FLBA Autumn Lecture 13.11.14

Same sex couples - now with added marriage

Status, Domicile and Separation – Gerald Wilson

Status

MSSCA 2013 does not create a new status of "same sex marriage" [1] (SSM). It extends the existing institution of marriage to same sex couples:

s.1 *The marriage of same sex couples is lawful.*

s.11(1) *In the law of England and Wales, marriage has the same effect in relation to same sex couples as it has in relation to opposite sex couples.* [2]

The same statutes govern marriage, regardless of the sexes of the parties: eg the Marriage Act 1949, MCA 1973, etc, although these have been amended by the MSSCA re formation and validity.

By contrast, civil partnership is a distinct institution and status from marriage, although the practical effect is almost identical. CP is governed by a separate statute (the CPA 2004) which reprises matrimonial law in a single code.

The CPA introduced CP across the UK (ie England, Wales, Scotland and NI) but not to the rest of the British Islands or Crown Dependencies. Since then, Eire (1.1.11), Isle of Man (6.4.11), Jersey (2.4.12) and Gibraltar (28.3.14 – also extending to opposite sex couples) have followed suit.

The MSSCA relates to marriage in E&W only [3] (and to cross-border recognition). Its main provisions came into effect on 13.3.14. Those for SSMs solemnized by UK authorities overseas came into effect on 3.6.14. Conversion of CPs to marriage under s.9 is due to be brought into effect in December 2014. Scotland followed suit with the Marriage and Civil Partnership (Scotland) Act, which received Royal Assent on 12.3.14. It is being brought into force over the course of this year.

[1] *pace* the Archbishop of Canterbury in the debate in the House of Lords:

The result is confusion. Marriage is abolished, redefined and recreated, being different and unequal for different categories. The new marriage of the Bill is an awkward shape, with same-gender and different-gender categories scrunched into it, neither fitting well.

[2] This is subject to minor qualifications - see particularly Sch.4

[3] MSSCA s.20(1)

A CP registered in E&W [4] can be converted to a marriage under MSSCA s.9 as from 10.12.14. This is in essence an administrative and purely civil procedure, by signing a declaration in front of a Superintendent Registrar (the fee of £45 will be waived for pre-MSSCA CPs converted before 10.12.15), although it can be combined with a separate ceremony if the couple prefer. The effect is set out in s.9(6):

(6) *Where a civil partnership is converted into a marriage under this section—*

(a) *the civil partnership ends on the conversion, and*

(b) *the resulting marriage is to be treated as having subsisted since the date the civil partnership was formed.* [5]

Forms and grounds of termination

The forms of termination for CP are equivalent to those for marriage, but some terms are different:

Marriage		CP
divorce	=	dissolution
judicial separation	=	separation order
decree nisi	=	conditional order
decree absolute	=	final order
divorced	=	?
widow / widower	=	surviving CP

Some of the grounds also differ:

Non-consummation only applies to opposite sex marriage (OSM). [6] It is disapplied re SSM by MSSCA, Sch.4, para.4, amending MCA 1973, s.12 (grounds on which a marriage is voidable). It has never applied to CPs.

Adultery is not a ground of dissolution in CP. It is a ground of divorce for both OSM and SSM, but MSSCA, Sch.4, para.3 amends the MCA 1973 to insert a new s.1(6):

Only conduct between the respondent and a person of the opposite sex may constitute adultery for the purpose of this section.

Venereal disease in a communicable form is a ground for annulment of marriage (whether OSM or SSM), but not CP.

Being of the same sex is no longer a ground of nullity in marriage: s.11(c) MCA 1973 is abolished. However, any SSM solemnized in accordance with the rites of the CoE (which includes the Church

[4] or an E&W CP registered overseas

[5] CPA s.1(3) is amended to like effect.

