

Living Together and the Law A Guide to Cohabitation

By David Cobern



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Foreword

If one was to go into any cafe, pub, supermarket, doctor's waiting room or member's club across England and Wales, and was to ask people what they thought about the rules regarding cohabitation without marriage, I guarantee that the vast majority of them would still, to this day, talk about the 'common law wife' (or husband) which, as all lawyers know, is a complete myth, particularly in relation to property rights.

This is despite the huge publicity over the potential for a new law to govern this situation being raised by the Law Commission in 2007 and abandoned by the Labour government in 2008 and by the Coalition government in 2011. Inheritance rights were similarly addressed by the Law Commission in 2011 and not acted upon by the government. There is yet another briefing paper on the subject dated February 2016.

But that does not mean that the current legal position should not be widely understood by people who are involved in such relationships and their families.

In light of the foregoing, the need for a clearly written, practical, but legally correct, text in this area of the law that is concise, approachable and understandable is obvious. The misunderstandings, preconceptions and uncertainties of most lay-people in this area go beyond property rights, and encompass children, parental responsibility and inheritance.

It is so refreshing to see that David has managed to produce a text that complies so with the requirements set out in the paragraph above, and is of a size that should not be daunting to even the most timid of readers. It covers the important areas in such a practical manner that I expect that many lawyers practising in this area will keep a copy of the book hidden behind their weighty tomes of 'proper' law texts!

The book is organised in a clear and logical manner which reflects David's no-nonsense but friendly approach to clients that I have experienced over nearly 30 years of working with him. He is one of the most thorough, thoughtful and practical members of the legal profession that I know, and I am honoured that he asked me to write this foreword and am extremely pleased to recommend this book to everyone who needs an approachable and accurate guide to this area of the law.

**Michael Berkley, Joint Head of Chambers, Magdalen
Chambers and Civil Recorder**

The Family Law Company

Some 25 years ago an idea for a new kind of specialist Family Law practice was born of a realisation that, in relation to the way the law then commonly operated, it actually made matters far worse for families in difficulty. What was needed was a problem-solving approach based on sound principles that put the interests of any children at the centre of the negotiations. There had to be a better way, a way in which law could be put to work FOR individuals to resolve their differences with the minimum of stress, delay, polarised positions and cost. This was to be a respectful and humane way of meeting people at their point of need, helping them to find solutions and involving them fully in regaining control of their lives in situations where they had felt out of control.

The Family Law Company by Hartnell Chanot grew from that initial idea, with a determination to serve clients' needs (not those of the lawyers), and to involve clients fully in finding solutions by helping them understand clearly how the law could help their situation whatever that might be, for both privately paying clients and for those who need legal aid.

Over time the company has grown from four staff, including its founder Norman Hartnell, to its present tally of some 70 employees specialising in the whole range of family problems including those of an ever-growing unmarried population. Norman was initially joined by Jane Chanot who shares his vision, and they have invited equally devoted and like-minded lawyers to join them as owners of the company to drive the business forward. Having started from a small office in 1991 in Castle St., Exeter, the company now occupies some 12,000 square feet of offices in Exeter and in Plymouth opposite the Family Courts, and it also has outposts elsewhere in the South West. The Family Law Company remains committed to the vision of putting law to work for those in need.

Specialist teams have been formed to deal with such diverse matters as: the resolution of issues concerning financial and children matters arising from a couple's separation; representation of children and parents in care proceedings; international abduction; protection of the victims of domestic abuse; mediation and other alternative dispute resolution models.

David Cobern, one of the company's owners, leads our team who advise those who are leaving an unmarried relationship. The law in this area is complex and very different to that applying when couples have been married. He draws on his wealth of legal and practical experience in this book, which answers the real questions he is commonly asked as he highlights traps for the unwary and explodes some myths in a style that is easy to read and understand. You could not be in better hands if you are looking for clear guidance in this area. It is my hope that in its pages you will find answers to your own personal questions and have a clearer understanding of how the law can help you.

Norman Hartnell
Managing Director

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PART I

OVERVIEW

Life is what happens to us while we are making other plans.

(Allen Saunders, Publishers Syndicate.)

Introduction

This is not intended to be a dry legal textbook (although parts of it necessarily are). It represents my long experience working for (and now as a director of) a firm of family law specialists and my particular interest in the legal rights and issues affecting unmarried couples. This is not about obscure points of law, but the practical legal and financial issues that arise time and again for unmarried couples during their relationships and on separation or death. It provides readily understandable information about protective measures and remedies available to people contemplating, already in, or emerging from, unmarried cohabitation. Whichever category you fall into, my hope is that you will find it helpful and informative.

