
foresight

Mythbusting the
common law marriage



About Foresight

Foresight is forward looking and insightful content produced by Mills & Reeve. It strives to better understand the key issues facing clients, champion businesses and the challenges they face, and offer broader commercial acumen in addition to legal expertise.



About us

Our national family law team is one of the largest in the country, with 29 family and divorce solicitors in total, including six partners.

We have specialist lawyers working from London, Birmingham, Cambridge, Leeds, Manchester and Norwich. All our teams are ranked in the top tier by leading legal directories *Chambers & Partners UK* and *The Legal 500*, based on independent research of clients, lawyers and other professionals.

We understand that life is complicated and there isn't always a one size fits all solution. We are aware that lawyers do not have all the answers! So, we work with experts in other professions when needed to help you get the best outcome and keep your costs low.

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Achieve more. Together.

introduction

As a leading family law firm that has always placed great emphasis on helping people take control of their lives and make their own decisions, we wanted to shine a light on the many common misconceptions surrounding the legal rights of unmarried couples living together in England and Wales.

We surveyed more than 1,000 cohabiting couples to highlight the myth of the common law marriage and examine the financial and legal issues facing them today.

Recent figures reveal that cohabiting couples are the fastest growing family type in the UK. Between 1996 and 2016, numbers more than doubled from 1.5 million to 3.3 million. Cohabiting couples account for around 17.5 per cent of families in the UK and this is set to rise further.

Despite the increase, those who live together as a couple are not afforded the same legal rights over property ownership and maintenance payments as married couples.

Our survey highlights the lack of awareness about their rights in the event of a relationship breakdown or death.

The survey also reveals the lack of professional advice available to unmarried couples and the lack of knowledge about protective measures such as cohabitation agreements.

Finally, we look at the demands for a change in the law and the prospect of any future legislative changes.



the myth of the common law marriage

There is widespread belief in the concept of the common law marriage. Couples think they are protected when they buy or own property together and if their relationship was to break down. There is also an assumption that the law provides a “fair” financial remedy if a cohabiting relationship ends. Unfortunately, this is not correct.

Common law marriage does not exist and hasn’t done for centuries. Cohabiting couples do not have the same rights as married couples and courts do not have the powers to reallocate assets, as they can on divorce, even if a property is involved.

We asked cohabittees if they believed couples, who had been living together for more than a year, had the same rights over their property as married couples.

More than one third (35 per cent) either believed that they had the same rights or didn’t know. The age group that was least aware was the 25 – 34 group with 33 per cent believing they had the same rights, compared to only 22 per cent in the 55 plus age group. Regionally, lack of awareness was highest in the Midlands with 30 per cent believing they enjoyed the same rights as married couples. That figure compares to just 16 per cent in London.

“Common law marriage does not exist and hasn’t done for centuries. Cohabiting couples do not have the same rights as married couples and courts do not have the powers to reallocate assets, as they can on divorce, even if a property is involved.”