[6] Consummation continues to refer to a specific heterosexual act. NB Wilful refusal to consummate first became a ground of nullity under the Matrimonial Causes Act 1937, to some opposition from the Church, which considered it akin to divorce.

in Wales) is void – s.25(3), (4) Marriage Act 1949. There are also special statutory requirements for the religious solemnization of SSM. Failure to obtain the necessary consents from the relevant governing authority of the religious organisation concerned renders a SSM void where the parties were aware of the defect – s.49A Marriage Act 1949 inserted by MSSCA 2013, Sch. 7, para.15. The effect of non-compliance with the other formalities of marriage (both OSMs and SSMs) is governed by ss.48 and 49.

Being of the opposite sex continues to render a CP void. The review required by MSSCA s.15 has firmly recommended no change. The challenge mounted in *Ferguson v UK* was dismissed by the ECHR as inadmissible.

A CP cannot change sex whilst remaining a CP. However, the CP can be converted to marriage under MSSCA s.9 instead of the more cumbersome procedure under CPA Sch.3. However, a married person may not change sex without his/her spouse's consent [7] (or get divorced). This also applies to a marriage which was converted from a CP during the process of applying for a gender recognition certificate.

Validity and Recognition

The validity of CPs formed in the UK is not affected by the domicile of the parties. As with marriage, eligibility to form a CP – eg age and affinity - depends on the part of the UK where the CP was formed (CPA s.3 for E&W; s.86 for Scotland; s.138 for NI). [8] There is a minimal residence requirement in E&W (CPA s.8(1) requires 7 days residence in E&W prior to giving notice to the registrar, and there is then a further wait of 15 days before the CP can be registered), but none in Scotland. There are also restrictions on persons subject to immigration control, mirroring those for marriage. However, "sham" CPs, like "sham" marriages, [9] otherwise remain valid.

UK CPs can be formed overseas in like circumstances to marriages (ie armed forces marriages under Part V of the Marriage Act 1949; and consular marriages). In respect of consular CPs and SSMs, the authorities locally must not object – CPA s.210; MSSCA Sch.6, para.1.

E&W SSMs are to be treated as CPs for the purposes of NI law – MSSCA Sch.2, para.2 (provision is made to make exceptions by SI). A dissolution, etc in NI of the deemed CP will have corresponding effect in relation to the SSM – *ibid*. para.4.

SSMs are currently available in: Argentina, Belgium, Brazil, Canada, Denmark (not Greenland or Faroes), France, Iceland, Luxembourg, Mexico (some states), Netherlands, NZ, Norway, Portugal, SA, Spain, Sweden, US (some states and tribes, currently in flux), Uruguay. Most of these also retain civil unions as well. Israel has no mechanism to solemnize SSMs but affords some recognition to SSMs contacted abroad.

Other same sex unions may be registered in: Andorra, Australia (most states), Austria, Columbia, Croatia, Czech Rep, Ecuador, Eire, Finland, Germany, Gibraltar, Greenland, Hungary, IoM, Jersey,

[7] Gender Recognition Act 2004, s.4A inserted by MSSCA Sch.5, Part 1

[8] ie *lex loci celebrationis* applies to questions of capacity, rather than the law of domicile

[9] ie where the parties intend only to acquire the legal status of marriage or CP. See *Vervaeke (formerly Messina) v Smith* [1983] 1 AC 145

Liechtenstein, Malta, Mexico (some states), NI, Slovenia, Switzerland, US (some states), Venezuela (Merida only).

Foreign same sex unions ("overseas relationships") are recognised as CPs under the CPA s.215.[10] There are two categories:

- Those specified in CPA Sch.20 (last updated by SI 2012/2976) are automatically recognised. Whilst this includes unions which are also be open to opposite sex couples, only same sex unions are recognised as CPs – CPA s.216. Some of the specified unions (eg the French PACS) have a markedly different character to CPs, eg without the financial consequences.
- Any other same sex union which has been registered with a responsible authority in a country or territory outside the UK – s.212(b), and which meets the general conditions in s.214:
  (a) neither party is in a subsisting marriage, CP or equivalent relationship;
  (b) the relationship is of indeterminate duration;
  (c) the effect is that they are treated as a couple (either generally or for specific purposes) or as married.

