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Declarations of Trust and Cohabitation Agreements





Introduction

This is a very complex area of law. At TWM Solicitors, we advise couples who are not married or are not in a civil partnership when they are buying a home together, as to how to protect their investment and avoid a dispute in the future. We can draft Declarations of Trust and Cohabitation Agreements.

We also act for separating parties in respect of their applications to Court concerning their property interests and any claims for financial provision in respect of their children.

What is a Declaration of Trust?

In its simplest form, a Declaration of Trust is a snapshot of how you hold the property, usually stated at the time of purchase. It can contain confirmation of the contribution towards the purchase price and costs of purchase, so if one party paid more they may recover the extra if the property is later sold. It can, however, be a much more detailed document dealing with:

- the relationship and obligations between the owners in respect of the property
- how the ownership shares might change over time
- what happens if one or more of the co-owners wants to bring an end to the co-ownership.

Declarations of Trust are often used by unmarried couples, couples with children from previous relationships and investors in property to give just a few examples.

Owning a property jointly

On the purchase of a property by two or more people the purchasers will be joint owners and must elect how they wish their joint ownership to be recorded at Land Registry. There are two options as follows:

Joint Tenants

Holding the property in this way means that on the death of one owner, their share will immediately pass to the other joint owner. This is independent of any Will that the deceased may have in place. This means that the survivor can sell the property on their own. Choosing this option means that you will share the proceeds of sale equally.

Please note that this is not necessarily the most appropriate option even if you are married, particularly if you are making Wills to protect your assets for beneficiaries other than your spouse or civil partner.



If you buy a property together when you are not married, or if one of you moves into the other partner's property, there are certain default provisions that apply in law.

Tenants in Common

Holding the property in this way means that on the death of one of the property owners, the share will not automatically pass to the other joint owner and will instead pass in accordance with any Will the deceased may have in place or, in the absence of a Will, by the Rules of Intestacy.

If you choose tenants in common you can decide any distribution of the value. If you own the beneficial interest as tenants in common, each owner owns a specific share of the property. You will both agree what this percentage is at the time you buy the property. This can be held in equal or unequal shares.

You can, therefore, take into account any financial arrangements and your intentions regarding your ownership of the property. You may decide that one of you should be entitled to a greater share of the sale proceeds than the other if you have made unequal contributions to the purchase price, mortgage or later improvements and want this formally recorded in writing.

In these circumstances, we recommend that a separate Declaration of Trust is prepared to state the share you each own. This Declaration can also include details relating to your ongoing contributions and obligations in respect of the property, such as how mortgage payments, repairs and decorations costs etc. are to be met and how that might impact on the shares of property ownership.

If you choose to hold the property as joint tenants and later decide you wish to change this to tenants in common or vice versa, Land Registry should be informed and this is something we can assist with. We would recommend that if you choose either option, you ensure that you have an up to date Will in place.

Tax implications

There may be tax implications depending on how you choose to hold the property and we recommend that you consider taking tax advice before you make any decisions. This is a service that we are able to offer you if you do not have your own tax advisor already.



What is a Cohabitation Agreement?

A Cohabitation Agreement is a binding contract that an unmarried couple can use to formalise aspects of their finances, both during their relationship and in the unfortunate event of a separation. Terms of the agreement are discussed between the couple.

If you want a more detailed agreement that governs other aspects of your relationship with the person you are living with, you might need a Cohabitation Agreement. If you are thinking of getting married or entering into a civil partnership (or have already), then a Pre or Post-Nuptial Agreement might be the best solution.

What does a Cohabitation Agreement cover?

A Cohabitation Agreement can be drafted to suit your circumstances, whether you own a property in joint names or in sole names and whether you have children, or not, the aim is to ensure that financial aspects are discussed openly and early to reduce the chance of a dispute later on.

What if I do not have a Cohabitation Agreement?

If you buy a property together when you are not married, or if one of you moves into the other partner's property, there are certain default provisions that apply in law. These may not actually be fair in your situation. There is no such thing as "common law marriage". There is no real protection in law for unmarried couples and so it is important to find out where you stand and ensure that your Cohabitation Agreement reflects the way that you would like matters to be dealt with in the unfortunate event of your relationship breaking down. Obviously, you hope that your relationship will not break down, but you could think of a Cohabitation Agreement as being similar to life insurance. You hope you will not need it but it is there to make a difficult time a little easier if the worst happens.

Can we not just have a Declaration of Trust?

