

Your guide to determining shares in the family home and personal property on cohabitation breakdown

Overview

Couples who live together ('cohabit') but do not marry have no obligation to financially support one another in the event of their relationship breaking down. Unlike married couples the court does not have the power to make orders in relation to property or maintenance on a discretionary basis and nor is it guided by principles of fairness, sharing, need and compensation. Instead, unmarried couples are reliant on trust law or proprietary estoppel to determine any dispute regarding their ownership of property. If you have been engaged, you may have additional remedies to claims under trust law and proprietary estoppel.

Despite widespread public opinion to the contrary there is no such thing as 'common law marriage' or 'common law husband and wife'.

For an overview of rights of occupation of the family home please refer to our guide to occupation of the family home on cohabitation breakdown.

Although there is no financial obligation to one another there is an obligation to financially support children. For an overview of the law in relation to child maintenance and financial provision for a child please refer to our guide to child maintenance and guide to Schedule 1 of the Children Act 1989. If you need help with the care arrangements for your children, please refer to our guide to the orders the court can make for children and the court process.

What types of property are there?

There are two types of property; real property (this is immovable property such as land and buildings) and personal property (movable and any property other than land).

What is the difference between legal title and beneficial interests?

There are two aspects to the ownership of property; the legal title to property and the beneficial interests in it (the right to receive the profits or income from a property or the right to live in it). Both may be vested in the same people, but this is not always the case. Put simply, parties' beneficial interests in a property will determine their share of the profit/equity.

Joint tenants or tenants in common?

Beneficial ownership can be held as joint tenants or tenants in common. Joint tenants have equal rights to the whole property. If one joint tenant dies the whole of the property automatically passes by the rules of survivorship to the co-owning joint tenant. As tenants in common, each party holds their own separate and distinct share and on death their share will not automatically pass to the surviving co-owner and instead passes in accordance with their Will, or if no Will under the Rules of Intestacy.

From 1 April 1998 the Land Registry form used to complete the transfer of a property (Form TR1) gives purchasers the option of one of the following declarations:

1. To hold the property on trust for themselves as joint tenants;
2. To hold the property on trust for themselves as tenants in common in equal shares; or
3. To hold the property on trust for themselves as tenants in common in some other share.

If joint purchasers don't want to hold the property in equal shares, they can insert the percentages in the TR1 Form or alternatively they can enter into a separate declaration of trust (also known as a deed of trust). Parties can also declare their beneficial interests in a cohabitation agreement or in Form JO.

As an alternative to completing the declaration of trust in Form TR1 parties can use trust information form JO. Form JO contains the same options as panel 10 of the TR1 but is designed as a separate form to assist in providing the relevant information and ensuring that each joint transferee signs a declaration of trust. If the declaration of trust on which the transferees will be holding the property is already contained in a separate deed or Will, a conveyancer may include details of it in, and sign the form JO instead of the transferees.

If neither panel 10 of the transfer nor a form JO are completed and lodged with the application to register a transfer the Land Registry will enter a Form A restriction by default. The wording of the Form A (Restriction on dispositions by sole proprietor) is as follows '*No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court*'.

How can I check the legal and beneficial ownership of a property?

You may have the TR1 Form from the time of purchase or other documents (cohabitation agreement, declaration of trust or Form JO). You can also check what is registered at the Land Registry by viewing or downloading an official copy of the register. You can apply for this using link [Search for land and property information](#)

If the beneficial interests are held as tenants in common there will be a Form A restriction in Section B of the Proprietorship Register. Please see above for the wording of the Form A restriction.

If there is no registered restriction in Section B you will hold the beneficial interest as joint tenants.

Can I sever the joint tenancy?

The joint tenancy can be severed to avoid the right of survivorship and the property automatically passing to the remaining joint owner(s) on death. When a joint tenancy is severed parties will automatically be granted equal shares as tenants in common.

A joint tenancy can be severed by a triggering event or act, by mutual agreement, or it can be severed unilaterally. A notice can be served on your joint tenant notifying them you want to sever the tenancy. Where severance is effected by agreement or by notice the application to enter a Form A restriction is made using Land Registry Form SEV. There is currently no fee payable for the entry of a Form A restriction. Please see above for the wording of the Form A restriction.

