

Do You have an interest in the Former Family Home (Unmarried Couples)?

Trust of Land (Appointment of Trustees) Act 1996

Information Sheet

The Court can determine the extent of a party's interests when an application is made under the Trusts of Land and Appointment of Trustees Act 1996 and can also order a sale of the property.

When an application is made under the Trust of Land Act, the Court can determine what share each party has but would also consider postponing either the sale of the property or payment of a lump sum from one party to another if the Court considers that it was in the best interests of the children that this is postponed until each of the children have obtained the age 18 or have finished fulltime education.

An application under the Trust of Lands Act 1996 can be made either in the High Court in the Chancery Division or a Family case in the Family Division. Alternatively, it can be made in the Local County Court where the defendant lives or where the property is situated.

An application is made by completing a Form N208 with a written statement in support of the claim. A Court fee is payable of £175. There would also be further court fees if the matter is to proceed on a contested basis of £110.00 pre trial checklist and trial fees of £545 (fast track) or £1090 (multi track) (as at April 2013).

The defendants in the case would be any other owner or any other person with an interest in the property. Each of these people must be served with the proceedings. Upon service, the defendants must file an Acknowledgment of Service Form and written evidence within 14 days.

Once an Acknowledgment of Service Form is filed, the Court will fix a hearing for directions. At the Directions Hearing, the District Judge will consider what additional Orders need to be made for the filing of evidence and the future conduct of the case, as well as fixing the timetable for the final hearing.

The case will then be adjourned for the final preparation of the case and then listing for a final hearing. The final hearing will not be for some months after the Directions hearing.

At the Directions Hearing, the Court will make Orders for discovery and that is the requirement of each party to disclose to the other party all relevant information and documentation relating to the case.

The Law

When two people live together, there is no body of legislation in place to protect them as there is with married couples. The law, in this regard, is presently under review. The only recourse available is contract law or complicated trust law in relation to the property.

Where property is held in joint names, the law assumes that it is held equally, ie, 50:50, unless there is evidence of an agreement either verbally or in writing that the shares are in some different proportion. When the position is set out in writing the position is normally clear cut. However, where there is no written agreement and where one of the parties claims a substantial and significant contribution to the purchase, upkeep or improvement of the property then the Court can make a determination that the shares are held other than equally. This very much depends on the strength and reliability of evidence.

In deciding whether to order a sale or declare a person's interest in a property the Court must take into account the following factors which are set out in Section 15 of the Act.

- a. The intentions of the person or persons (if any) who created the Trust;
- b. The purpose for which the property is subject to the Trust is held (ie, the current purpose rather than the original purpose);
- c. The welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the Trust as his home and;
- d. The interests of any secured creditor of any beneficiary and the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in the property subject to the Trust (or in case of dispute) of the majority (according to the veil of their combined interests).

Property Law

In order to decide whether someone (call him/her 'B') has a share in a property, the legal title to which is registered in the sole name of someone else (call him/her 'A'), there are two main legal concepts which are relevant.

Resulting Trust

The first is known as a 'resulting trust'. This arises when B has made a direct financial contribution to the purchase of the property in A's name, and there are no circumstances (eg an express or implied agreement) to show that the contribution was intended to be a gift or a loan. For this purpose we must look at how the price was found and paid at the time of the purchase itself, and not at, for example, who paid the mortgage instalments later on. A resulting trust

means that A holds either all or part of the property on trust for (ie for the benefit of) B. I deal with the question of the size of B's share under a resulting trust later on in this letter.

Constructive Trust

If B did not make a direct financial contribution to the purchase of the property in A's name, the concept of resulting trust cannot apply. The second, more complex concept is known as 'constructive trust'. But there are two very different ways in which this can happen, and I must set them out separately. They are:

1. Where there is an express agreement, arrangement or understanding between A and B as to who should own what particular share in the property, or, at any rate, A promises B or induces B to believe that B will receive a share in the property. Such an agreement, arrangement, understanding or promise may be in a formal document or it could be confirmed by a statement only made orally and very imprecisely.

However, such an express agreement, arrangement, understanding or promise is not enough by itself, unless it is in writing and signed by A (this would then be called an 'express trust' rather than a 'constructive trust'). Except in that case it is also necessary for B (the person claiming a share in the property) to have acted to his or her detriment (disadvantage) or altered his or her position in reliance on that agreement, arrangement, understanding or promise.

2. Where there is no such express agreement, arrangement, understanding or promise the Court may in some cases regard the matter as if there had been one. Often the Court calls this 'imputing a common intention'. In order to do this, the Court looks at the conduct of A and B in relation to the property. If B contributed directly to the payment of mortgage instalments, or to payments for a substantial improvement to the property, the Court may infer that this must have been because there was a common intention to share the property. People do not usually pay other people's mortgages for nothing. But less important contributions, like contributing to household expenses, will not do, because there may be many reasons why people pay those, other than an intention on the part of A to give away a share in the property to B in return.

Ascertaining the Share

The major difference between the two types of trust - resulting and constructive - is that the concept of a resulting trust relies upon the precise share in the property usually being based on the amount of the direct capital contribution, proportionate to the purchase price. However, under the concept of constructive trust, once it is established that either through 1. or 2. above the intention was for someone to share in a property then the court will take into account a wider range of factors, not just the proportion of the contribution to the purchase price, in deciding what the amount of that share should be.

