

# Debunking the myth of the common law marriage

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*'I do not support two classes of adjudication depending on whether there happens to be a marriage. I support the extension of the existing system of judicial equitable distribution to the unmarried, warts and all.'*

These are the words of Sir Nicholas Mostyn, a Judge in the Family Division of the High Court, at a family law conference a few weeks ago. The comments were widely reported and believed to have been in part a response to former High Court Judge, Sir Paul Coleridge, who has been an outspoken proponent of the institution of marriage, believing it to be more stable than cohabitation and the 'ideal' structure for families. Given that the Government shelved the Law Commission's carefully considered recommendations on reform, I do not anticipate the debate about the legal rights attaching to cohabitation will be resolved anytime soon. This is unfortunate given that the pernicious myth of the 'common law marriage' persists. This is the idea that unmarried couples who are living together are, after a certain period of time, treated for all purposes by the law as if they were married. They are not, as demonstrated in the recent case of *Southwell v Blackburn* [2014] EWCA Civ 1347. ***Southwell v Blackburn*** The case involved an unmarried couple who moved in together in 2002 and lived as if man and wife. Ms Blackburn, who had two young daughters, helped select the property but Mr Southwell bought the house in his sole name, with his own money and his own mortgage. When the relationship broke down in mid-2012, Mr Southwell required Ms Blackburn and her daughters to leave and illegally changed the locks while they were out. Ms Blackburn was unable to show that she was the beneficiary of a constructive trust because there was no common intention on the part of Mr Southwell to share the property with her. However, she was able to establish an equity in the property on the basis of proprietary estoppel because Mr Southwell had assured Ms Blackburn she would have a secure home and she had given up her own accommodation in reliance on that promise, and the Judge at first instance held that it would be unconscionable in all the circumstances to allow Mr Southwell to renege. In the Judge's view, it was inequitable for Mr Southwell not to return Ms Blackburn to the position she had been in before they moved in together, so he ordered Mr Southwell to pay her the sum of £28,500 (representing £15,000 she had spent on the property she had given up and £5,000 she contributed to the new house, adjusted for inflation). **The Court of Appeal** In dismissing Mr Southwell's appeal, the Court of Appeal made some interesting points:

- the promise that she would always have a secure home was specific enough and not impliedly limited to the duration of the couple's relationship;
- a denial of co-ownership was not inconsistent with the promise of secure rights of occupation;
- in these cases, courts should focus on the causal link between the assurance relied upon and the detriment asserted rather than attempting to make an accounting evaluation of the benefits, financial and otherwise, which flowed between the parties during the relationship; and
- having promised her a secure home, the fact that they were not married did not make it conscionable for Mr Southwell to force Ms Blackburn to leave with nothing.

*Southwell v Blackburn* demonstrates how fact-specific these claims are and makes clear that in cases of proprietary estoppel, courts are not going to focus on the nature of the relationship between the parties but on whether the requirements of assurance, detriment and reliance, are satisfied. Further, courts are not interested in carrying out a detailed inquiry and accounting exercise in relation to the benefits arising from and passing between a couple during the relationship. In cohabitation cases, it is the principles of property, trusts and contract that will apply. **Put it in writing** Whether one thinks the outcome of the *Southwell v Blackburn* was fair or not, the case illustrates just how complex, uncertain, expensive, and potentially unjust the law can be for cohabitants. It may be time for the Government to reconsider the Law Commission's 2007 recommendations for reform in this area. In the meantime, as unromantic as it may be, unmarried couples thinking about purchasing property or moving in together would be well advised to consider how they intend to hold the property they will live in and to put their intentions in writing or have a cohabitation agreement drafted. It will not prevent heartbreak in the event the relationship ends, but it may well save the stress, anxiety and costs of litigation when it does.