

USLegal Guide to Common Law Marriage



INTRODUCTION

Common law marriage allows persons who live together as man and wife for a sufficient time and with the intent of having an exclusive relationship akin to a marriage to have the legal rights of formally married persons. Not all states recognize common law marriages.

Among those states that permit a common-law marriage to be contracted, the elements of a common-law marriage vary slightly from state to state. The necessary elements are (1) cohabitation and (2) "holding out." "Holding out" means that the parties tell the world that they are husband and wife through their conduct, such as the woman's assumption of the man's surname, filing a joint federal income tax return, etc. That means that mere cohabitation can never, by itself, rise to the level

of constituting a marriage. Of course, many disputes arise when facts (such as intentions of the parties or statements made to third parties) are in controversy.

Common law marriage is commonly perceived as being created by living together for a certain number of years. However, states generally don't define a number of years of cohabitation for a common law marriage to exist. In order to have a valid common law marriage, there must be proof of all of the following:

- cohabitation for a significant period of time
 - hold themselves out as a married couple -- typically this means using the same last name, referring to the other as "my husband" or "my wife" and filing a joint tax return, and
 - intent to be married.
- In some states, such as Pennsylvania, common law marriage was just another way to create a marriage by exchanging words of present intent, for example vows such as "I take you for my husband." "I take you

for my wife." A common law marriage is legally recognized as a marriage and the way to end it is by getting a divorce.

STATES THAT RECOGNIZE COMMON LAW MARRIAGE

•Alabama
Colorado
District of Columbia
Georgia (if created before 1/97)
Idaho (if created before 1/96)
Iowa
Kansas
Montana
New Hampshire (for inheritance purposes only)
Ohio (if created before 10/91)
Oklahoma
Pennsylvania (if created before 1/05)
Rhode Island
South Carolina
Texas
Utah

PROPERTY RIGHTS OF UNMARRIED COHABITING COUPLES

Generally, unmarried cohabitants do not enjoy the same rights as married individuals, particularly with respect to property acquired during a relationship. Marital property laws and other family laws related to marriage do not apply to unmarried

couples, even in long-term relationships. The characterization of property acquired by unmarried cohabitants is less clear than that of married couples whose ownership of property is governed by marital and community property laws. Some property acquired by unmarried couples may be owned jointly, but it may be difficult to divide such property when the relationship ends.

Cohabitation is generally defined as two people living together as if a married couple. State laws vary in defining cohabitation. Some states have statutes which make cohabitation a criminal offense under adultery laws. Under one state's law, cohabitation means "regularly residing with an adult of the same or opposite sex, if the parties hold themselves out as a couple, and regardless of whether the relationship confers a financial benefit on the party receiving alimony. Proof of sexual relations is admissible but not required to prove cohabitation." Another state statute defines cohabitation as "the dwelling together

continuously and habitually of a man and a woman who are in a private conjugal relationship not solemnized as a marriage according to law, or not necessarily meeting all the standards of a common-law marriage." Yet another state, Georgia, defines cohabitation as "dwelling together continuously and openly in a meretricious relationship with another person, regardless of the sex of the other person."

Living together, or cohabitation, in a non-marital relationship does not automatically entitle either party to acquire any rights in the property of the other party acquired during the period of cohabitation. However, adults who voluntarily live together and engage in sexual relations may enter into a contract to establish the respective rights and duties of the parties with respect to their earnings and the property acquired from their earnings during the nonmarital relationship. While parties to a nonmarital cohabitation agreement cannot lawfully contract to pay for the performance of

sexual services, they may agree to pool their earnings and hold all property acquired during the relationship separately, jointly or to be governed by community property laws. They may also agree to pool only part of their earnings and property, form a partnership or joint venture or joint enterprise, or hold property as joint tenants or tenants in common, or agree to any other arrangement.

Other legal issues that may affect cohabiting couples include estate planning and medical care. Generally, someone who cohabits with another is not considered an heir under the law or have the same rights to make medical care decisions in the same manner as a spouse. Therefore, unmarried cohabitants may consider estate planning and power of attorneys in addition to having a nonmarital agreement.

In some cases of people who formerly cohabited, courts have found a trust created in property of one person who cohabits with another, whereby

the property is deemed held for the benefit of their domestic partner. When there is no formal trust agreement, a resulting trust may still be found under certain circumstances in order to enforce agreements regarding the property and income of domestic partners. If there is evidence that the parties intended to create a trust, but the formalities of a trust are lacking, the court may declare a resulting trust exists. The court may also declare that a constructive trust exists, which is essentially a legal fiction designed to avoid injustice and prevent giving an unfair advantage to one of the parties. This may be based on the contributions made by one partner to the property of the other. Each case is decided on its own facts, taking all circumstances into consideration.

