

Cohabitation agreements can protect couples in their golden years

By AdvocateDaily.com Staff



Even divorced baby boomers can be somewhat naïve about love and marriage, and many remain in denial about the financial realities that can hit hard when a second (or third) partner dies or has to go into a nursing home, says Markham family lawyer [Cheryl Suann Williams](#).

Williams, principal of [Williams Family Lawyers](#), says some clients come to her as an afterthought when making their wills — often prompted by their estate lawyer.

“When people come in they often don’t have a fraction of the things in their mind that we actually need to discuss,” she tells [AdvocateDaily.com](#).

For one thing, they need to know that common-law marriage and actual marriage are quite different when it comes to inheritance, possession of houses and the sharing of a couple’s assets, Williams says. For another, there are frequently grown children that have to be considered.

Setting up cohabitation agreements for older couples comes with a different set of issues than for younger ones, she says.

“I would be thinking about health issues, death, adult children and inheritances in that scenario,” Williams says.

It’s crucial for people to put their minds to these difficult topics so that surprises don’t compound the challenges that come with aging, she says.

Cohabitation agreements enable couples to make the hard decisions while life is good, and they remain in force even if a will is changed or challenged, Williams says.

She describes one couple who came to her recently who had lived together for 30 years but were not officially married as the common-law wife was not divorced from her first husband — in fact, she had no idea where he was. Both had children from their previous marriages.

“With marriage comes the automatic right to inherit the spouse’s assets,” Williams explains. “If there’s no will, the first \$200,000 of a spouse’s estate goes to the surviving spouse, who then shares the remainder with the spouse’s adult children. But no such rights exist for common-law couples.

“They may want to make provisions — as this couple did — that whoever dies first, his or her estate goes to the surviving common-law spouse, and after the surviving spouse dies, the estate gets divided among all of their respective children,” she says.

Since there’s no right to the division of property for common-law couples, if a surviving spouse needs support, they have to sue the estate and make a dependency claim under the *Succession Law Reform Act*, Williams says.

A cohabitation agreement can state whether or not the parties have a right to claim as a dependent, she adds.

“They can say ‘upon my death my common-law spouse will inherit \$500,000 from my estate’ or ‘my common-law spouse will have a right of possession to stay in my home until her death,’” Williams says.

People often talk about making “mirror wills,” as a way to protect each other, but that’s not the best route, she says.

“They think, we love each other, we’ve been together 20 years, and when he dies he’s going to leave in his will that I get a share of his estate, so I’m going to do the same, and everything will be great,” Williams says.

“But you cannot rely on that because they can make a will today, and the next day, they can rip it up or change it,” she says. “The only way to guarantee the desired outcome is by creating a cohabitation agreement.”

Such agreements can also stipulate how nursing-home care will be funded if one party needs it, Williams says.

“Perhaps they own a house together and that’s their only joint asset. Would the house be sold to fund the care, or would the other party keep the house and fund the care another way? The wise thing for people to do, especially when they’re

advancing in age and there could be potential health problems, is to deal with these issues ahead of time," she says.

Williams stresses that to be valid a cohabitation agreement must be signed and witnessed, and both parties must make full financial disclosure.