

CIVIL PARTNERSHIP PROCEEDINGS

These notes focus on the issues which practitioners are likely to face upon the breakdown of civil partnerships. The statutory provisions for civil partnership mirror those for marriage, so most of the issues will be the same and will be dealt with in the same way. I will therefore concentrate on the few statutory differences and the more important practical differences these cases will present.

Termination

1.1 A civil partnership is terminated in the same way as marriage, namely, by dissolution (= divorce) or annulment (= nullity). Judicial separation is also available, though likely to be very rare. There are some minor differences:

- (i) Adultery is not a ground for dissolution of civil partnership. (The definition of adultery remains sex between a married person and a person of the opposite sex.) Unfaithfulness should, however, amount to unreasonable behaviour. Some have suggested that same-sex couples are more likely to have “open” relationships, but these are perhaps less likely to register.
- (ii) Non-consummation and venereal disease are not grounds for nullity, but again should be good grounds of unreasonable behaviour. Whilst the sexual basis of civil partnership is not made as explicit in statute as it is for marriage¹, the nature of the commitment is such that very few people would enter it intending only a platonic relationship.
- (iii) A prior subsisting marriage or civil partnership is grounds for nullity, but it is not called bigamy. The relevant criminal offence is making a false declaration to the registrar - see s.80 CPA.
- (iv) Civil partners must be of the same sex. Breach renders the union void, as with the equivalent provision for marriage, and does not convert civil partnership into marriage or vice versa. Where a person changes sex, it is a ground for dissolution/divorce. They may then marry their ex-civil partner or form a civil partnership with their ex-spouse under the special procedure in Sch.3.

1.2 As with marriage, civil partners must wait a year from registration before seeking a dissolution. Thus, the first time UK petitions for dissolution could be issued was 20/21 December 2006.

1.3 The procedure and forms for applications closely mirror those for marriage. The FPR 1991 has been amended to refer throughout to civil partnerships by the Family Proceedings (Amendment) (No.5) Rules 2005 No.2922. Some forms are shared – e.g. a new Form E – others are equivalents – e.g. Forms M5A, M6A, etc. Only a limited number of courts have been designated as Civil Partnership Proceedings County Courts: the Principal Registry, Birmingham, Brighton, Bristol, Cardiff, Chester, Exeter, Manchester, Leeds and Newcastle.

¹ although the prohibited degrees apply to civil partnership as they do to marriage

1.4 The terminology of civil partnership is different from marriage:

civil partnership	marriage
registration	wedding
objection	caveat
civil partnership agreement	engagement
civil partner	husband / wife / spouse
surviving civil partner	widow / widower
dissolution order	decree of divorce
nullity order	decree of nullity
presumption of death order	decree of presumption of death
separation order	decree of judicial separation
conditional order	decree nisi
final order	decree absolute
civil partnership proceedings	matrimonial proceedings

Some terminology is common to both marriage and civil partnership: e.g. petition, step-relatives and in-laws, child of the family. There is no equivalent to “divorced”.

Financial relief - powers

2.1 The courts have almost identical powers in respect of civil partnerships as in respect of marriage. However, the Act recasts these powers, setting them out afresh in Schs.5-7.

- Schedule 5 rehearses the provisions for financial relief upon divorce, etc set out in the Matrimonial Causes Act 1973, Part II (see the annex hereto);
- Schedule 6 those for financial relief in the Magistrates’ Court during the subsistence of the marriage set out in the Domestic Proceedings and Magistrates’ Courts Act 1978;
- Schedule 7 those for financial relief after termination overseas set out in the Matrimonial and Family Proceedings Act 1984, Part III.

The Act does not expressly state that these powers are identical to those for marriage but s.72 states that such provision “corresponds” to that for marriage.

2.2 The Married Women’s Property Act 1882, s.17 provides a remedy to determine the property rights of spouses and fiancés. CPA 2004, ss.65-86 provides an equivalent remedy for civil partners and those who have agreed to enter a civil partnership.