Caitlin Jenkins

Partner

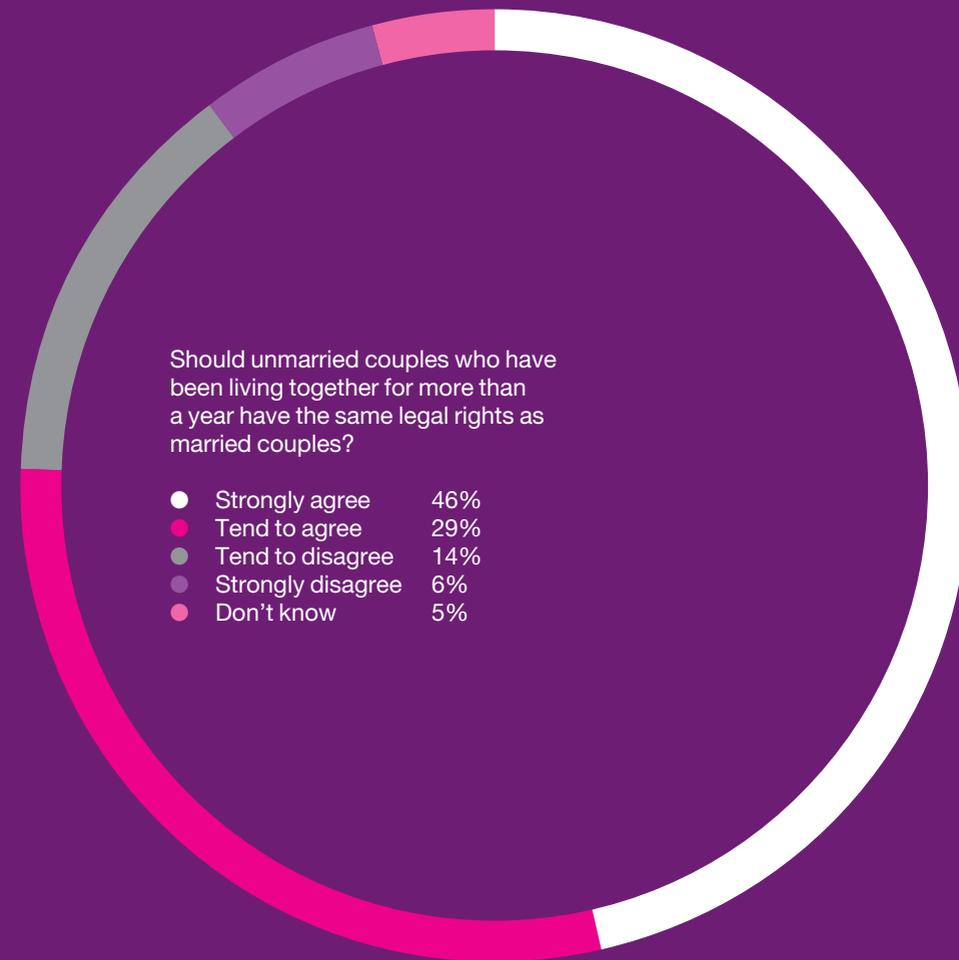
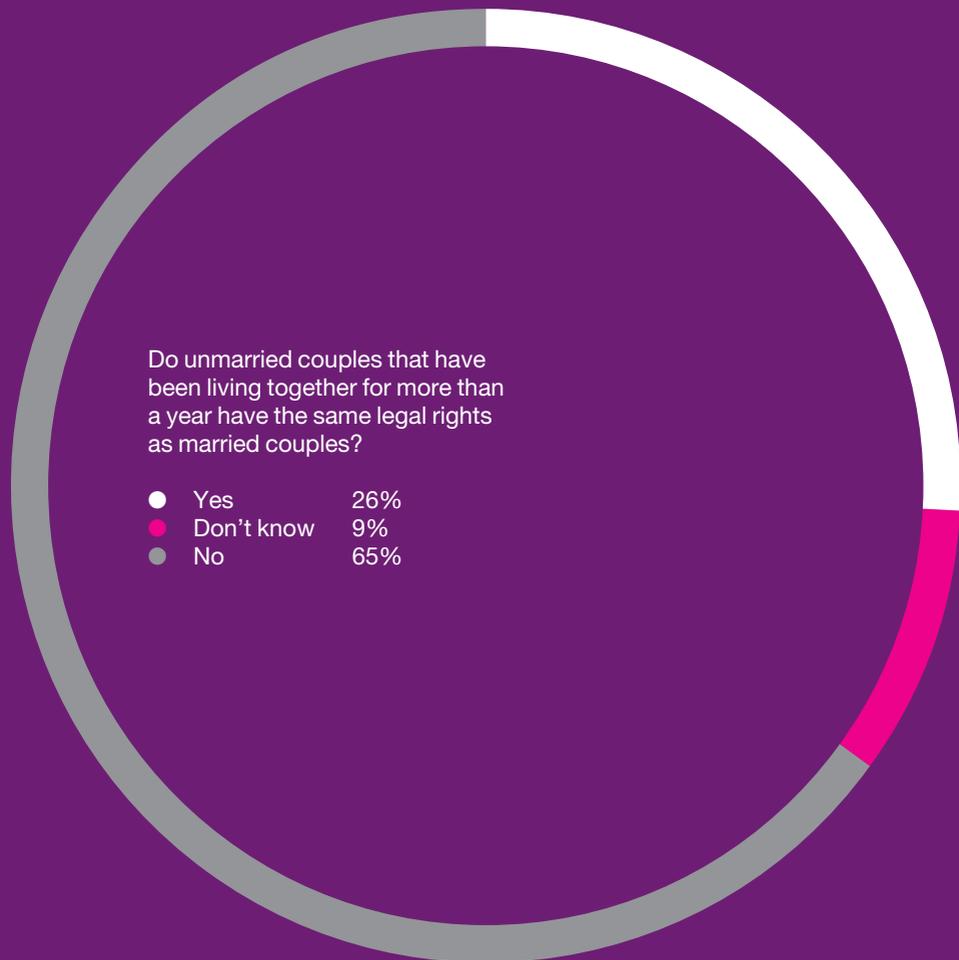
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the law as it stands

