to the children's father. This may often mean that the property will then have to be sold.

The Court has the power to make an Order for child maintenance only where the amount of child maintenance is agreed, and in other very limited circumstances. Otherwise, an application has to be made to the Child Support Agency to assess the amount of child maintenance.

The Court has no power whatsoever to order payment of maintenance or capital for a former partner. Despite popular use of the term, there is no such concept in law as "common law" husband or wife.

PROCEDURE FOR APPLICATIONS UNDER THE TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996

Applications can be made at Court for a declaration as to the nature and extent of a person's interest in a property and/or an Order for the sale of that property under the Trusts of Land and Appointment of Trustees Act 1996.

A claim form is first completed, together with a further document called a Particulars of Claim, which provides further details and information as to the claim being made. These are sent to the Court with the appropriate court fee. Once the Court returns the claim form and the Particulars of Claim, these must be served on your former partner. Alternatively, the claim form can be served and then the Particulars of Claim within 14 days of doing so, but it is probably more efficient to serve them both at the same time.

Your former partner must then file a formal Court document, which is known as a Defence, within 28 days. If appropriate, another formal Court document must be filed, dealing with your former partner's Defence. There will then follow a process whereby

any relevant documents will be disclosed. Once that has been done, the Court may transfer your application to the Court, which is hearing your application under Schedule 1 to the Children Act 1989 (if applicable) so that they can be heard simultaneously. The matter will be listed for a final hearing several months ahead, when a Judge will determine your application. A suitably qualified barrister will represent you at the final hearing. It is usual to involve him or her once the initial stages have been commenced and prior to the disclosure of documents so that he or she can keep a close eye on your case from then until the final hearing.

The final hearing could be a year or more from the start of your case, if you are not able to reach an agreement. This is because, bringing Court applications is a lengthy process and can be subject to delays. These delays can be by the Court, delays by your former partner in providing information and documents, or in taking steps in the Court proceedings.

*Naim Qureshi
Partner-Family Department
Child & Child
14 Grosvenor Crescent, London SW1X 7EE
Tel 020 7201 5599*

The information in this article is intended for general guidance only. It provides useful information in a concise form and is not a substitute for obtaining legal advice. If you would like advice specific to your circumstances please contact us.