



**Atherton
Godfrey**

S O L I C I T O R S

COHABITANTS PROPERTY RIGHTS

This fact sheet is intended to act as a general guide to a cohabitant's rights to property on separation. We are happy to discuss the circumstances of your own situation in more detail.

Unmarried couples who live together (known as cohabitants) do not have the same rights to make property claims when they separate as married couples or civil partners do. Instead, disputes between cohabitants about a property are determined in accordance with the law of trusts.

There are three common types of dispute between former cohabitants:

1. Whether a person has an interest in a property (e.g. an entitlement to a share of the value), and, if so, the extent of that interest
2. Whether one person has the right to occupy a property and/or exclude the other person, and
3. Whether a property should be sold

This guide will address each of these issues.

Establishing an interest in the property

Joint owners

If the property is owned by more than one legal owner, then the property is held on trust for the benefit of the legal owners and/or others.

Sometimes the terms of this trust are expressed in a written declaration of trust, either at the time the property was bought or subsequently. If so, then this will be decisive.

If there is no express trust then the court must determine for whose benefit the property is held and the extent of their shares.

The presumption is that the beneficial ownership of the property is the same as the legal ownership of the property. The burden is on the person who denies this to prove otherwise. This means that if the property is jointly owned and there is no written declaration of trust, the presumption is that each owner has an equal beneficial interest in the property.

In order to rebut this presumption, it must be shown that there was a common intention that the property be held in something other than equal shares. The intention is looked at objectively, that is the intention which was reasonably understood by the other party to be shown by the party's words and conduct.

If the common intention of the parties includes the extent of each other's shares, then the court will give effect to that. However, if the intention only shows that they intended to hold the property in something other than equal shares then the court must decide what each party is entitled to by reference to what is fair having regard to the parties' whole course of dealing.

One legal owner

If the property is legally owned by only one person then the court's approach is different.

Where someone who is not a legal owner claims an interest in the property, the burden is on them to show that the legal owner holds the land on trust for them in the shares claimed, or (to the extent that this is different), at least is under an obligation to transfer such an interest to them.

This cannot be done merely by showing an oral declaration of trust. However, no writing is needed if the trust is imposed by law, whether by virtue of a *common intention constructive trust* or *proprietary estoppel*. These terms are explained below.

Common intention constructive trust

For a common intention constructive trust to arise:

1. The parties must have had a common intention to share the property beneficially; and
2. The non-legal owner must have relied on their belief in that intention to their detriment

The common intention of the parties may either be expressed between them, as when they have a discussion and reach a conclusion, or it may be inferred from the whole course of conduct between them.

The court has no power to impute an agreement or common intention to the parties based on what it considers would have been fair or reasonable. When the court is considering what the parties actually intended, the court looks at the objective circumstances available for consideration, and not into their minds themselves.

Once the common intention is established, the question is whether the conduct of the claimant in relying on the common intention to their detriment makes it unconscionable for the defendant to go back on that agreement.

If such detrimental reliance is established, then the next stage is the quantification of the claimant's share. If that is established by the common intention itself, then there is no need for the court to attempt to quantify it. But in cases where it is clear that the parties intended that the claimant should have a share, but did not quantify it themselves, the court must do so. It does this, once again, by having regard to the whole course of the conduct between the parties.

This time, because the parties have not reached an agreement, it is necessary for the court to consider what is fair. Here, at this final stage, the court imputes to the parties something the parties did not agree.

Proprietary estoppel

The doctrine of the proprietary estoppel operates in a similar way. In order to establish that they have a beneficial interest in the property, the claimant must show:

1. The legal owner by their words or conduct made an assurance to or created an expectation in the claimant. It need not be the promise or a specific right or interest, as long as it is clear enough in all the circumstances.
2. This is relied upon by the non-legal owner, to their detriment, such that it becomes unconscionable for the legal owner to go back from it.

If the claimant can show this then they are entitled to an appropriate remedy. This may be an order for the defendant to perform the promise itself, or it may be something else, for example, the payment of money by the defendant to the claimant.

Obtaining evidence of an interest

At an early stage in any dispute, it is helpful to gather evidence of any discussions or agreement about the interest of each person in the property.

This could include obtaining a copy of the title entry from the Land Registry, the transfer deed and the file of the solicitor who dealt with the purchase.

Occupation of the property

Occupation by a legal owner or tenant

If the property is owned or rented in joint names, both people have a legal right to occupy the property. Neither can lawfully exclude the other without a court order. If one person changes the locks, the other person can attend the property with a locksmith to gain entry. Nevertheless, it is important not to do anything that may be considered threatening or harassing.

Occupation by a non-legal owner or someone not on the tenancy

If someone is not a legal owner or named on a tenancy, they cannot be evicted from a dwelling house that they have been living in with the consent of the owner without receiving at least four weeks written notice. Even after the notice period has ended, the only lawful way to evict the person would be to obtain a court order.

Sale of the property

If a property is jointly owned then the property cannot be sold without the consent of both legal owners without a court order.

In deciding whether to make an order that the property should be sold the court must take into account all relevant matters including:

- The intentions of the people who created the trust
- The purposes for which the property subject to the trust is held
- The welfare of any child who occupies or might reasonably be expected to occupy the property as their home
- The interests of any secured creditor or any beneficiary
- The circumstances and wishes of any beneficiaries of full age and entitled to an interest in the property

In most cases, where a property has been purchased to be a home for a couple who have later separated, the court will order that the property be sold. However, much will depend on the circumstances of the individual case.