Important Information to be Obtained From You

In order to assess your case, please provide the following information:

1. What discussions took place prior to and during the purchase of the property with your partner? Please provide dates, times and locations of any such discussions. Were any third parties present and, if so, who?
2. Who paid the deposit on the property? If it was borrowed, who was it borrowed from? If it was a gift, who was the money from and why was it given? If it was funded by savings, whose savings were they and from which account were they taken?
3. Who paid the legal fees, surveyor's fees and who paid the stamp duty? Was there any agreement in relation to how this money was paid? From which account was the money paid?
4. Who made the mortgage payments and from which account? Who paid the other household expenses and from what account?
5. Were there any structural repairs or alterations carried out, eg, an extension or new roof? If so, who paid for them and from which account? Were there any discussions between you as to the basis upon which such payments were made?
6. Who paid for other expenditure such as holidays, furniture, children's clothing and equipment, and so forth? From which account were these sums paid?
7. Were you engaged at any time during your relationship, if so, please give full details?

Mediation

In recent years the Government has supported and developed schemes for mediation which offer an alternative way of resolving differences between people involving children matters. If both parties agree to be referred for mediation, then any Court proceedings can be put on hold until the mediation option has been fully considered. Mediation is where a trained mediator uses

his/her skills to encourage the parties to reach a settlement between them which reflects both parties needs, interests and responsibilities and of course those of the children. The role of the mediator is to facilitate that agreement reached between the parties rather than to impose an agreement which is what a Court may do. We can arrange referral to Mediation.

The mediator cannot give legal advice but is independent of both parties and the Court. Each mediation session normally lasts about 1½ hours and mediation involving finance can take between 3 and 4 sessions before a conclusion is reached. Children matters normally take between 1 and 4 sessions. It is essential that both parties give full and frank disclosure of their personal and financial circumstances. In certain situations where a dispute involves children and the children are old enough the mediator can see the children and feed back to the parties what the children say.

The advantages of mediation are that it can be a cheaper, quicker and more effective method of settlement than Court proceedings. This is because the parties themselves have reached an agreement that they are reasonably happy with and therefore it is one that is likely to be fair and effective.

At any time during the mediation process you would be able to take advice independently from us and then resume the mediation. Mediation may not be appropriate if you consider that you would not be in a fair bargaining position with your spouse or former spouse or that you feel that for whatever reason you would have difficulty discussing matters directly with your spouse or former spouse even through a mediator.

The mediator can give you information about the relevant law. Solicitors can, if necessary, provide you with legal advice in between mediation sessions, to help you to feel informed and at ease during mediation negotiations.

If financial matters need to be resolved, full financial information has to be provided. The mediator will give you guidance to help you do this. You may also wish to involve us at this stage, which mediators encourage.

The discussions that take place in mediation about possible solutions are confidential. However, any financial information that is produced can be shown to a family court, if necessary and appropriate.

Once a consensus is reached in mediation, we can advise on the appropriate legal formalities that would ensure that your proposals become legally binding.

Mediation can help couples to:

- reduce tension and hostility
- make decisions on an informed basis
- tailor-make solutions to their particular requirements
- communicate and co-operate
- explore and examine options
- appreciate and consider the needs of the children
- express their feelings in a secure environment
- save legal costs because the process can help to resolve many issues.

Mediation may not be appropriate if you consider that you would not be in a fair bargaining position with your spouse or former spouse or that you feel that for whatever reason you would have difficulty discussing matters directly with your spouse or former spouse even through a mediator.

You can consider mediation at any point during the case, not just the outset.

Legal Aid is available for mediation subject to your financial eligibility.

Collaborative Law

Collaborative law is fundamentally changing the way people think about family law. For separating couples who generally seek a fair solution and want to minimise the pain of a family breakdown it may offer the very best way ahead.

Collaborative lawyers sign an agreement with you which disqualifies them from representing you in Court if the Collaborative process breaks down. That means they are absolutely committed to helping you find the best solutions by agreement rather than conflict. The best solutions are often those which are able to work out together in which all of you can share rather than a Judge who doesn't know you imposing a settlement. The process is carefully prepared but you and your former partner to sit down in a room together with your solicitors and discuss the issues face-to-face.

For it to work it needs the right people with the right frame of mind. They have to have a genuine desire to make it work and a willingness to disclose honestly and fully all information about their circumstances. It doesn't mean that you already agree on everything otherwise you wouldn't need lawyers. The Collaborative lawyer's skills are not only the very best experts in family law but also those who have been trained to settle disputes in a collaborative way. It is often successful because you have the benefit of your own legal advice at the time when you are discussing matters rather than in mediation where the mediator is not able to give advice and there is a significant time delay with you being able to seek advice from us in the mediation process. There is no threat of Court

proceedings hanging over you and the additional pressures and costs that that can bring.

You set the agenda so you talk about the things that matter to you most. You set the pace because you are not governed by Court dates and appearances. You maintain a level of contact with your former partner which could form the basis of a long term understanding and accord which is immensely beneficial if there are children involved.

In collaborative law there is full and frank disclosure. All discussions take place in a four way meeting. We would be present to help you articulate your views, advise you and secure your interest. The lawyers and you commit to working in a non-confrontational way with mutual respect and a desire to resolve things sensibly and amicably. In particular situations it is possible to have matters referred to trained counsellors who can help you emotionally and improve communication with your spouse and partner, financial experts who are able to give information with regard to tax or financial investments. Experts who are able to deal with any particular problems that the children might have.

It may be worthwhile talking to your spouse or partner about collaborative law and share this information. Information about collaborative lawyers can be found at <http://www.resolution.org.uk/>. The benefits of collaborative law can be both the non-confrontational team based approach which focuses on the matters which are important to you; the process involves you rather than Judges making decisions.

If you would like more information about collaborative law then please let me know.