Whilst you can change from joint tenants to tenants in common you cannot change beneficial ownership from tenants in common to joint tenants.

If we have an express declaration of trust will this be conclusive of our beneficial interests?

In the absence of fraud, mistake, or undue influence an express declaration of trust will be conclusive of the beneficial interests. Joint tenants will equally be entitled to the profit or income from the property and equally have the right to live in it.

Tenants in common will be entitled to the profit or income from the property, either equally if they hold the property as tenants in common in equal shares or, if they declared it would be held in some other share they will be entitled to the profit or income in accordance with their deed of trust, cohabitation agreement or declaration in the Form TR1.

What is the position if we didn't declare our beneficial interests at time of purchase?

This situation is most likely to apply to purchases pre-1 April 1998 and before the introduction of Form TR1 requiring parties to declare their beneficial interests.

Where a property has been purchased in joint names there is a presumption that the beneficial ownership is

held jointly in equal shares. This presumption can be displaced if it can be shown that the parties had a different common intention at the time they acquired the property or they later formed the common intention that their respective shares would change.

If it is not possible to ascertain by direct evidence the extent of the interest the court may either infer the parties' shared intentions in relation to the property in the light of their whole course of conduct in relation to it or impute an intention that the claimant is to have a fair beneficial share in the property. The court will assess the quantum of the fair share having regard to the whole course of dealing between the parties in relation to the property.

Can you make a claim against property if you are not the legal owner?

A sole legal owner will be presumed to be the sole beneficial owner unless the contrary can be shown by the non-owning claimant. A claimant will first need to show that there was an agreement that they should have a beneficial interest in the property, which may be expressed or inferred from conduct, and that they have acted to their detriment. If an agreement can be shown to have been made, then absent agreement about the extent of the interest the court may either infer the parties' shared intentions in relation to the property by reference to their whole course of conduct in relation to it or impute an intention that the claimant is to have a fair beneficial share in the property.

The standard of proof is the balance of probabilities. The burden of proof rests on the party who seeks to show that the beneficial ownership is different from the legal ownership.

When quantifying the beneficial interests, the court will assess each party's share as that which it considers fair, having regard to the whole course of dealing between them in relation to the property.

What is the difference between an inferred and an imputed intention?

Lord Neuberger in *Stack v Dowden* [2007] UKHL 17 gave the accepted definition of inferred and imputed intention as follows:

An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements.

An imputed intention is one which is attributed to the parties even though no such actual intention can be deduced from their actions and statements and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend.

What are the factors for consideration when assessing the parties' whole course of dealing?

In *Stack v Dowden* Lady Hale set out a non-exhaustive list of factors to assist in assessing the parties' common intention:

- Advice or discussions at the time of the transfer which cast light on the parties' intentions at the time.
- The reasons why the home was acquired in joint names.
- The reasons why (if it is the case) the survivor was authorised to give a receipt for the capital monies.
- The purpose for which the home was acquired.
- The nature of the parties' relationship.
- Whether they had children for whom they both had responsibility to provide a home.
- How the purchase was financed, both initially and subsequently.

- How the parties arranged their finances, whether separately or together or both.
- How they discharged the outgoings on the property and their other household expenses.

Domestic contributions, such as making family meals and providing for a child's care and upbringing are also factors that the court will have regard to when establishing beneficial interests by way of a constructive trust (*Graham-York v York and others* [2015] EWCA Civ 72). The claimant was awarded a 25% beneficial interest in the home she had lived with her deceased former cohabitee where her financial contribution was insignificant, but she had made domestic contributions by cooking family meals and jointly bringing up the parties' daughter during 33 years of cohabitation, 27 of which were at the property. The property was solely owned in the deceased's sole name.

What is proprietary estoppel?

Proprietary estoppel arises from the courts' equitable jurisdiction to 'adjust' rights over property if the assertion of strict legal rights is found to be unconscionable. It arises most commonly where a property owner encourages another to act to their detriment in the belief that they will obtain an interest in the property.

A claimant seeking to rely on proprietary estoppel must establish:

1. A representation made or assurance which encourages or allows the claimant to believe that they have or will have some right or benefit over the property;
2. Reliance by the claimant on the representation or assurance;
3. Some detriment incurred by the claimant as a consequence of that reliance;
4. It would be unconscionable for the property owner to go back on their representation or assurance.