2.3 Matrimonial home rights under the FLA 1996 have been extended to civil partners and re-labelled “home rights”.

2.4 A civil partner may be liable for child support for a child of the family under CPA 2004, Schs.5-7 or under the Children Act 1989, Sch.1 (see CPA 2004, s.78(4)), - *see below at para.5.5ff.* The CSA applies only if the biological parent does not have residence (which will be rare in the case of a mother) – in which case the person with care is entitled to child support.

ANCILLARY RELIEF PROVISIONS

CPA 2004, Sch.5		MCA 1973
Part 1	periodical payments, secured periodical payments, lump sums	s.23
Part 2	property adjustment orders	s.24
Part 3	sale of property orders	s.24A
Part 4	pension sharing orders	ss.21A, 24B
Part 5 para.23	ancillary relief criteria duty to consider a “clean break”	s.25 s.25A
Part 6	pension attachment orders	s.25B-D
Part 8	maintenance pending outcome	s.22
Part 9	financial provision during subsisting civil partnership	s.27
Part 10 para.46	commencement of proceedings	s.26
para.47-48	duration of periodical payments	s.28
para.49	duration of orders for children and age-limits	s.29
Part 11	variation and discharge	s.31
Part 12	arrears and repayment	ss.32, 33, 38
Part 13	consent orders and maintenance agreements	ss.33A-36
Part 14 para.74-75	freezing order, order setting aside a disposition	s.37
para.76	directions for settlement of instrument	s.30
para.77	avoidance of settlement or transfer on bankruptcy	s.39

Financial provision in practice

3.1 The most contentious problem for practitioners will be whether (and, if so, how) to treat a civil partnership in the same way as marriage. Is it a straightforward matter of discrimination?

- (a) Where is the discrimination? - both parties will be of the same sex and sexual orientation: and one of them may be asking the court not to apply the normal practice on ancillary relief in marriage.
- (b) All marriages are different and are treated differently as a result – hence the wide discretion afforded by s.25 MCA 1973: discrimination (of a sort) is inherent in the regime.
- (c) If we try to compare two civil partners to a married couple, which is to be viewed as the husband and which the wife? Of course, this is an absurd question, but some people still try to understand same-sex relationships in terms of traditional heterosexual roles, which are in fact quite alien. It also points up the fact that sexual discrimination is a factor in divorce, in response to sexual discrimination in marriage and in society generally.
- (d) There are real differences in practice between civil partnerships and marriages in general. This can result in individual civil partnerships being markedly different from the norm for marriage. However, it is easy to fall into overgeneralisations and stereotypes.
- (e) The institutions of civil partnership and marriage are distinct – and indeed there are (very minor) legal differences between them.

What are the practical differences?

4.1 Civil partnership is objectively different to marriage in several obvious and important ways:

- (i) the institution is a new one: previously, the law hardly recognised same-sex relationships at all – at least for a transitional period courts will need to be sensitive to how this affects the individual couples before it;
- (ii) the parties are of the same sex, so gender discrimination and gender dynamics are not an issue;
- (iii) same-sex couples cannot conceive children together, so only one will be the biological parent of any one child, although both may have been emotionally involved in conception by donor insemination;
- (iv) there is no single internationally recognised concept of registered same-sex union.

4.2 In marriage (and heterosexual relationships more generally), the fact that one party is male and one female has particular consequences which it is easy to take for granted, but which do not always apply easily to same-sex relationships.

- (i) The expectation of having children generally leads heterosexual women to expect a degree of financial dependency on their partner. This does not apply to lesbians (let alone gay men): they are just as likely to have to support their partner in having children as vice versa; indeed, in my experience, the biological mother is likely to place more importance on her earning role than the non-biological mother does (who may be more concerned to prove herself in the parenting role).

- (ii) The traditional division of roles by gender applies just as much to gay men and women. Paradoxically, a division of roles is therefore quite alien to same-sex relationships. A gay man is no more likely to take the role of home-maker than a heterosexual man; a lesbian is no more likely to expect her partner to do so than a heterosexual woman. Home-making is likely to be shared, whatever the parties' earning roles.
- (iii) Outside the world of celebs, the role of hostess or trophy partner makes no sense for same-sex couples. Homophobia generally makes the public display of partners a financial and social disadvantage, however attractive they may be.