The Cohabitation Rights Bill, which addresses the rights of cohabiting couples, had its second reading in the House of Lords in December 2014. The purpose of the Bill is to provide protection for people who live together as a couple and to make provision for property of deceased people who are survived by a cohabitant.

However, since then there has been little progress and, following the Brexit vote, family law is unlikely to be at the top of the legislative agenda. Despite the continued rapid rise of the cohabiting family and the statistical evidence of demands for legislative change, there is no imminent prospect of new laws to offer protection to cohabiting couples.

We asked cohabitees whether unmarried couples should have the same legal rights as married couples. Three-quarters of those surveyed (75 per cent) agreed they should, while more women (78 per cent) agreed than men (73 per cent).





property ownership and disputes

When it comes to property ownership things can get very complicated very quickly. For example, there are numerous types of ownership structures when a couple live in a property owned by one or both of them.

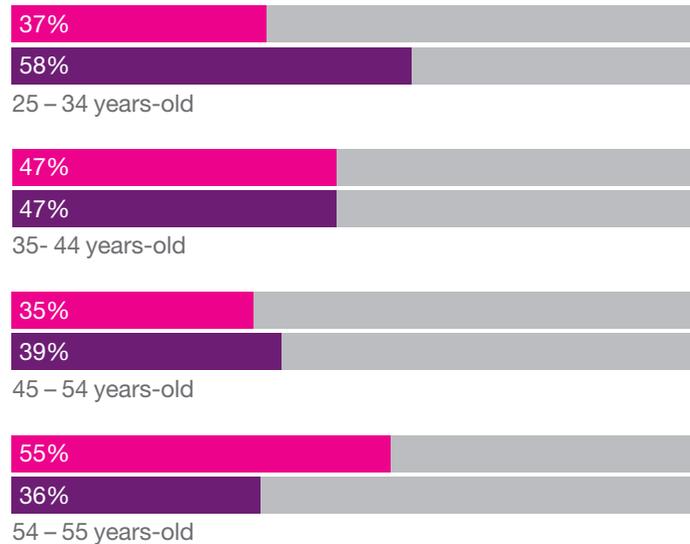
Our survey revealed that 41 per cent of cohabiting couples bought their home as joint tenants, 40 per cent bought the property without any involvement from the other and 13 per cent bought as tenants in common.

How did you purchase your home?



Have you made equal contributions to the purchase of your home?

- Contributed to deposit
- Contributed to mortgage



Across the age groups, 54 per cent of respondents aged 25 – 34 bought as joint tenants, 15 per cent acquired their property as tenants in common, while 27 per cent bought the property on their own.

In the 55-plus age group 38 per cent were joint tenants, 11 per cent tenants in common and 44 per cent acquired the home with no involvement from the other cohabitee.

Half of those interviewed contributed 50 per cent to the deposit however there were considerable differences across the age groups. With those aged 25 – 34 only 37 per cent put equal sums towards the deposit. This figure rose steadily to 53 per cent with those aged 45 – 54 and 55 per cent in the 55-plus age group.

When it comes to monthly mortgage contributions, 42 per cent pay equal amounts. However, while those aged 25 - 34 are less likely to contribute equal amounts to the deposit, 58 per cent pay equal amounts to monthly mortgage payments, compared to 39 per cent aged 45 – 54 and 36 per cent in the 55-plus age group.