CPA s.216 confirms that the parties must have been of the same sex in English law at the time the union was formed.

Validity is determined by local law, subject to two exceptions:

- If one of the parties was domiciled in the UK at the time of registration, the parties must have both been over 16 and outside the prohibited degrees applying in E&W, Scotland or NI (as appropriate) – s.217.
- If it is manifestly contrary to public policy to recognise the capacity of either party to enter into the relationship – s.218.

Foreign SSMs are now recognised in E&W as marriages (and no longer as CPs) – MSSCA s.10. Previously, they could not be recognised as marriages in common law on the basis that this would be "offensive to the conscience of the English court". [11] CPA s.213 has been amended to exclude foreign marriages from the definition of overseas relationships – MSSCA Sch.2, para.5. CPA Sch.20 awaits amendment, although the continued inclusion of foreign marriages in the list will not affect their status as marriages and not CPs in English law.

The validity of SSMs may be subject to the Dual Domicile Rule (DDR): [12] for the purposes of English law, the formal validity of a marriage (wherever celebrated) is determined by local law, but capacity is determined by the law of the ante-nuptial domicile of the parties, rather than local law. This has two distinct effects, depending on whether the marriage takes place in E&W (after the MSSCA) or elsewhere:

[10] Where the overseas relationship was terminated prior to 5.12.05 (when the CPA came into effect), it will only be treated as a CP for the purposes of obtaining financial relief in the UK under Sch.7 after dissolution, annulment or JS overseas and for such other provisions as may be set out in subordinate legislation under s. 259.

[11] *Cheni (otherwise Rodriguez) v Cheni* [1965] P85.

[12] Rules 73 and 74 Dicey, Morris and Collins *The Conflict of Laws* (15th Ed)

in E&W: eg where the SSM is contracted in E&W after the MSSCA by a person whose law of domicile does not allow SSM (eg currently NI, the CI, Eire, Italy, Russia, much of the US, etc).
However, where one party is of E&W domicile, the English law of capacity applies,[13] so the marriage will be valid.

elsewhere: eg an English domicile contracting a marriage in Canada prior to the MSSCA - *Wilkinson v Kitzinger (No 2)* [2006] EWHC 2022 (Fam) confirmed that the rule continued to apply.[14] In relation to English domiciles, this only affects SSMs before 13.3.14, although it may continue to affect other domiciles.

This may be mitigated where the parties have acquired a domicile of choice in a SSM-jurisdiction. Proof of change of domicile is upon the person asserting the same, but a court may be more ready to credit a change of domicile in such cases – see eg *Re G and M* [2014] EWHC 1561 (Fam) in the context of a French same sex couple seeking a parental order in the UK.[15]

MSSCA s.11(1) is ambiguous as to whether it incorporates or excludes the DDR. If it is incorporated, the same law applies to SSM and OSM, but the practical effect is very different: the DDR cannot operate to invalidate a marriage on the grounds that it is an OSM (as that would be contrary to the definition of marriage). If it is excluded, the effect of the law is the same for both SSM and OSM, but arguably the law itself is different.

The DDR would also create several curious problems, eg:

- The marriage in *Wilkinson v Kitzinger* may no longer be recognised as either a CP or a marriage.
- If a couple convert their CP to a marriage under s.9, the CP ends – s.9(6). If they are non-SSM domicile(s), is the marriage or the conversion void?
- If NI domiciles marry in E&W, will it be valid as a CP in NI and/or a marriage in E&W, (given that a valid E&W marriage will be treated as a CP is NI, and the parties have capacity in NI law to register a CP) or a complete nullity?

More importantly, it creates great uncertainty for the large number of gay men and lesbians in E&W (especially London) who are of non-SSM domicile. Where certainty of status is vital (eg immigration), it may be necessary to advise the parties to enter into a CP rather than a marriage.

