TO SHARE OR NOT TO SHARE?

Rhiannon Lewis, Partner, and Richard Kwan, Trainee Solicitor, for Dawson Cornwell, examine issues around property when relationships break down...

The adage, "You can't judge a book by its cover", should serve as a useful reminder for anyone thinking about setting up a home with someone outside a civil partnership. Appearances can be deceiving. If you think that putting a property into joint names means you will definitely be entitled to half a share, think again. Peering behind what's on the front cover and into the couple's lives to examine their intentions and conduct may reveal that in reality, one partner owns a lot more (or a lot less) than 50% .

Highlighting this issue is a recent case put before the Supreme Court. In this case, which attracted much media attention, Leonard Kernott jointly held a property in Essex with Patricia Jones; (note: the principles equally apply to gay couples). He later found that he was entitled to just 10%.

The two parties met in 1981, when they purchased a bungalow in joint names in 1985 in Thundersley, Essex for £30,000. They shared the mortgage and upkeep until 1993, when Kernott moved out. Jones stayed in the property with their two children and paid all the mortgage contributions and maintained the house entirely on her own. By 2008, the value of the bungalow in Thundersley had risen to £245,000.

Where the property is in joint names, the starting point is that the parties are entitled to equal shares. However, unequal shares may result if, for instance, there is a written document to this effect (such as a cohabitation agreement or declaration of trust) or if both parties intend – without putting it in writing – that the property should be held in unequal proportions. The problem with the latter case however, it that it can be very difficult for the courts to work out what the couple actually intended. Legal representatives may be left trying to piece together snippets of conversation which took place years ago when one person allegedly said to the other, "What's mine is yours".

As a result, where there is a lack of evidence of what the parties intended and therefore an actual intention cannot be inferred, judges can look at what is fair and at the couple's whole course of dealings to determine what their respective shares should be. In legal jargon: they may 'impute' an intention where they cannot 'infer' an intention.

What makes things even more complex is that intentions can change, and in this case, some judges decided to 'infer' an intention while other judges 'imputed' an intention. They also disagreed about how much practical difference there was between 'inferring' and 'imputing'!

If this all seems confusing, don't worry, because it is. Furthermore, despite efforts to reform the law, there is no sign that this will happen any time soon. It is therefore strongly advisable that couples put in writing what their respective shares are in any property they own together (this goes for property held in someone's sole name as well). The time and heartache of untangling the mess, should things go wrong, (especially if you want preserve a friendship or if there are children involved) is just not worth it.

Drawing up a cohabitation agreement or declaration of trust can help mitigate the uncertainties and lack of protection under the current law. It's too easy to brush these matters under the carpet, but in the long term, especially if there are children involved, it is in the interests of everyone to get matters clarified sooner, rather than later.

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