



## INFORMATION ON COHABITATION AGREEMENTS

You have instructed us in connection with a Cohabitation Agreement. These notes are intended to give you a general idea of what you should consider prior to entering into a Cohabitation Agreement.

### 1. General

Many people form relationships and also bring up children outside marriage. Whilst there is broadly one set of laws applying to people who are married, for those who are not married there are a variety of differing rules, the application of which can be difficult to predict and therefore expensive to resolve. Many couples prepare contracts setting out what should happen in different events, but the majority do not.

You need to know how the law would deal with your situation to be able to assess whether you need to take action. Any agreement that you prepare could be considered by the Court at the end of the day.

It makes sense to have your agreement dealt with by a lawyer experienced in preparing such agreements so that what you intend is clear and the possibility of future difficulties is minimised.

Some of the things you might want to record may not be enforceable through the Courts and you will need advice on where the dividing lines fall. Essentially a document such as this is merely a record of intention within a particular set of circumstances.

Unless you agree otherwise and record that agreement formally, resolving any claim on each others capital assets or income (there may be no claim) may be difficult and expensive and may well involve Court proceedings, the outcome of which may be hard to predict.

### 2. Legal Background

#### 2.1 Shares in Your Home

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Your home will probably be your biggest asset and the name in which the asset is held will be vital. A debt in both of your names can probably be pursued against either of you (leaving you to sort out who should contribute what).

The starting point is to look at the asset. Who owns it? If it is one person then what claim if any does the other person have on it? The general principles are as follows:

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- You can share in a property if you have contributed directly to its acquisition or value – you would share in the proportion in which you contributed to it (“the resulting trust”).
- You can share in the property if you contributed directly towards it or:
- There was an argument that you would share in the property.
- In either case, looking broadly at the contributions; it is right that you should do so; here the Court will award a share to the claimant that in all the circumstances seems right, generally up to a maximum of one half the proceeds after selling costs and the mortgage (“the constructive trust”).
- There may be a final and even vaguer principle that where a claimant has relied on a promise or understanding to his or her detriment then the Court will take minimum steps to prevent the property owner from acting in a way that is inconsistent with that obligation (“proprietary estoppel”).

It is always difficult to predict how the court will deal with any particular set of circumstances, but in general terms there is a strict application of the rules which does not always mean that it is a fair application.

## 2.2 Outgoings of the Home

The Court does not involve itself in who pays what whilst you live together. It will probably consider who has paid what after you have separated, but the rules are difficult to predict and there is nothing that can be done until the Court makes its judgement which may be after a year or more (in the meantime you will both have to make do). Further, the nature of the payments may affect your share in the property.

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In the event that your separation follows harassment, the Court would have power to reconsider this aspect and make other provision if an application were made.

### 2.3 Repairs and Improvements

The Court generally cannot order either of you to carry out repairs etc. on the property (it might simply order a sale). Whether sums paid by each of you will be taken into account when dividing the proceeds will depend on the circumstances and may be difficult to predict.

### 2.4 Joint Accounts

Generally it will be convenient to have at least one joint account and you may want to operate joint credit/charge accounts. The Court will not be involved unless your relationship breaks down and even then there are no clear rules about who is entitled to withdraw what and it will be very expensive to work out what has happened anyway.

### 2.5 Other Assets

Generally you have no claim on the income, pension, or savings of your partner; you must tell us if there are any other assets to be taken into account.

### 2.6 Separation

If you separated, how would this be managed? Our suggested deed would record not only the sale of the home, division of proceeds and payment of outgoings pending separation but also what to do with joint accounts.

### 2.7 Death

If one of you died, the survivor might have no claims to any money owned by the other. Any claims that existed would involve expensive Court proceedings and possibly a battle against your partner's family.

Generally, if a person dies without a spouse, what he/she leaves ("his or her estate") goes:

- Equally to any children when they reach the age of 18.

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- If there is no spouse and no child then it will pass in order through, for example, parents, brother and sisters, aunts and uncles, cousins and so on.

A cohabitant can apply to interrupt the provision of the Will if he/she:

- Was being supported by the person who has died; or
- Had lived with the person for the two years before the death.

Children who are not provided for can always apply for a share of the estate. However, the Courts have shown themselves reluctant to provide for grown and financially independent children.

The Court will only overturn the provisions of a Will to the extent that this is required to provide for the maintenance of the person applying.

## 2.8 Incapacity

If either of you became unable to manage your affairs, your partner may not be entitled to assist. The various banks and other institutions could refuse to recognise that your partner had any rights to involve him/herself.

## 2.9 Surnames

Some cohabitants wish to use the same surname. Whilst most institutions will accept this as a matter of course if you are married, if you have not married, they will probably seek a legal document.

## 2.10 Bankruptcy Planning

You probably cannot plan for the bankruptcy of the financially more vulnerable partner, for example by putting assets in the other partner's name, given that any trustee in bankruptcy would have the power to set aside that transaction up to five years after the event and perhaps longer. If this is a consideration, further specialist advice should be obtained.

## 3. Cohabitation Agreement

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Your Cohabitation Agreement should deal with the following:-

### 3.1 The Property

- The circumstances in which the property should be sold if you do not agree.
- How the property should be sold.
- How the proceeds of the sale should be divided.
- What should happen to the proceeds of any life policy.
- What repairs to the property you will do if you cannot agree.
- How you will pay for repairs to the property.
- Whether the sums paid for repairs will be taken into account when dividing the proceeds of sale.

### 3.2 Outgoings

- Who will be paying which outgoings during the relationship.
- Who will pay the outgoings if you separate.
- What accounts you will operate.
- What you will each pay towards the accounts.
- Broad ground rules about how those accounts should be used.

### 3.3 Other Matters

You may wish to set out other “lifestyle” aspects in your non-legally binding agreement. These might include:-

- Your aims in the relationship.
- Where you will live, the sort of household that you wish to run, household tasks.
- Sexual relations – disclosure.
- Children – whether to have any – decisions about their upbringing - care and consequent financial arrangements.
- Careers.

## 4. Incapacity

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Many cohabiting couples will prepare an Enduring Power of Attorney giving their partners the right to manage all their affairs if they become incapable (but not otherwise). Please let us know if you wish us to prepare Enduring Powers of Attorney.

### 5. Surnames

We can prepare a Change of Name Deed for you. Changing the surname of any child however may involve additional complications. Please let us know if you wish us to prepare a Change of Name Deed for you.

### 6. Will

You should set out what your intentions by an interlocking system of a Deed and a Will for each of you and your partner, dealing with:

- What rights your partner would have to occupy the home over what period.
- What capital you would give your partner from your estate.
- What would be done about the contents of the home.
- Would your partner act as your Executor/Personal Representative (the one with responsibility for winding up your estate).
- Whether you provide for your partner to receive monies, e.g. from your pension/any life policy or from any death in service benefit.
- You may also need to nominate employment related death benefits.

Each of you will need to prepare a Will providing who would wind up your estate, who would receive what from your estate and perhaps whether there should be any child care arrangements. Separate information is available on this.

Your Will should consider the position from the perspective of either of you dying first (so there would be one arrangement if you were survived by your partner and a different arrangement if your partner survived you) or your dying together. You will need to take into account inheritance tax planning issues, particularly if your estate is large.

Broadly, your Will might address the following:-

- Funeral directions.

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- Appointment of Executors.
- Guardians of any existing children (the appointment will not be effective until all those with parental responsibility have died).
- Any future children.
- Disposal of personal possessions.
- Any gifts of money.
- Who receives the balance of the estate.
- Trust provisions (especially for the children).

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