4.4 The institution and practice of marriage is very strongly influenced by its history. By contrast, same-sex couples have had to make it up for themselves as they go along. Because civil partnership is distinct from marriage and the registration procedure does not include any sort of exchange of vows, there is as yet no norm to govern the parties' expectations of and commitments to each other, which may therefore be quite uncertain or particular to the couple.

4.5 Thus, heterosexual couples tend to expect a high degree of economic interdependence and an obligation to contribute economically to the relationship (whether by earning or in the home). This expectation is so strong it has even spawned the myth of "common law marriage" for unmarried opposite-sex couples. However, same-sex couples have no reason to feel any such obligation unless they have made explicit commitment, such as to the mortgage, providing for children or coping with illness.

4.6 All these factors may lead to a number of practical differences:

- (i) A long period of cohabitation prior to civil partnership will be common (in marriage the average period is 27 months).
- (ii) Well-established and defined financial arrangements are common - e.g. cohabitation agreements, deeds of trust, wills, "living wills", explicitly joint and separate accounts and property. (Even so, many same-sex couples will still put their trust in each other rather than such explicit legal arrangements.)
- (iii) Many elderly couples will form a civil partnership in order to avoid inheritance tax or to benefit from civil service widow(er)'s pension. They may well not expect their separate finances to be affected. Indeed, some may even maintain separate homes.
- (iv) The idea of equal sharing of assets accruing during the relationship may well come as a shock – but then it still does to some husbands and wives. Equally, the idea that each has a duty to contribute in money or money's worth to the relationship may seem very odd to the parties.
- (v) If one party does not earn or earns less than the other, it should not be assumed that they have taken on the primary home-making or child-caring role (although a biological parent may well be more likely to be a primary carer for the child). They may simply prefer to earn less and have more free time.

4.7 Courts are likely to be unsure – at least initially – of what commitments this new institution should entail and what is "fair" upon dissolution. This may lead them to be more conservative in the awards they make, notwithstanding Lord Nicholls' observation in *Miller/McFarlane* that it is not a question of taking from one party, but

of giving each their due. It may also lead courts to be more deferential to the expectations and understanding of the parties when they registered.

The immediate legal issues

5.1 *The duration of the union* should probably include the period of cohabitation prior to registration in the same cases as for marriage. Some commentators have argued that this should not date back before December 2005 when the law first allowed registrations, to avoid retrospective effect. But is there in fact any retrospective effect? – cohabitants will not be saddled with financial obligations to each other unless they actually take the step of registration. Indeed, their inability to register earlier would make it more difficult to argue that registration reflected any change in the essential nature of the relationship.

This issue will be particularly important in applications under the Inheritance Act 1975, where the court must have regard to what might have been awarded upon dissolution. In such cases, it would be very difficult to resist taking years, in some cases decades, of cohabitation into account.

5.2 The issue of *maintenance* in civil partnerships challenges existing gender stereotypes. After a marriage, it is rare for a man to receive spousal maintenance or for a woman to pay it. It may therefore seem odd to award maintenance between parties of the same sex. Moreover, in practice maintenance after marriage alleviates some of gender pay-gap: but this gap does not apply as between civil partners. A court may also feel unsure of the extent to which civil partnership even creates a duty of maintenance: there are no vows of mutual support in a civil partnership ceremony, unless the parties choose to include them.

5.3 The courts may be more ready to depart from the *yardstick of equality*. Some of the bases of this rule may not apply quite as readily to same-sex unions as to marriages:

- judicial and social expectations of what is fair in marriage;
- marriage as an economic partnership;
- the non-commensurability of domestic and earning roles;
- gender inequality.

However, equal sharing is still the most practical solution for the courts, who cannot be expected to weigh up the minutiae of a couple's life together. Even so, civil partnership may give rise to some particular reasons for departure:

- (i) Where the couple maintained partly or wholly separate finances (following Baroness Hale and Lord Mance's judgments in *Miller/McFarlane*), particularly where this reflects long-standing arrangements during prior cohabitation. This would incidentally mitigate the effect of including the period of prior cohabitation as part of the duration of the civil partnership.
- (ii) Initially, at least, a court may also be persuaded by a party's complaint that they never signed up to "marriage" as such and that their expectations of dissolution were never of financial equality. (Note, this is not the same thing as the "legitimate expectations" of marriage which were held irrelevant in

Miller/McFarlane.) In *Lambert v Lambert* [2003] Fam 103, it was held the parties' sense of fairness is not relevant, but the court may be less sure of its own sense of fairness in civil partnerships until it has more experience of such cases.