Point of law

property ownership

There are typically two tiers of property ownership:

Legal ownership

The legal owner will be named on the Land Registry title.

Beneficial owners

Their names will not necessarily appear on the Land Registry title but they have the right to share the proceeds of sale and to occupy the property.

When a couple live in a property owned by one or both, it will usually be owned in one of the following ways:

- **Joint tenants at law and in equity** - where the couple are named on the legal title and own the whole of the beneficial interest jointly. On sale, the starting point is equal division.
- **Joint tenants at law and tenants in common in equity** – where the couple are named on the legal title and own separate shares in the beneficial interest. If there is no express agreement about what those shares are, then the starting point is that they own 50 per cent each. Usually couples own property as tenants in common to specify that they own more/less than 50 per cent, or to ensure that they can each pass their share of the property under their will, rather than it going to the other person automatically on death.
- **Sole ownership** - only one party's name appears on the legal title and they are the legal owner. The other party faces an uphill struggle to show that they are entitled to any part of the beneficial interest.

Joanna Grandfield, Head of Family,
London, Mills & Reeve



property disputes

Most disputes between cohabiting couples are about property. When couples embark on buying their home they are often in the first flushes of love, or buying for several practical reasons with no thought that the relationship will ever end.

Often, as highlighted in our survey, couples don't contribute an equal share to the mortgage deposit or split the monthly bills equally. It is not uncommon for couples to have an unwritten agreement whereby one pays the mortgage while the other takes care of the bills.

While these arrangements may work when the couple are on good terms, if the relationship breaks down disputes often arise over how the property is divided, particularly if they own, as the majority do, their home as joint tenants.

For the 40 per cent of those surveyed who live together but the property is in the sole name of one of the parties, if the legal owner disputes the non-owner's claim to a share in the property, the non-owner would have to apply to the court for a ruling that they have an interest in the property.

If a property is in the sole name of one of the parties, there are several ways the non-legal owner can try to establish they have a beneficial interest in a property in which they both reside. However, it is usually very difficult to find the necessary evidence to persuade the court.

Such cases are complex and the process can be lengthy. They are also very costly and can result in the loser paying the other party's legal costs.

Despite the potential problems cohabiting couples face over the ownership of their home if they split up, only 33 per cent of our respondents said that they were given professional advice on different ownership structures.

Perhaps even more alarming is that more than a third (35 per cent) of cohabiting couples were unaware that if they own their homes as "joint tenants" the value of the home is typically split 50:50 regardless of how much each person contributed.

Client stories

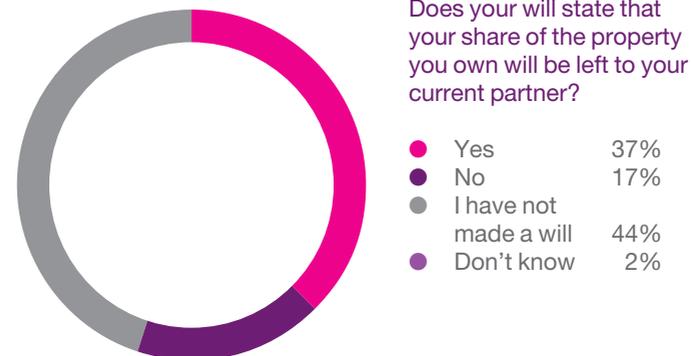
A 32-year old from Manchester bought a "project" property with his partner as joint tenants. He borrowed money from his grandmother for the deposit and from his parents for the renovation work on the "understanding" that it would be repaid. He has also spent a huge amount of his time working on the property.

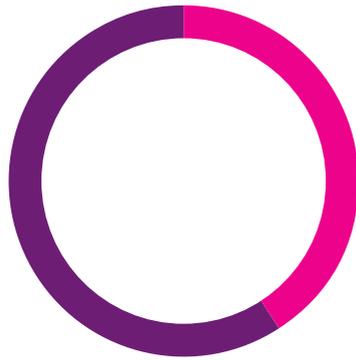
On the other hand, his partner has made no capital contribution to the property. The relationship has ended very badly and she now wants her 50 per cent of the equity. There is nothing in writing with his grandmother or with his parents - a classic example of a failure to protect the investment.