We lawyers deal with cold, hard facts. We are paid to ask 'What if?' Consequently, this book will be anathema to the incurable romantic. I make no apology for that. It is intended to help those who want to know and 'hats off' to those who feel able to trust to luck. I hope it works out for you. If you believe that you and your partner may not be attuned to one another's feelings about these issues, then you may feel this is not a work to share with them or indeed to keep on your bedside table.

COHABITATION DEFINED

To live together and have a sexual relationship without being married.¹

The legal statutory definition:

A man and a woman who are (or were) living together as if they were husband and wife; or

Two persons of the same sex who are (or were) living together as if they were civil partners.²

More couples are choosing to live together outside marriage. In 2015, out of a total of 18.7 million families living in the UK, 12.5 million consisted of married couples (including same sex married/civil partnerships) and 3.2 million families included unmarried couples.

This is compared with just 2.1 million cohabiting unmarried couples in 2000. Very significantly, cohabitation appears to have reached a tipping point in terms of social acceptability so that it is moving swiftly from rare to commonplace and in due course, if present trends continue, to the norm. To illustrate the pace of change, the number of people who were cohabiting with one another in the 1980s was a fraction of the number doing so now. Between 2000 and 2010 the number of children living in opposite sex cohabiting families increased from 1.3 million to 1.8 million (an increase of over 38 per cent).

Over the last three decades there have been developments in the law affecting the unmarried. Unmarried fathers can now acquire parental responsibility for their children by being present at the registration of the birth rather than having to seek a court order or written agreement.³ Unmarried couples have been recognised as potentially providing a stable and loving relationship into which children can now be legally adopted.⁴ Limited rights have been introduced for unmarried partners who are financially dependent on their partner to claim against the partner's estate on death.⁵

However, popular misconceptions remain. In fact the above developments have contributed to this. Many couples in long-term unmarried relationships mistakenly believe they enjoy rights akin to their married counterparts. Some cohabiters think of themselves as the 'common law spouse'. Calling oneself a 'common law spouse' might, to the more conservative minded, carry some significance in terms of respectability, but it is no more than a self-appointed 'label' to which no legal rights attach whatsoever. The lack of awareness is sufficiently widespread that the Ministry of Justice has funded two voluntary sector partners⁶ to manage a campaign to make cohabitants more aware of their legal status and to provide them with practical advice on how they can protect themselves and their families, should they wish to do so.

NOTES

¹ The *Oxford English Dictionary* definition.

² S25 Family Law (Scotland) Act 2006.

³ Children Act 1989 s.4 (1) (a) refers.

⁴ Adoption and Children Act 2002 S48 (1) refers.

⁵ Law Reform (Succession) Act 1995 inserting S1A and S1B to the Inheritance (Provision for Family and Dependents) Act 1975.

⁶ <http://www.advicenow.org.uk/a-to-z/c#browseAZ> and <http://www.oneplusone.org.uk/>



Just a Piece of Paper?

WHAT IS THE DIFFERENCE BETWEEN BEING MARRIED AND UNMARRIED?

Here is a familiar quote:

I John take you, Jane,
to be my wife,
to have and to hold
from this day forward;
for better, for worse,
for richer, for poorer,
in sickness and in health,
to love and to cherish,
till death us do part;
according to God's holy law.
In the presence of God I make this vow

Jane, I give you this ring as a sign of our marriage.
With my body I honour you,
all that I am I give to you,
and all that I have I share with you,
within the love of God,
Father, Son and Holy Spirit.⁷

They are beautiful and momentous words. Whatever you think about marriage as an institution, the meaning of the marriage vow is clear. The couple openly promise to stick with one other through thick and thin for the rest of their lives and to share all that they have. While some unmarried couples may make informal promises to one another, there is no legal significance to this and many more couples make no promises at all. They are free to separate at any time without legal repercussions.

There are some legal implications in relation to the arrangements for unmarried parents and their children (dealt with later), but the really significant practical and legal differences lie in the approach to financial arrangements on separation.

From a legal perspective the promise made by a married couple makes the task of deciding how to deal with their financial arrangements simpler on separation. This is reflected in the act of parliament that gives the courts powers to decide these things. It is known as The Matrimonial Causes Act 1973.⁸ It gives judges a clear set of guidelines. It requires them to take into account things like:

- the needs of the children;
- what each spouse earns;
- how much capital they each have;
- what they each need;
- whether either of them has health problems;
- how long they have been married;
- what standard of living they have enjoyed together;
- what they have each contributed;
- whether either of them has behaved very badly;
- what benefits either of them would lose when the marriage ends (for example, pension rights).

Regardless of who owns property, savings or pension rights, or who generates the income in a marriage, the court can adjust it to produce a fair result. Lots of case law (previous decisions) has been created to help judges interpret the rules. Consequently lawyers are able to advise their married clients of the range of possible outcomes with a fair degree of accuracy.