- (iii) In the absence of children, a court may well be suspicious of the stay-at-home civil partner: Why didn't he (or she) work? Was this an "obvious and gross" failure to contribute to the welfare of the family? However, it is not clear why the wife who merely presides over the home – if she really exists – should be treated any differently.

5.4 "Pre-nuptial" agreements are likely to have the same legal status as in marriage, as the same public policy reasons would seem to apply to a similar degree: the jurisdiction of the courts should not be ousted; it is in the public interest for spouses to receive appropriate provision; contracts providing for divorce undermine the institution of marriage. If some of these public policy reasons might seem to have less weight when applied to the new institution of civil partnership, this probably reflects the weakness of the rule in modern conditions, rather than any difference between marriage and civil partnership.

Even so, there are several reasons to think that in practice "pre-nups" will have greater weight for civil partners. The court is more likely to have regard to them where there are no children or where neither party's economic position has been prejudiced by the relationship. There is less likely to be an imbalance of bargaining power when both parties are of the same sex (although, why have a pre-nup unless one party is much richer than the other?) The court may be more willing to defer to the parties' own view of what is fair for them, as expressed in their pre-nup, particularly if it reflects settled arrangements over years of prior cohabitation. Certainly, many commentators expect civil partnership cases to be at the forefront of reconciling the courts to pre-nups.

5.5 As between civil partners, *child support* will almost always be a matter for the court. The practitioner can be faced with a wide variety of circumstances:

- (a) The CSA only has jurisdiction as against a biological parent who does not have residence.
- (b) If the child is a child of the family, the biological parent and his/her civil partner will be liable to each other under the CPA 2004 (and Sch.1 CA 1989).
- (c) The step-parent's liability may be limited by:
 - (i) the extent she was involved in the conception and upbringing of the child; and
 - (ii) whether the other biological parent is also liable – but this may be unfair where the latter was a known donor and the insemination was a joint decision by both mothers.
- (d) A parent (or step-parent for whom the child is/was a child of the family) may also be liable under Sch.1 to any other parent (or step parent for whom the child is a child of the family) or person with residence. This will particularly apply to shared care arrangements, where the child lives with or is cared for by both sets of parents.

- (e) The civil partner of a parent/donor who does not have care will not be liable for child support. However, the donor's liability for his child is obviously still a factor in the ancillary relief.

5.6 *Foreign unions* also raise particular difficulties. The criteria for recognition are very generous. Thus, a French PACS (a form of cohabitation registered by a notary) between two people of the same sex is recognised as a civil partnership. In French law it does not generally create financial obligations between the parties. However, if one party is able to meet the jurisdictional criteria for a dissolution in England or for financial relief following a foreign dissolution, English ancillary relief rules will apply. The court, however, may be able to depart from its normal practice and take into account French rules, following *A v T (Ancillary relief: cultural factors)* [2004] 1 FLR 977.

General principles

6.1 Perhaps surprisingly, there is no explicit statutory bar on discrimination. Although the powers of the court are essentially the same under the CPA 2004 and the MCA 1973, no provision says they are the same. CPA s 72 says they “correspond” to the powers on marriage and CPA Schs 5-7 recast the powers in new language and a somewhat different order. Nor does any provision require the courts to exercise the powers in the same way. The CPA contains no anti-discrimination provision (except with regard to employment).

6.2 Whilst Article 14 of the ECHR forbids discrimination on the grounds of sexual orientation, in *M v Secretary of State for Work and Pensions* [2006] 2 WLR 637 the House of Lords held that the ECHR was not engaged with respect to family financial orders. Potter P in *Wilkinson & Kitzinger v A-G* [2006] EWHC 2022 (Fam) at para.88 even commented that “the CPA is a measure which is not concerned with the privacy or family life of such couples as such” (perhaps a surprising observation, given that it creates a web of step-relations and in-laws). In any case, it might even be argued that the Article 8 requirement of “respect for family life” involves different treatment depending on different circumstances: that there is a positive duty of differentiation in the individual case.