There are a number of potential solutions:

[13] See *Sottomayor v De Barros (No.1)* (1877) LR 3 PD1 and *(No.2)* (1879) LR 5 PD1, where an English and a Portuguese domicile married in England. They were cousins within the prohibited degrees in Portuguese law, but not in English law. Had they both been of Portuguese domicile the marriage would have been invalid.

[14] See *Brook v Brook* (1861) 9 HLC 193, where an English couple married in Denmark, but the marriage was invalid as they were within the prohibited degrees in English law.

[15] Theis J also held *obiter* that the couple's marriage in Iowa on 15.4.13 was valid under s.10(1)(b). However she did not expressly consider the effect of domicile in relation to that marriage. The marriage took place at a time when neither the UK nor France permitted SSMs.

(i) If the DDR invalidates SSMs, it discriminates in practice on the grounds of sexual orientation. [16] This is a breach of Art.14 ECHR [17] on a ground that requires cogent justification. [18] The justification here would be respect for the rights of other jurisdictions to determine whether their domiciles may marry. However, many other jurisdictions do not recognize our SSMs, so reciprocity is not an important factor here. If the breach is not justified, the DDR can simply be redefined so as not to apply to any qualification based on the sex on the parties.

(ii) Arguably, the DDR does not so apply anyway, as the sex of the parties is more a matter of definition than capacity: see past editions of *Rayden*, which consider SSM as no marriage at all. However, that would appear to contradict both s.11(c) MCA 1973, which held SSMs void, and *Wilkinson v Kitzinger.*

(iii) MSSCA, s.10 (Extra-territorial matters) provides:

> (1) *A marriage under—*
>
> (a) *the law of any part of the United Kingdom (other than England and Wales), or*
>
> (b) *the law of any country or territory outside the United Kingdom,*
>
> *is not prevented from being recognised under the law of England and Wales only because it is the marriage of a same sex couple.*
>
> (2) *For the purposes of this section it is irrelevant whether the law of a particular part of the United Kingdom, or a particular country or territory outside the United Kingdom—*
>
> (a) *already provides for marriage of same sex couples at the time when this section comes into force, or*
>
> (b) *provides for marriage of same sex couples from a later time.*

However, this section does not apply to marriages contracted in E&W.

(iv) There is a public policy exception to the DDR. This has been used to ignore disability based on eg religion. It appears unlikely to apply to a rule against SSM, unless the MSSCA is to be treated as a Damascene conversion and the law of NI and Jersey as contrary to English public policy.

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[16] This is because no jurisdiction bars OSMs, so the DDR does not operate to invalidate them. Even if this were not the case, its operation would be a clear breach of Art.12 (right to marry).

[17] Art. 8 (right to private life) and probably also Art.8 (right to family life) and Art.12 (right to marry) are engaged, so Art.14 is justiciable here.

[18] *Salgueiro da Silva Mouta v Portugal* [2001] 1 FCR 652, ECtHR. The State's margin of appreciation is narrow – *Kozak v Poland* (2010) (Application No.13102/02). The justification cannot be based on sexual orientation itself – *EB v France* (2008) 47 EHRR 509. However, the State may restrict marriage to opposite sex couples – *Schalk and Kopf v Austria* (2011) 53 EHRR 20; but not other registered unions – *Vallianatos and others v Greece* (Application No.29381/09). Once the State opens marriage to same sex couples, it appears likely that Art.14 then applies in full.