A minority of states have anti-cohabitation laws on their books, although they are largely not enforced. State laws also exist allowing cohabitation as affirmative defense in certain criminal sexual offenses. Cohabitation

alone may not qualify as common law marriage. Under the terms of an alimony order, payments may cease if the recipient cohabits with another. Some state statutes and case law allow modification or termination of alimony based upon a significant change of circumstances, such as cohabitation. State laws involving cohabitation vary by state, so local laws should be consulted for requirements and applicability in your area.

Jared Laskin, a prominent “palimony” lawyer in California has written an online article about palimony since the 1976 decision of *Marvin v. Marvin*; see: <http://www.palimony.com/7.html>. Reading that article will give some notion of the rights of a cohabitant whose domestic partnership is not working.

It is recommended for cohabiting couples to create a cohabitation agreement, which can be enforced under contract law principles. Such agreements provide for the terms of dividing assets and debts upon

termination of the relationship.

A resulting trust is a trust created in property of one person who cohabits with another, whereby the property is deemed held for the benefit of their domestic partner. When there is no formal trust agreement, a resulting trust may still be found under certain circumstances in order to enforce agreements regarding the property and income of domestic partners. If there is evidence that the parties intended to create a trust, but the formalities of a trust are lacking, the court may find a resulting trust exists.

The court may also declare that a constructive trust exists, which is essentially a legal fiction designed to avoid injustice and prevent giving an unfair advantage to one of the parties. This may be based on the contributions made by one partner to the property of the other. The court typically requires a finding of unjust enrichment before it will impose a constructive trust. Each case is decided on its

own facts, taking all circumstances into consideration.

The doctrine of unjust enrichment is based upon the principle that one should not be permitted unjustly to enrich himself at the expense of another but should be required to make restitution of or for property received, retained or appropriated. The general rule is that a payment of money under a mistake of fact may be recovered provided that such payment will not prejudice the payee. It is considered unjust enrichment to permit a recipient to retain money paid because of a mistake, unless the circumstances are such that it would be inequitable to require its return. This applies even if the mistake is one on one side (unilateral) and a consequence of the payors negligence, or that the payee acted in good faith. "A person who has conferred a benefit on another by mistake is not precluded from maintaining an action for restitution by the fact that the mistake was due to his lack of care." (Restatement of Restitution § 59.) Equity, which is based

on notions of fairness, often allows a person who pays money to another under the mistaken belief a valid contract exists to recover that money when the contract is subsequently canceled for fraud or mistake and the rights of innocent parties have not intervened. (Restatement of Restitution §§ 17, 28.)

A constructive trust is one that arises by operation of law against one who, by fraud, wrongdoing, or any other unconscionable conduct, either has obtained or holds legal right to property which he ought not to, in good conscience, keep and enjoy. A constructive trust is an appropriate remedy against unjust enrichment. Unjust enrichment is present in nearly every case where a constructive trust is imposed. However, the court's creation of a constructive trust is not necessarily dependent on a finding that the person whose property is subjected to it has acted wrongly, but may rest as well upon a finding of unjust enrichment arising from other circumstances that "render it inequitable for

the party holding the title to retain it." (Starleper v. Hamilton 106 Md.App. 632, 666 A.2d 867 (1995).)

The basis for creating a constructive trust is to prevent unjust enrichment. (Restatement of Restitution § 160, comment c.) "Where a person wrongfully disposes of property of another knowing that the disposition is wrongful and acquires in exchange other property, the other is entitled to enforce a constructive trust of the property so acquired." If the property so acquired is or becomes more valuable than the property used in acquiring it, the profit thus made by the wrongdoer cannot be retained by him; the person whose property was used in making the profit is entitled to it." (Restatement Restitution § 202.) When property is given or devised to a defendant in breach of a donor's or testator's contract with a plaintiff, equity will impose a constructive trust upon that property being held by another even though (1) the transfer is not the result of breach of a

fiduciary duty or an actual or constructive fraud practiced upon the plaintiff, and (2) the donee or devisee had no knowledge of the wrongdoing or breach of contract. (Jones v. Harrison , 250 Va. 64, 458 S.E.2d 766 (1995).)

A person who has been unjustly enriched at the expense of another may be required to make restitution to the other. Despite not having a contractual agreement, a trial court may require an individual to make restitution for unjust enrichment if he has received a benefit which would be unconscionable to retain.

A person may be deemed to be unjustly enriched if he (or she) has received a benefit, and keeping it would create injustice.