6.3 Equally, there is no explicit statutory sanction for the court to use its powers differently between marriage and civil partnership in general.

6.4 Is there then anything in the legal nature of civil partnership to justify different treatment? Civil partnership may be a statutory clone of marriage, but it is clearly a distinct institution from marriage. The essential distinction is that civil partners must be of the same sex and spouses of the opposite sex. Some commentators have also pointed to the lack of any explicit statutory reference to any religious or sexual basis for civil partnership as making it essentially different. But English civil partnership is surely closer to English marriage than many foreign forms of marriage: it is exclusive and indeterminate, but allows for dissolution by the court.

6.5 But even if the two institutions are different in nature, that is no reason for different application of equivalent rules. It is difficult to see how any difference in application of financial rules can bear any relationship to any perceived differences

between the institutions. Even if civil partnership were seen as inferior in some way, why should that mean an ex-civil partner should pay or receive more or less than an ex-spouse in similar financial circumstances?

6.6 In any case, civil partnership should not be seen as in any way an inferior institution to marriage, according to Potter P in *Wilkinson & Kitzinger*, where he decided that making civil partnership a distinct institution from marriage was not a breach of the ECHR. Indeed the Government, in that case, argued that “the financial and other material rights created in civil partners under the CPA are essentially equivalent to those of married persons”. To discriminate in the application of those rights might erode the basis for the judgment in that case and re-open the case for same-sex marriage.

6.7 Even if there is nothing in the legal nature of civil partnership to justify different treatment, are same-sex relationships so different in practice from opposite-sex relationships that different rules are in fairness required? In reality, marriage itself covers a wide range of different circumstances. Civil partnership probably covers much the same range, although probably with a different pattern of frequencies (e.g. probably fewer male couples have children; probably more same-sex couples have dual careers). Ideally, the same rules should be applied, but tailored to the individual circumstances of the couple, not to their sexuality per se. The question is, are the rules which have grown up to deal with marriage flexible enough to be fair in civil partnership?

6.8 Perhaps the strongest considerations for the courts will be the practical ones, and generally these tend to point to treating civil partnerships as if they were marriages:

- (i) Ancillary relief is uncertain enough in marriage. It is currently even more difficult to advise civil partners what to expect, making the process longer and more expensive for them. The sooner clear, explicit principles are established, the better. If the case law on marriage is directly applied to civil partnerships, this process will much quicker and simpler.
- (ii) It will generally be to the advantage of one party to a dissolution to stress (or even exaggerate) any differences in their civil partnership from general notions of marriage. But in reality, civil partnerships are unlikely to be very different in general from marriages. Courts should be sceptical, although they do need to be sensitive to difference where it is clearly established.
- (iii) Distinctions made in an individual reported case will tend to be generalised in future cases. This creates a danger of general differences in treatment from marriage and hence of discrimination.
- (iv) Conversely, differences established for civil partners may affect later cases in marriage. This may not always be a bad thing: some of the implicit notions behind the current ancillary relief rules may be made explicit and tested. Is the yardstick of equality always fair? Should women pay maintenance? Should pre-nups be enforced?

Conclusion

All new pieces of legislation take time to bed in. As yet there is no case-law to guide us. This makes it both a frustrating and an exciting time for practitioners. It can also

make settlement more difficult. Lawyers acting for the wealthier party should certainly be putting the case for treating civil partnerships in a different way from marriage. The consequent litigation risk alone can reduce quantum in settlements. However, few litigants will have the desire or resources to test the issues in court. They involve quite fundamental questions about the nature of discrimination, which could be very expensive and time-consuming to resolve.

However practitioners treat these matters, they should resist facile comparisons between the economically weaker partner and a wife. Both common sense and the CPA 2004 agree: a man cannot be a “wife” and a woman cannot be a “husband”.

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