Jurisdiction

The Domicile and Matrimonial Proceedings Act 1973, s.5 provides two bases for jurisdiction in E&W re divorce, nullity and JS:

(i) Brussels II;

(ii) where no court has jurisdiction under Brussels II, and either party is domiciled in E&W when the proceedings are begun.[19]

Whilst Brussels II covers jurisdiction re OSM, it is not clear that it extends to SSM (UK legislation is not capable of changing the definition of marriage in EC law). It does not extend to CP or other civil unions. The CPA and MSSCA provide parallel bases for jurisdiction: [20]

(i) equivalent grounds to Brussels II,* save that there is no "first to issue" rule as under Art.19, so *forum conveniens* applies;

(ii) where "no court has, or is recognised as having, jurisdiction" under the Regulations,** and:

(a) either party is domiciled in E&W when the proceedings are begun;[12]

or (b) the CP or SSM was formed in E&W and it is in the interests of justice for the court to assume jurisdiction.[21]

* The Brussels II-type grounds are set out in the Civil Partnership (Jurisdiction and Recognition of Judgments) Regs 2005, reg.4 and the Marriage (Same Sex Couples)(Jurisdiction and Recognition of Judgments) Regs 2014, reg.2:

(a) both habitually resident in E&W

(b) both last habitually resident in E&W and one continues to reside here

(c) R habitually resident in E&W

(d) P habitually resident in E&W and resident here for the year preceding the petition

(e) P is domiciled and habitually resident in E&W and resident here for 6m preceding the petition

(f) both domiciled in E&W (this does not apply to CPs)

** Unlike Brussels II, the Regulations do not provide for other states to have jurisdiction. However, they provide instead for the recognition of EU[22] judgments for divorce/dissolution, nullity and separation of SSMs and CPs. Recognition is automatic, "without any special formalities", as under Brussels II Art.21, but subject to exceptions corresponding to those in Art.22.[23]

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[19] In the case of a petition for nullity following the death of a party, there is an additional ground, where the deceased died domiciled in E&W or habitually resident in E&W for the preceding year

[20] CPA, s.221; DMPA, Sch A1, para.2, inserted by MSSCA, Sch.4, part 4.

[21] This additional ground is to cover the case where the parties are or end up domiciled and resident in jurisdictions which do not recognise their CP or SSM and so will not entertain proceedings. See the recent refusal of the Supreme Court in Nebraska in the case of *Nichols* to permit a divorce re a SSM contracted in Iowa. A similar application (*Shaw*) is pending in Florida re a SSM contracted in Massachusetts.

[22] The CP Regs, Reg.6 lists the individual states (which include Denmark). The SSM Regs, Reg.3 refers to "a member state of the EU other than the UK." Scotland is not included (for now).

[23] There is also particular provision in both Regs for a judgment obtained otherwise than by means of proceedings, which may be refused recognition if there is no official document certifying it is effective in local law or, where either party was domiciled elsewhere when the judgment was obtained, there is no such certificate that the judgment is recognised as valid in the law of that domicile.

Do the Regs thereby recognise the jurisdiction of other states to be seized in such cases, prior to any actual judgment (which would limit the additional grounds of jurisdiction in E&W)? Such recognition would appear to be implied. However, both the CP and MSSC Regs provide that the English court may not review the jurisdictional basis of the foreign judgment. In addition, many EU states do not recognise CPs or SSMs, and so do not accept they have jurisdiction in such cases – until there is a foreign judgment, the Regs do not assist in sorting out which states have or do not have jurisidiction.

MCA 1973, s.19 governs jurisdiction to make presumption of death orders in respect of OSMs. This will be replaced by the Presumption of Death Act 2013, s.1, when it comes into force. Jurisdiction thereunder is supplemented by CPA s.222 and DMPA Sch.A1, para.3 and 10 inserted by MSSCA Sch.4, Part 4.