To give effect to their decisions the divorce courts have the powers they need. They can adjust shares in marital property (regardless of which spouse is the legal owner at the end of the marriage). They can make maintenance orders, lump sum orders and share out pension rights.

For the unmarried, fairness is irrelevant to the outcome. The court cannot take into account any of the things referred to in the list above when deciding how to settle their financial arrangements. Neither can the court:

- adjust shares in property;
- make a maintenance order for one partner against the other;⁹
- make lump sum orders for one partner against the other;¹⁰
- share pensions.

So, for example, a judge cannot:

- Order an unmarried man to transfer some of his share in a jointly owned property to his former partner because she is earning less and cannot borrow enough to purchase a home of her own.¹¹
- Order the high earning former cohabitee of an unemployed, disabled woman to pay maintenance to her.¹²
- Order a wealthy banker to pay a lump sum to his former unmarried partner who has no savings of her own.¹³
- Order an unmarried fireman with a generous pension to share it with the mother of his children even though she might have sacrificed career aspirations to look after them.

WHY DOES THIS DIFFERENCE SOMETIMES CREATE PROBLEMS FOR UNMARRIED COUPLES?

The commonest cause of dispute in unmarried relationships is differing expectations combined with reluctance to address ‘the elephant in the room’. ‘Maybe our relationship will end or be damaged if I ask the question that is troubling me.’ For some, not asking is a risk worth taking and so the couple proceed at cross-purposes. Some labour for years under the illusion that their partner shares their view about what should happen financially if they separate.

Consequently, separation after a committed relationship can have catastrophic consequences for one party. The most extreme situations will see the person who owns none of the assets left virtually penniless after a long relationship because their partner owns all the assets and offers no financial provision whatsoever.

There are remedies available for financial provision for children, but one partner often finds themselves left out in the cold financially.

Irrespective of what may be said after a relationship ends, we have all felt moved to give assurances to our partners about our love for them and our shared plans for the future. In hindsight, these conversations are often interpreted differently. For example, ‘I vaguely remember saying this was to be your home for life before you moved to live with me. But that was ages ago and I remember a few months ago you said you knew it was my house and you have no right to stay here’. When it comes to their day in court people will almost always have conflicting recollections about what was said between them and which conversations actually mattered.

If the couple end up in court, the court’s findings about these frequently vague and historic recollections will determine the very uncertain outcome of litigation between them. It all too often comes down to the performance of the witness on the stand; a terrible way to decide something that could have been agreed in better times.

In court cases between the unmarried, where there has been no clarity or agreement, the present law requires detailed (and costly) examination of past dealings between the parties. Ironically, this defeats the very object that motivates many cohabiting couples who reject the idea of marriage – ‘Let’s keep it simple by staying unmarried’.

Whether we choose to confront these difficult issues or not, as time passes in any relationship financial security becomes ever more important. It must be helpful for unmarried partners to be clear about what will happen if their relationship ends or on the death of one of them. This allays anxiety about the future or suspicion and misunderstanding about the other’s intentions. Fairness avoids dispute, but so too does clarity. In some respects, clarity is most important, because it helps us to make the right decision about our future. If someone is wondering whether their relationship will last or whether to have a child with their partner, clarity about the financial arrangements between them will help them to make the right decision, not only for themselves, but also for their partner and (ultimately) any children.

At the end of the day, if the answer is that one unmarried partner doesn’t want to share assets with the other, even though they are expecting their partner to make sacrifices for the relationship (by, for example, giving up job opportunities for children or supporting their partner’s business), then the disadvantaged partner commits to the relationship at their own risk.

We lawyers strongly advocate discussions about these issues between unmarried partners. Granted, it is not a romantic proposition but, if you can reach an understanding, so much the better for all concerned. At least you won't end up lining the lawyers' pockets.

There are many different situations in which unmarried couples may want to understand their respective financial positions in their relationship:

- at the outset of the relationship (very sensible, but perhaps optimistic);
- when deciding to buy property together;
- when planning or expecting a child;
- when going into business together;
- when one party is about to introduce capital (for example, an inheritance);
- when illness strikes;
- when the relationship is ending or has ended (see Chapter 16).

NOTES

⁷ From the Church of England marriage service.

⁸ Section 25 a) to h) refers.

⁹ Child maintenance is still available (see Chapter 17).

¹⁰ Lump sums are available for children (see Chapter 17).

¹¹ The exception is a transfer for the benefit of children – but the property reverts to the payer later (more on this in Chapter 17).

¹² As above, in limited circumstances a court can order maintenance for children (more on this in Chapter 17).

¹³ As above, a court can order a lump sum for child related expenses (more on this in Chapter 17).

PART II

COHABITEES AND THEIR CHILDREN