'til death do us part

What happens if one of the cohabittees dies? If a cohabiting couple own the property as beneficial joint tenants, it will automatically pass to the survivor upon the other party's death, regardless of the deceased's will.

On the other hand, if they hold it as tenants in common, then the deceased's share in the property will pass under the deceased's will or under the intestacy rules. The intestacy rules do not make any provision for an unmarried partner. The surviving partner retains their share in the property. The survivor and the deceased's estate will then own the property as tenants in common, and the property may need to be sold to realise the estate's share, against the wishes of the survivor.





Were you aware that if the property is owned as joint tenants, 50 per cent of the home will automatically pass to the co-owner upon death, regardless of what your will states?

● Yes 41%
● No 59%

It is possible for a cohabitee to make a claim for reasonable financial provision from their deceased partner’s estate, but this can be difficult, traumatic and expensive. It is far easier to make a will than have family members deal with claim after death.

Yet despite this, 44 per cent of the cohabitees we surveyed had not made a will and almost 60 per cent were unaware of the joint tenancy rules where the property automatically passes to the surviving cohabitee, despite what their will states. More men (43 per cent) than women (39 per cent) were aware of the rules. These findings are particularly alarming given that more than 40 per cent of our cohabitees either bought or own their home as joint tenants.

Of those that had made a will, 37 per cent had left their share of the property to their co-owner. There were wide disparities across the age groups. Only 13 per cent of those aged 25 – 34 had left their share of the property to their co-owner, compared to 41 per cent of those aged 45 – 54 and 50 per cent of the those in the 55-plus age group.

“Having a will is the only way to guarantee what happens to your property on your death. The lack of a will often leads to family disputes and problems which could otherwise be avoided.”

Simon Pedley, Partner, Mills & Reeve

Client stories

A 46 year old woman from Oxford and her partner, who had been cohabiting, jointly owned a valuable house as tenants in common. Each of them owned their share separately and could leave it in any will they made. However, neither had made wills or had given any real thought to what might happen on death.

On her partner’s unexpected death in his mid-40s, his share in the house passed to his relatives as he died intestate and did not have children. The woman obtained nothing from her partner’s estate. The partner’s family wanted their share of the property and took steps to have the property sold against the woman’s wishes. But by pursuing a claim under the Inheritance (Provision for Family and Dependants) Act we managed to negotiate a settlement where the woman was given a greater share in the property and the right to reside there for a reasonable period. Ultimately, she did have to move out to allow her partner’s share to be realised for his estate.

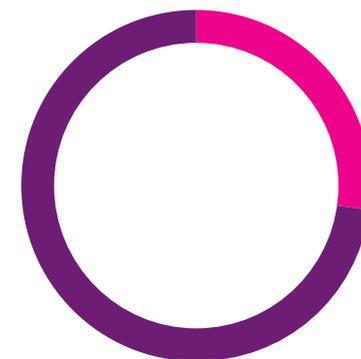
Both the woman and her partner had, to the extent they thought about it, proceeded under some sort of misapprehension about common law marriage. This illustrates the importance for all cohabiting couples to give proper thought to what they want to happen to jointly owned property should one of them die – both when acquiring the property and deciding the basis on which it will be held, and in terms of preparing suitable wills.



keeping it in the family

For those cohabiting families that did have dependent children, the survey revealed that almost three-quarters of respondents (73 per cent) did not know what kind of support they would be entitled to for their children if they separated from their partner.

Regionally, only 8 per cent in London knew compared to 31 per cent in The North and The South.



Do you know what type of support for your children you would be entitled to if you and your partner were to separate?

- Yes 27%
- No 73%

maintenance provision

If cohabiting couples have children together, both parents are expected to pay towards the cost of bringing them up until they leave school or finish their education if they go on to University. The Child Support Act 1991 and Schedule 1 to the Children Act 1989 enables financial provision to be made for the children of separated unmarried parents. This includes child support and lump sum payments, and enables a parent with whom the child resides to apply for orders:

- for the purchase of property for the benefit of the child; or
- the transfer of property for the benefit of the child.