Detriment is not confined to pure financial detriment. Detriment could for example be pleaded if the claimant gives up a job or their own property or rental accommodation upon reliance of the respondent's assurance.

A claim for proprietary estoppel can be pleaded independently or in the alternative to a constructive trust. It can also constitute an exception to the general rule that an express declaration of trust is conclusive of the beneficial interest.

What adjustments can be made to take account of unmatched mortgage payments or other payments towards a property?

Once parties' beneficial interests have been determined the court can be asked to adjust their share of the sale proceeds to take account of unmatched mortgage payments or other payments in connection with the property such as maintenance or improvement costs. This process used to be called 'equitable accounting'. The time from which these compensatory payments can be claimed will usually be from the date of separation, however, they might extend into the period of the relationship if this was the common intention of the parties.

Claims may also be made for costs in association with being absent from the property (known as an occupation rent). The court has the power to order a party in occupation of the property to make payments to the other co-owner(s) whose entitlement to occupy has been excluded or restricted.

How are bank or building society accounts divided?

There is a presumption that funds in a bank or building society account held in joint names and intended to be used as a common pool, will be divided in equal shares, regardless of the source of the credits to the account. Any items bought with funds from the account will be regarded as jointly owned property. This will include

the payment into the account of salaries. This presumption can, however, be rebutted by evidence showing a contrary intention, either express or implied. In these circumstances the funds will be held in the proportions as the contributions made.

How are contents or personal possessions divided?

A chattel is an item of personal property that is movable as distinguished from real property (land). This will include personal possessions and house contents. Ownership of your chattels will be determined based on contributions to the purchase price or any agreements between you or can be determined based on intentions (express or implied) regardless of contribution to the purchase price.

What about gifts?

Gifts will remain the property of the person to whom the gift has been made. Gifts will include the payment for goods or services on behalf of the other during the relationship. The fact that the relationship has come to an end does not give the paying party the automatic right to reclaim those monies from the other party. In the absence of clear evidence that the monies were a loan, any payments made will be deemed to be a gift and therefore not recoverable.

Mere usage of items will not be enough to satisfy a court as to ownership. It will be necessary to show that there was an intention to transfer ownership and that there was actual delivery.

What additional remedies are available to engaged couples?

Engaged couples can make an application under section 17 of the Married Women's Property Act 1882 provided that no more than three years has elapsed since the agreement was broken off. There may be an advantage to bringing a claim under section 17 as the definition of property is wider than simply land or buildings and it can also apply to property abroad. If a respondent has disposed of an asset in respect of which a claimant has a valid claim the court can also order payment to the applicant to represent the value of their interest in that asset or order the transfer of an asset into which the original property can be traced.

Section 37 of the Matrimonial Proceedings and Property Act 1970 (MPPA 1970) is also available to an engaged couple and can be used where a party has made a substantial contribution in money or money's worth to the improvement of real or personal property, whether or not that person has a beneficial interest in the property. Property under section 37 is again given a wider definition than simply land and buildings and subject to any agreement to the contrary, there is the advantage of an automatic presumption of an interest compared with having to establish the tests under trust law principles.

What orders can the court make?

An application under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA 1996) may be made by any person who is a trustee of land or has an interest in trust property. Trust of land means any trust property which consists of or includes land.

Section 14 of the TOLATA 1996 makes provision for the court to order the sale of property held on trust. In addition to ordering or preventing the sale of trust property the court may declare the nature or extent of a person's interest in the trust property. The court can give directions as to the right to occupy under sections 12 and 13 and order the payment of an occupation rent. The court may also make directions regarding the proceeds of sale of trust property and any other property acquired with the proceeds of sale.

Section 15 of the TOLATA 1996 sets out the factors to which the court can have regard when determining applications under section 14 and will include the intentions of the person or persons who created the trust, the purposes for which the property subject to the trust is held, the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home and the interests of any secured creditor of any beneficiary. Case law has held that these factors are not exhaustive and are not in any particular order. Each case will turn on its own facts.

For a detailed overview of the court process see our guide to making an application under the Trust of Land and Appointment of Trustees Act 1996.

This guide is for general guidance only and should not be treated as a definitive guide or be regarded as legal advice. If you need more information about the issues referred to in this guide, please seek formal advice.