Declarations of validity re OSMs and SSMs are made under FLA 1986, s.55; re CPs under CPA s.58. The same grounds of jurisdiction apply in all cases, save that there is an additional ground for CPs and SSMs, where the union was formed in E&W and it appears to the court to be in the interests of justice to assume jurisdiction in the case.[24]

Applications for financial relief following an overseas divorce, nullity or JS are governed by MFPA 1984, Part III. This applies equally to OSMs and SSMs. Corresponding provisions apply to CPs under CPA Sch.7. Relief is not available if either party has formed a later marriage or CP prior to the application.[25] The jurisdictional and leave requirements are the same for all.[26]

Financial Remedies and Orders

The powers of the courts are the same for marriage and CP. In the only appellate decision, *Lawrence v Gallagher* [2012] EWCA Civ 394, LJ Thorpe described them as identical. *Wilkinson v Kitzinger* held that CP afforded equivalent rights to those in marriage and to be a parallel institution equivalent in status: so the fact that it is a CP is no reason for the court to apply its powers differently. It should be clear that the principles developed for OSM will apply equally to CP and SSM.

This does not mean that outcomes should be modelled on the nearest equivalent OSM. The focus of financial remedies is fairness as between the parties, not an attempt to treat same-sex couples the same as opposite-sex couples (NB the CPA and MSSCA do not include any express provision requiring equal treatment with OSMs or forbidding discrimination). The outcome has to fit the particular circumstances of the individuals: in particular, the following can be important factors:

sex – this can affect the court's assessment of needs and its expectations as to earning capacity and the reasonableness of a return to full-time work

[24] CPA s.224(b); DMPA Sch.A1, para.4 inserted by MSSCA Sch.4, Part 4

[25] MFPA s.12(2); CPA Sch.7, para.3.

[26] Jurisdiction: MFPA s.15; CPA Sch.7, para.7. Leave: MFPA ss.12 and 16; CPA Sch.7, paras.4 and 8.

gender-dynamic – opposite-sex couples commonly prioritise the husband's career, often because of children or the expectation of having children, but sometimes simply because of gender norms: this is a major cause of relationship-generated disadvantage

children – it remains very rare for male couples to bring up children together; most female couples have children from previous relationships

age difference – this commonly results in one party having (and having brought in) most of the resources, but also having the greater needs (because of the imminence of retirement)

Child support

The CSA only applies as against a legal parent (not a step-parent or a purely genetic parent) who does not have primary residence. In other cases, provision may be made under the MCA, CPA or Sch.1 CA.

In addition to financial provision upon divorce, etc, CA 1989, Sch.1, para.16 has an extended definition of "parent":

(2) *In this Schedule, except paragraphs 2 and 15, "parent" includes—*

(a) *any party to a marriage (whether or not subsisting) in relation to whom the child concerned is a child of the family, and*

(b) *any civil partner in a civil partnership (whether or not subsisting) in relation to whom the child concerned is a child of the family;*

and for this purpose any reference to either parent or both parents shall be read as a reference to any parent of his and to all of his parents.

This means that where two married/CP couples bring up children together (eg a male couple and a female couple), an application may be made by one couple against both members of the other couple (not just against the legal parent).[27]

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November 2014

[27] See *T v B* [2010] EWHC 144 (Fam), where a claim by the genetic mother against the non-genetic mother failed because they were not CPs.

Residual Inequality, Capacity and Children
Martin Downs

Pension and Inheritance Rights

1. MSSCA 2013 Schedule 4 Part 1 provides that the meaning of a will (or other private instrument, such as a deed settlement) executed before the MSSCA 2013 (strictly speaking section 11) came into effect – will not change thereafter.

2. Accordingly, a reference to a spouse before that date will mean a souse of the opposite sex. For private legal instruments executed thereafter, a reference to a spouse is likely to include a spouse of the same sex – unless the context shows otherwise.

3. The Civil Partnership Act 2004 made less favourable treatment on grounds of civil partnership unlawful in the field of employment and occupation.

4. There was in any event an argument based on sexual orientation discrimination.

5. The only exception to this is occupational pension schemes which provide survivor benefits to spouses. These must also be provided to civil partners but only in respect of rights accrued on or after 5 December 2005 – which was the date that the CPA 2004 came into force.