There is no financial limit on the order that the court can make. However, the court can only make one order for either a purchase or a transfer of property. It is important to remember that it must be for the benefit of the child so ordinarily if a house is bought eg, for the child and mother to live in, once the child finishes their full-time education the property would be sold and the funds returned to the parent who provided the funds or the property.

Philip Way, Partner, Mills & Reeve



“We are often asked whether the financially weaker member of a cohabiting couple can claim maintenance for themselves. The short answer is no. There is no entitlement to maintenance payable between a cohabiting couple as there is between a divorced couple.”

Marc Saunderson
Partner
Mills & Reeve



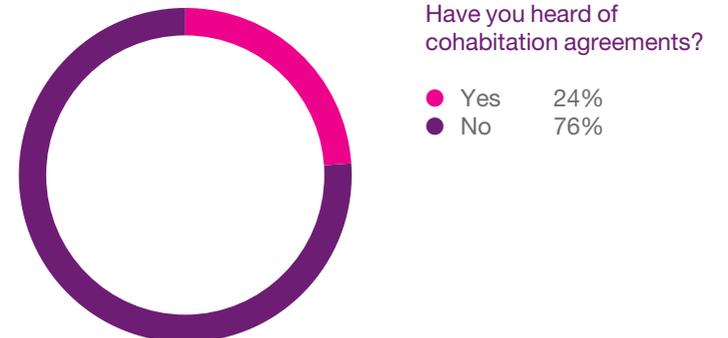
prevention is better than cure

Unlike prenuptial and post-nuptial agreements, cohabitation agreements are legally binding between couples. They can provide certainty in property division upon the breakdown of the relationship. An agreement can avoid a great deal of unpleasantness and cost.

They generally cover:

- The ownership of property
- The ownership of personal belongings and furniture
- Who will contribute to fees, household expenses etc
- How to resolve ownership of joint accounts
- They may also cover financial provision for any children

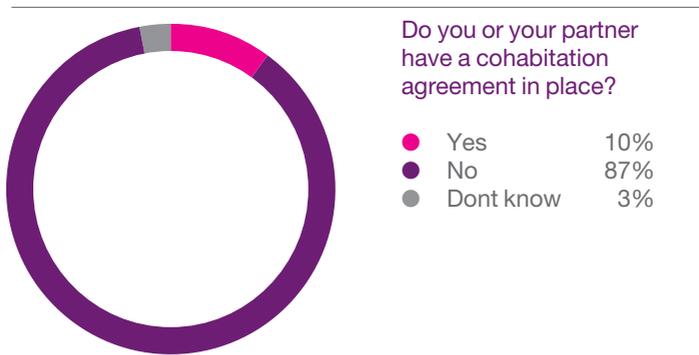
Despite the obvious benefits, there is huge lack of awareness of cohabitation agreements among unmarried couples and, therefore, very little take up.



More than three-quarters (76 per cent) had never heard of cohabitation agreements. The survey also found that 79 per cent of women compared to 74 per cent of men were unaware of their existence. Across the age groups, knowledge of such agreements was more prevalent in the 25 – 34 age group with 30 per cent being aware of cohabitation agreements compared to 20 per cent in the 55-plus age group.

84 per cent of respondents did not have a cohabitation agreement in place, 10 per cent did have an agreement, while 3 per cent didn't know. More males at 11 per cent had an agreement compared to 8 per cent of females. In the age groups, cohabitation agreements were most prevalent in the 55-plus group at 13 per cent this compared to only 6 per cent in the 45 – 54 age group and 11 per cent in the 25 – 34 age group. Regionally, 16 per cent in The South had an agreement compared to 5 per cent in London and 7 per cent in the Midlands.

To avoid costly and lengthy disputes and prevent unnecessary upset, cohabittees should consider legally documenting their intentions. These can include amending the Land Registry documentation, making a will, or having a cohabitation agreement.



The regional split of those with an agreement in place



“Cohabitation agreements remove the potential for disputes and the substantial financial and emotional costs litigation incurs. Agreeing who owns what, and properly recording it, removes any issue so people have the certainty and reassurance they need.”

