

When the only ring is on your keys: What common-law couples should know before buying a house together

Danielle Kubes, Financial Post

Charmaine Ferguson and Colin Andrews have been together for three years, since they were 28.

Their lives are tied together in almost every significant grown-up way. They love each other, they support each other — Colin even moved from Edmonton to Calgary so Charmaine could accept a teaching job — and they own property together.

But they're not married. They're not even engaged.

"We decided to move, and then we were in a position deciding whether to rent or to buy and so, Colin sold his townhouse and then we bought a house in Calgary together," Ferguson says. "Marriage was never part of the conversation."

They're part of a growing number of Canadians who are choosing to buy property without tying the knot.

The number of common-law couples in Canada rose 13.9 per cent between 2006 and 2011, according to the latest data from Statistics Canada. While there's no Canadian data on how many of those couples choose to purchase instead of rent, a 2013 study in the U.S by Coldwell Banker Real Estate found that 17 per cent of couples bought a home before they were married, with that number rising to 24 per cent among millennials.

This trend is part of the larger shift in how millennials — and, increasingly, society at large — view marriage.

"We live in a time where people don't necessarily see marriage as necessary for making all kinds of commitments," says Eric Klinenberg, a professor of sociology at New York University who co-authored *Modern Romance* with Aziz Ansari.

For most of Western history, going back to ancient Greece, where husbands and wives were scolded for feeling eros, a passionate love for their spouses, instead of philia, a friendship-based love, marriage was a union that technically featured two individuals at its centre, but really expressed itself as a tightly woven net that stabilized, secured and nurtured clan alliances, offspring and property.

Five questions you need to answer before you buy a house together



Karin Mizgala, founder of Money Coaches Canada, has some tips on what to talk to your partner about before you take the property plunge — relevant to married and unmarried couples alike.

1. What sort of living situation do you want?

He wants a big house in the suburbs, you want a semi-detached downtown. Have a good “heart-to heart on what each individual is looking for,” she says, before starting your search.

2. Who’s covering the down payment?

If you’re not married and break up in the first few years, the house will likely be divided proportionally according to who contributed to the down payment. If only one-half of the couple can contribute to the down payment, it’s possible the other party could be left with nothing, even if he or she helped pay the mortgage or for renovations. If there’s an inheritance involved, it could lead to resentment. You’ll need to find a fair way.

3. Have you thought of all the monthly, extra expenses?

If only owning a house was as simple as paying the mortgage. “One of the biggest mistakes people make is they crunch the numbers but then they’re not really considering setting aside money (for) any emergency things that come up,” Mizgala says. Who’s responsibility is it to pay the plumber when you have a leak?

4. Have you drafted a cohabitation agreement?

No? Well you should. To avoid he said/she said arguments later on, write down how you’ll divide the household responsibilities and who is entitled to what if you separate. You can always change it later on.

5. Have you gotten professional legal help?

You’ll want it. A lawyer will sit down with you and help you draft a fair cohabitation agreement, and advise you on your province’s common-law provisions.

Sharing finances without the church or state recognizing a committed union was impossible. Literally: Women weren't allowed to hold property in their name in Canada or the U.S until the middle of the 19th century.

It was socially unacceptable for quite a while longer; the risk of loss and destitution without the protection afforded by a legal union — protection that continued even if the marriage collapsed — was too great. Women especially, as they were usually the lower-earning spouse and unable to contribute monetarily to the household, would have been greatly disadvantaged.

But, now that both genders can successfully achieve everything outside marriage that they could formerly only accomplish within the institution, entangling assets out of wedlock is just another one of marriage's ancient functions that has gone the way of the dowry.

"Marriage is going to be a decision, to me, which is entirely based on your love to that person, your commitment for that person, your willingness to go forward and support that person," Andrews says. "It's not in any way a financial decision for me."

Klienberg echoes this modern viewpoint, that marriage is not the beginning from which a shared life develops but is rather an emotional commitment that comes after the shared life has already been tested and found true.

"I think for a lot of young couples buying a home is an economic decision and it's a better idea than renting. I say this not as a sociologist who studied it, but also as someone who did this personally," he says. "For me, buying a home with someone felt like less of a commitment than getting married. It's relatively easy to sell a home if you decide you want to do that, but getting divorced is a much more complicated thing."

But is it really so much easier to offset assets if a couple falls apart, especially if it's acrimonious? How does the court divide these assets? What are the risks to entering such an arrangement?

Canada does not have true common-law marriage. Although provinces and various government agencies, like the CRA, may recognize marriage-like relationships in specific contexts, automatic rights to property are not included. But, couples who act like they're married and buy property together can be entitled to most of the same protections that the law affords legally married couples.

"The Supreme Court of Canada case that was in the last couple of years says if you live as husband and wife, legally you should be treated the same way when it comes to property," says Donald S. Baker, a family law specialist at the Toronto firm Baker and Baker. "However, as is their wont, they didn't give any guidelines at all."

The main difference, he says, is that a married couple, from the date of ceremony, is considered a partnership, regardless of who actually deposits and withdraws from the piggy bank. Upon the breakdown of the marriage, the piggy bank is divided equally, usually to the benefit of the lower-earning spouse.

An unmarried couple, on the other hand, is afforded this protection only insofar as their habits indicate: Do they have a joint bank account? How long have they been together? The courts treat the separation of assets as an “accounting exercise,” Baker says, with the house divided according to who put in what.

“The longer you live together, the deeper the roots and the more you will resemble a legally married couple,” Baker says.

Take Ferguson and Andrews as an example. He provided the entire sum for the down payment, but Ferguson contributes to the mortgage and maintenance, proportional to her income. If they were to break up now, the courts would likely give the entire house to Andrews, and Ferguson’s contributions would be considered rent — she would have no claim to the property.

However, if they were married, the courts would likely award half to Ferguson.

Ferguson thinks the law, as it stands, is fair.

“I don’t feel entitled to something that I didn’t earn,” she says. “And it’s not that I don’t feel like this is half my house, it is.... When I have more solid work and as time goes by, it will end up being a more equitable purchase.”

Since there is no federal legislation surrounding common-law couples and couples who buy property together may not even want to be considered common-law, Baker strongly recommends sitting down with each other and a lawyer to draft a cohabitation agreement, similar to a marriage agreement — or what’s known in the U.S as a pre-nuptial agreement — which lays out the rights and responsibilities of each person.

It forces the couple to discuss their finances honestly, as well as lay out a plan for who pays the mortgage, who pays the maintenance, who pays for the furniture and how it will be divided in the event of a break up. It has the added bonus of saving a bundle on lawyers in the future.

“Not to have a road map as to what you’re going to do in the event of a breakdown, whether it be common law or marital, in my mind is crazy,” Baker says. “You’re really taking a big chance that you know what the odds are.”