6. To cover this, an exception was introduced to the CPA 2004 which is currently to be found in paragraph 18(1) of Schedule 9 to the Equality Act 2010 which provides that it is not unlawful to restrict civil partners' access to benefits that accrued before 5 December 2005 (the date that the CPA 2004 came into force) or are payable in respect of service before that date.

7. MSSCA 2013 Schedule 4 Part 6 extends this restriction with the effect that same-sex married couples can be restricted from having access to survivors' benefits based on rights accrued from 5 December 2005. Provision for this is made at MSSCA 2013 Schedule 4 paragraph 17.

8. In addition, the provisions in the 2013 Act in relation to private legal instruments (examined above) means that existing pension scheme documents will not be read so as to include same-sex spouses. However, any changes to pension scheme rules from 13 March 2014 will not fall within this exemption and will be subject to the interpretation provisions in the 2013 Act.

9. This was all very controversial at the time that the legislation was going through Parliament. As a result, the government conceded that there should be a review (mandates by s. 16 of the Act).

10. The outcome of that review was published on 26 June 2014, with the conclusion that further consideration is required before any changes are made to the law.
'The review finds that reducing or eliminating the remaining differences in survivor benefits in the private sector would cost £0.4 billion, but that this cost would be concentrated in a relatively small group of schemes. Furthermore, the cost to the public service schemes would be £2.9 billion. In considering its response to this review, the Government will need to consider these costs and the potential impact on pension schemes, along with the wider consequences of making retrospective changes to scheme rules. As this review demonstrates, these are complex issues and the Government will have to consider these very carefully before making a decision on whether the law should be changed.'

11. This was also the subject of litigation in any event in litigation that was supported by Justice: *Walker v Innospec.*

12. Mr Walker worked for Innospec for 23 years and entered into a civil partnership in 2006. Innospec's pension scheme provided a pension to the spouses of deceased members. It does not provide the same pension to civil partners, except in respect of benefits accrued after the Civil Partnership Act came into force in 2005. As a result, in the event of Mr Walker's death, the Innospec scheme will pay his civil partner about 1% of the benefits it would provide to his widow, had he married a woman.

13. The Employment Tribunal had found that such a difference in treatment – which is ostensibly permitted by Paragraph 18(1) of Schedule 9 to the Equality Act 2010 – contravened EU law, in particular Directive 2000/78/EC; and held that it was possible to read paragraph 18(1) of Schedule 9 compatibly with that law so as to remove the unlawful discrimination.

14. Innospec appealed and on 12 February 2014, the EAT (the case now known as *Innospec v Walker* UKEAT/0232/13/LA) held that the Equality Act 2010 exception was compatible with the Directive. The EAT considered that it could not be asked to "legislate rather than interpret" so as to conclude that it was incompatible. To do so would be "diametrically opposed to the thrust of the legislation in this particular respect and to the apparent intention of Parliament".

15. Mr Walker has been given permission to appeal and the matter is listed before the Court of Appeal in February 2015.

Mental Incapacity and Same Sex Relations

16. Mental Capacity Act 2005 Principles s.1
    (i) Section1 including the presumption of capacity (with all practicable steps to assist)
    (ii) Capacity is not to be equated with wisdom
    (iii) Best interests
    (iv) Proportionality

17. Incapacity defined in sections 2 & 3
    2 (1) refers to lack of capacity in relation to a matter and inability to make a decision for himself in relation to a matter
    3 (1) – (4) concerns decisions

    s. 16 powers: personal welfare

    "Extend in particular to…"

    S 27 (1) Nothing in this Act permits a decision on any of the following matters to be made on behalf of a person

    (a) Consenting to marriage or civil partnership
    (b) Consenting to have sexual relations
    …

    (h) giving a consent under the Human Fertilisation and Embryology Act 1990"

18. The starting position is that the common law tests survived the coming into force of the Act (initially)

    MCA Code 2008 # 4.32

    RT v A Local Authority [2010] EWHC 1910 (Fam) Para 51

    Marriage: Sheffield City Council v E [2005] 1 FLR 965 Munby J

    in *PC & NC v City of York* [2013] EWCA Civ 478 para [22]

