

## **PROPERTY/FAMILY**

### **UNMARRIED COUPLES: WHAT IS A FAIR SHARE?**

In November, a Supreme Court judgment was made which has triggered calls for legal reform, further to the Court awarding a female hairdresser the overwhelming share of her jointly owned property.

The unexpected ruling in the long running case of Jones-v-Kernott overturned previous strict interpretations of property titles and exposes the inadequacies of what one legal expert described as a “fairly incomprehensible” area of the law.

There are over 2 million unmarried couples living together in England and Wales with almost 50% of children now being born outside of marriage.

### **GOVERNMENT DELAY**

The unanimous decision by five Supreme Court Justices makes it clear that even though the home was registered in the names of both the man and the woman, judges are permitted to substitute a fairer division of possessions. Earlier this autumn, the Government announced it would not take up the Law Commission’s recommendations on reforming the rules governing the property rights of cohabittees in this parliament. Specialists in family law however, warned more split ups will now be contested and called for urgent parliamentary reform.

### **CASE FACTS**

Leonard Kernott and Patricia Jones separated in 1993, after living together in their property in Thundersley, Essex for 8 years. The Supreme Court was asked whether the

assets should be shared 50:50 or predominantly allocated to the woman, who has paid all of the mortgage for the past 13 years.

The Court was told that Kernott, an ice-cream salesman, moved out after the break up. Jones, a hairdresser, was left to pay the mortgage, maintain the house (valued at £245,000.00 in 2008) and raise the couples' two children.

The Court heard that Kernott waited until his children were grown before making a claim on his old home in 2006. In 2008, a County Court judge sitting in Southend, ruled that Ms Jones should get 90% of the value of the house and her former partner, 10%. That decision was upheld by the High Court in London in 2009.

Last year, the Court of Appeal overturned the lower court ruling, deciding that Kernott was entitled to half the value of the house, because the couple owned equal shares when they separated and neither had since done anything to change that situation.

## **DECISIVE FACTORS**

In restoring the County Court Order for sharing the assets, Lord Walker and Lady Hale, said that it was a "..... logical inference that the couple intended Mr Kernott's share in the property to crystallize in 1995 when they took the house off the market and cashed an Insurance Policy to enable Mr Kernott to purchase another property in his own name. The presumption of joint beneficial ownership could be rebutted by evidence that it was not, or ceased to be, the common intention of the parties to hold the properties jointly" the Justices said.

Another Supreme Court Justice, Lord Wilson, added "in the light of the continued failure of Parliament to confer upon the courts limited re-distributive powers in relation to the property of each party upon the breakdown of a non marital relationship, I warmly applaud this development of the Law of equity".

Lord Kerr said that the split of 90% and 10% originally imposed by a County Court Judge was "a fair one as between the parties".

## **LAWYERS' REACTION**

Many solicitors, who had been expecting the Court of Appeal ruling to be ratified, welcomed the judgment as a fairer distribution of property. Experts in the field have said that the Supreme Court's decision may go some way to addressing the injustices inherent in the current law affecting cohabitants. However, it does so at the cost of certainty and will surely lead to more litigation, as co-owners attempt to unscramble what is, unless you are a specialist, a fairly incomprehensible area of the law. The law in this area is thought not to be fit for purpose.

Couples should not assume that the legal pieces of paper which show co-ownership of a property are the end of the story. If one of them goes on to make a different arrangement, for example moving out or not paying the mortgage, then the Court can and may well adjust the original shares.

Experts dealing regularly with such matters have said that the Supreme Court's decision approves the increasing tendency of the Courts to avoid the harsh results of a strict interpretation of property law, through the use of "inferred intentions" as a means of getting round legally correct, but morally unfair results. "Legislation needs to be introduced to reflect the society which it is supposed to serve", said one leading critic

## **STATUTORY CHANGE NEEDED**

However, the situation is different in Scotland, where 5 years ago, the devolved administration legislated to give cohabitants financial rights and obligations. Despite many other countries, including Scotland, committing to cohabitation laws, the UK government remains reluctant and has confirmed that no cohabitation law reforms will be implemented in this parliamentary term. It is hoped that this ruling, alongside the Law Commissions detailed recommendations for a new statute, encourage the government to take this matter more seriously.

## **THE TEST**

So the Jones-v-Kernott case gives the Courts what many think will be new or sharper teeth. This case establishes that the starting point now is to try to work out what, from their conduct, the parties can be inferred as having intended. If that exercise can be done, the Court will not change things. If inferring the intention of the former cohabitants is not possible, the Court has to focus on what is fair and deliver a fair outcome taking into account all the dealings between the parties.

## **ACTION**

The Government needs to step in and make laws to protect unmarried couples. Until that happens, there will remain uncertainty. The Courts will have to undertake the kind of exercise I have outlined. Good legal advice is essential. Here at Busbys we are able to help, so do get in touch on **01288 35 9000**.

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