A Declaration of Trust can regulate the ownership of property, but many couples want to go further than just this issue, particularly as the law does not make any specific provision for unmarried couples. For example, you might want to formally agree that you will both execute Wills to ensure that properties pass in the way that you want them to on death. You might want to ensure that your life assurance policy is assigned to your partner or your children, or that your pension benefits are nominated to the correct person. A Cohabitation Agreement can deal with almost any circumstances in financial arrangements that you would like it to cover. It can deal with debts, either those that existed before your relationship or those that accrued during the relationship, as well as any inheritance or other financial windfall. It can give real peace of mind to have a written agreement in place so that you both know where you stand from the very beginning of your relationship or property ownership.



I own a property in my sole name and my partner is going to move in to it. Surely we do not need a Cohabitation Agreement?

A Cohabitation Agreement is essential in this situation. There are various ways that your partner might acquire an interest in your property by making certain financial or even non-financial contributions during your relationship. It is therefore very important to make it clear from the outset that these contributions will not give them an interest in your property.

Will having children or getting married affect the Cohabitation Agreement?

If you have children, or go on to have children whilst living with your partner, there are applications for financial support that could be made, depending on your and your partner's financial circumstances, irrespective of what the Cohabitation Agreement says. It is important to take legal advice on this when entering into a Cohabitation Agreement. If you are getting married, then it is very important that you take legal advice before doing so. Your Cohabitation Agreement is likely to cease to be valid, but you may wish to enter into a Pre-Nuptial Agreement at the same time as a Cohabitation Agreement. The law for unmarried couples is very different from the law upon marriage. We can advise you on both.

What does TWM have to offer?

We will provide you with full advice on what the law would be if you did not have a Declaration of Trust or Cohabitation Agreement in place, the aspects that these documents can cover and the effect of having these agreements in place. The wishes of you and your partner and your individual financial arrangements will be fully explored and converted into a working document in the event that it is ever needed. This can provide real peace of mind, especially as your home is often the most financially valuable asset that you have.

Examples of common situations:

Example 1: ▲

Nathalie and Phil are buying a property together but will be contributing towards the purchase price in unequal shares

Due to a gift from her relative or perhaps having more savings set aside, Nathalie is able to contribute significantly more than Phil to the purchase price of their property. Although they plan to contribute towards all future outgoings equally, Nathalie and Phil both agree that it would be in their best interests to protect their initial investments in the property in the event of a sale or a breakdown of their relationship. They use a Declaration of Trust to provide for this.

Example 2: ▲

John and Jane would like to transfer their second property into Jane's name

John and Jane are a married couple. John works as a banker in the City and his salary means that he pays tax at the top rate. Jane is on a career break looking after the two young children at home and at the moment has minimal income from some investments, but well under her personal allowance. They have a second property in joint names and decide to use a Declaration of Trust to show that Jane has a 99% interest in it. The income will then be treated as her income and tax paid at her personal lower rate.

Example 3: ▲

Lawrence wants to ensure that he will be compensated for mortgage payments towards his partners property if they were to separate

Irma, who is in her 30s, has entered into a new relationship with Lawrence who is now in his early 60s. Lawrence has been married and divorced on 2 occasions and has 2 children with each of his ex-wives, Kara and Zoe. All 4 children are now over the age of 18. Irma and Lawrence want to buy a property together using monies that Irma has recently inherited from the death of her grandmother. Lawrence has no funds to contribute as a result of high legal fees in his two divorces. Lawrence will, however, contribute to the mortgage when they have purchased the property. The property will be purchased in Irma's sole name, Lawrence wants some reassurance that he will receive something by way of compensation for his mortgage payments in the event that he and Irma separate, and so they agree to enter into a Cohabitation Agreement.

Example 4: ▲

Priti and Sanjay decide to document how they wish to deal with their assets to avoid any future uncertainty

Priti and Sanjay have both been married previously and do not want to marry again. Having been through acrimonious divorces, they enter into a Cohabitation Agreement so that they have clearly expressed how they want to deal with their home and assets if they separate. Unfortunately, after living together for 5 years their relationship breaks down. However, knowing that finances will be dealt with as set out in their Cohabitation Agreement enables them to navigate through their separation in a respectful, civil manner and avoid high legal fees, acrimony and uncertainty.

Example 5: ▲

David and Colin are buying a property and wish to protect David from being liable for Colin's debts if they separate

David and Colin are unmarried and have been together for 5 years, renting a property. They are looking to purchase a property together. They would like to use a Cohabitation Agreement to record that if their relationship breaks down, David would be protected from having liability for any of the debts in Colin's sole name, which he accrued prior to their relationship starting.

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