Nick Stone
 Partner
 Mills & Reeve



opinion

The results of our survey clearly indicate both the need and demand for legislative change surrounding cohabitation. There is a complete lack of knowledge among the public, many of whom think that there is such a thing as the common law marriage and, if couples live together, they will become a common law spouse with the same rights as a married couple.

“Under the current law governing cohabitation, it is possible that, at the end of a relationship, one partner who contributed significantly more than the other in terms of a deposit to purchase the property, monthly mortgage repayments and bills, must hand over 50 per cent of the property to the other party.”

Alison Bull, Partner, Mills & Reeve

In fact, the common law marriage was abolished back in the 18th century and the present day reality is that cohabiting couples are not afforded the same rights as their married counterparts.

Under the current law governing cohabitation, it is possible that, at the end of a relationship, one partner who contributed significantly more than the other in terms of a deposit to purchase the property, monthly mortgage repayments and bills, must hand over 50 per cent of the property to the other party.

Similarly, it is also plausible that one partner, whose name was not on the legal title but had made substantial contributions both financial and non-financial including staying at home to bring up the children, could and do end up with nothing.

The law surrounding cohabitation can result in terribly unfair results and cases are often complex, lengthy and expensive. Also, the 'loser' can also end up paying the other party's costs. Moreover, couples are not adequately informed on or aware of the various ownership structures and their implications. Two thirds of our respondents said they were not given professional advice on the different ownership structures. While those that bought their home together as joint tenants – which is typically the case – more than a third (35 per cent) were unaware that the value of the home is typically split 50:50 regardless of how much each person contributed in the event of a breakup.

“There are more and more people living together and choosing not to get married or enter into civil partnerships. Society is changing and the legal system needs to catch up. What we have is a set of archaic laws that do not protect cohabiting couples – and there is clearly demand for change.”

Alison Bull, Partner, Mills & Reeve

Almost 60 per cent were unaware of the joint tenancy rules upon death where the property automatically passes to the surviving cohabitee, despite what their will states.

There is also widespread ignorance and lack of take up of wealth protection measures such as declarations of trust and cohabitation agreements. Only 10 per cent of couples living together had a cohabitation agreement. Such agreements are legally binding and can prevent much unpleasantness and expense.

There are more and more people living together and choosing not to get married or enter into civil partnerships. Society is changing and the legal system needs to catch up. What we have is a set of archaic laws that do not protect cohabiting couples – and there is clearly demand for change.

Alison Bull, Partner, Mills & Reeve

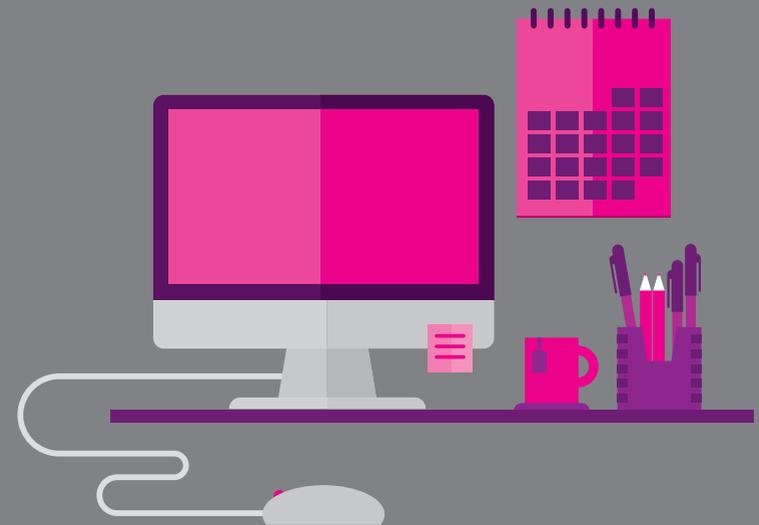
useful legal resources

A ground-breaking knowhow base available for subscription online. It contains Mills & Reeve's knowhow and legal research, together with video content on legal topics.

Divorce.co.uk is a free Mills & Reeve resource base for married couples.

www.divorce.co.uk

www.familylawhub.co.uk



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