

# Family Law

The Newsletter for Kingsley Napley Family Law

Spring 2008

## In this edition:

We examine the outcome of the highly publicised Mills v. McCartney case and advise parents how to avoid the pitfalls of investing in their children's properties. We also bust the common law marriage myth and comment on the government's recent decision not to update the cohabitation law.



# Government fails to protect the “common law” spouse?



*“[A] woman who has cohabited with a man for 30 years, lived as his wife, by agreement given up her own career to look after their three children could find herself homeless”*

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Family lawyers have long been concerned over the lack of legal protection for cohabiting couples if the relationship breaks down or one partner dies. Contrary to popular myth, there is no such creature as the “common law” wife and cohabittees have no special legal protection however long the relationship. Unfortunately, many people make the decision not to marry based on this mistaken belief.

In fact, cohabittees are forced to rely on antiquated and complicated property and trust law if they wish to make any claim on the property they occupy. They have no claim to any other assets or maintenance if the relationship breaks down. If they have children, they may be able to apply on behalf of the child for a number of orders including a transfer of property, although this only lasts until the child reaches adulthood as it is for their benefit. Also, transfers between cohabittees are not exempt from stamp duty and inheritance tax may mean that on one party's death, the family home has to be sold.

This can result in significant hardship for cohabittees and also their children. For example, a woman who has cohabited with a man for 30 years, lived as his wife, by agreement given up her own career and brought up their three children could find herself homeless after the relationship breaks down if the property is in his sole name. She may have no claims under property law and would have no right to maintenance or a share in any pension.

A study published by the National Centre for Social Research (“NatCen”) in 2000 found that 56% of the population

mistakenly thought that cohabitation for a certain number of years gave them legal rights equivalent to marriage. Despite a 2004 government funded campaign to raise awareness, the NatCen study published in January 2008 found that 51% of the population still believes in the “common law marriage” myth.

Only 20% of cohabittees have ever taken legal advice on their position.

Resolution (formerly the Solicitors' Family Law Association) has long been campaigning for a change in the law, not to put cohabiting couples on a par with married couples (it is recognised that many people decide not to marry to avoid financial and legal ties) but to provide some legal safeguards in the event of relationship breakdown or death. The position looked promising when in 2005 the Government asked the Law Commission to consider the need for reform. After a consultation period, the Law Commission published their report in July 2007 which concluded that the current law was deeply unsatisfactory and recommended a new law to protect cohabittees who had lived together for a certain number of years or who had children together and who could prove financial disadvantage as a result of the relationship. For those couples

wishing to remain financially and legally independent, it would be possible to opt out of the scheme.

While Resolution expressed doubts about certain details of the proposed law, it broadly supported the changes and had been eagerly anticipating the Government response to the Law Commission's proposals. It was therefore very disappointing to see the Government announce on 6 March that it will “take no further action for the time being” and that it would wait for a report from the Scottish Executive on the cost and likely benefits of reforms already in place in Scotland.

This is despite indication from the NatCen report of January 2008 that nine out of ten people believe a cohabiting partner should have a right to financial provision on separation if the relationship has been long term, includes children and has involved prioritising one partner's career over another.

It appears that not only is the Government out of touch with public thinking but there is also no current hope of reform to assist the 53% of cohabiting couples who believe in the “common law” marriage myth.

This newsletter is published for general guidance only and is not to be a substitute for legal advice which should be sought before taking any steps in relation to information that may be included in this publication. If you have any queries arising out of the issues raised, or require any other information about family law matters, please feel free to contact a member of the team on 020 7814 1200.

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