BEWARE THE “COMMON LAW MARRIAGE” MYTH

“In our law cohabitation does not have special legal consequences. Generally the proprietary consequences and rights flowing from a marriage are not available to unmarried couples, regardless of the length of their cohabitation” (extract from judgment below)

If you live as a couple, avoid the trap of believing the myth of the “common law marriage”. It’s a very persistent myth, possibly because some other countries do indeed give formal recognition to certain forms of life partnership.

But not in South Africa - there is no such thing in our law as a “common law marriage”. No matter how long you have lived together, if you break up or when one of you dies, neither of you automatically has any of the rights and protections afforded to a couple in a marriage or civil union.

Apart from the personal consequences the financial downsides can be huge, and our courts are all too often faced with sad and bitter disputes which end with one of the partners destitute and homeless after decades of cohabitation.

A recent High Court case highlights the financial dangers…

22 years on, a couple splits

* For most of 22 years, with only a short early separation, a man and woman “in a romantic relationship” lived as a couple, in a household complete with the woman’s daughter from a previous relationship.

* They had been jointly involved to one degree or another in a series of business ventures including vegetable farming (on a farm purchased in the man’s name), commercial blasting, a bakery and a packaging business, and what was at stake in the High Court was whether the woman could prove her claim to a 50% share of the resultant assets.

* The facts were bitterly disputed, with the man adamant that the relationship had been nothing more than co-habitation as lovers. But eventually the Court concluded, on the basis of the facts that it found proved, that “the parties intended to pool their resources for the benefit of a joint estate” and that the woman had accordingly proved the existence of a “universal partnership”.

* Not however to the 50/50 extent she claimed, and the end result is that at age of 47 and after 22 years she leaves the relationship with only 30% of the net assets. Hard though that may seem, she could easily have been left with nothing, as we shall see below when we look at what our law says about such relationships.

The difficulty of proving a “universal partnership”

The problem in such a case is that you have to prove a lot more than just cohabitation.

You also need to prove the existence of a “universal partnership” and that, as many cases in the past have illustrated, is not easily achieved, not least because the onus is on you to prove your case. You will need to prove all of the following:

* Each of the parties brought something into the partnership, or bound themselves to bring something into it, whether it be money or labour skills;

* The business had been carried on for the joint benefit of both parties;

* The object was to make a profit; and

* The partnership contract was legitimate.

If, as is common in this sort of situation, you rely on a “tacit” agreement (an unexpressed agreement inferred from your actions as a couple), you have to go further and prove that:

* The other person was fully aware of the circumstances connected to the transaction;

* The act relied upon was unequivocal; and

* The tacit contract does not extend beyond what the parties contemplated.

Again, not easily proved, as “A tacit contract will be interpreted strictly and not extensively, since a contract must be interpreted in favour of the person on whom it is sought to place an obligation.”

The good news - there’s a simple solution…

We have talked above only about the financial consequences of life partnerships which are unregulated by agreement. But formal marriage also provides a range of other legal benefits and protections (such as rights of inheritance and support and other personal aspects of your relationship) which are not automatically available to you.

Fortunately you can avoid all the risk and uncertainty of an unregulated relationship with a quick and simple solution - a formal cohabitation/life partnership agreement.

Just be sure to get it in place early on. Take professional advice (jointly – this is to protect you both!) as soon as you commit to a long-term relationship.