19. The modern approach is to be found in the Judgment of Munby J (as then) in Re E (an alleged patient); Sheffield City Council v E [2005] 1 FLR 965

    This approach was supported by the Court of Appeal in *PC & NC v City of York* [2013] EWCA Civ 478 para [22]

20. In *XCC v AA; BB; CC; & DD* [2012] EWHC 2183 Parker J at para 30 said,

"In my view a marriage with an incapacitated person who is unable to consent is a forced marriage within the meaning of the Forced Marriage Act 2007. In my earlier judgment I said:

> "[185] In this case the family does not perceive DD to have been "forced" because there was no threat or physical or emotional coercion. In this context it must be made clear that "Forced Marriage" is defined by the Forced Marriage (Civil Protection) Act 2007 as occurring
>
> "if another person ("B") forces A to enter into a marriage (whether with B or another person) without A's free and full consent"; and by section 1 (6) "force" includes "coercion by threats or other psychological means"."
>
> "[186] "Force" in the context of a person who lacks capacity must include inducing or arranging for a person who lacks capacity to undergo a ceremony of marriage, even if no compulsion or coercion is required as it would be with a person with capacity."

Sex and Marriage

21. In X City Council v MB, NB; and MAB [2006] EWHC 168 Munby J [at paragraph 60 - 62] acknowledged that this overlooks the sexual relationship which he said was generally implicit in marriage - while noting it was not vital. He added that marriage also requires respect by each party of the right of the other to choose whether or not to engage in any and if so what sexual activity (against a backdrop that the refusal of a sexual relationship may, in certain circumstances, entitle the other spouse to a decree of nullity of divorce].

22. The relationship between marriage and sex was stressed in *A Local Authority v H* [2012] EWHC 49 where Hedley J said [para 33],

    "for so long as marriage requires sexual intercourse for its consummation, it must follow that the person who lacks capacity to consent to sexual relations (as H does) must lack capacity to marry. It is enough to state that."

    This, of course, does not apply to same sex marriage.

Article 12

23. Article 12 of the European Convention states:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

24. The potential significance of this was sidestepped by Munby J in Sheffield CC v E [2004] EWHC 2808 at para 140. However, in *KC & NNC v City of Westminster & IC* [2008] EWCA 198, Wall LJ said that:

"In my judgment there is nothing to suggest that the relevant Marriage Acts and the English concept of capacity to marry offend either HRA 1998 or ECHR Article 12[28]."

- *IM v LM and others [2014] EWCA Civ 37*

"77. Going further, we accept the submission made to us to the effect that it would be totally unworkable for a local authority or the Court of Protection to conduct an assessment every time an individual over whom there was doubt about his or her capacity to consent to sexual relations showed signs of immediate interest in experiencing a sexual encounter with another person. On a pragmatic basis, if for no other reason, capacity to consent to future sexual relations can only be assessed on a general and non-specific basis.

….

79….. we hold that the approach taken in the line of first instance decisions of Munby J, Mostyn J, Hedley J and Baker J in regarding the test for capacity to consent to sexual relationships as being general and issue specific, rather than person or event specific, represents the correct approach within the terms of the MCA 2005."

25. This is broadly consistent with the approach taken in *D Borough Council v B* [2011] EWHC 101 – concerning a same sex relationship.
26. The next order questions arose in the case of *Re: TZ A Local Authority v TZ* (No. 2) COP 973 where Baker J was dealing with an adult male who was capacitous as concerns sexual relations. He identified the subsequent issues as:

"18. Accordingly, the questions arising here are:
(1) whether TZ has the capacity to make a decision whether or not an individual with whom he may wish to have sexual relations is safe, and, if not,
(2) whether he has the capacity to make a decision as to the support he requires when having contact with an individual with whom he may wish to have sexual relations."

Baker J concluded that he did not have such capacity, These sorts of issues open up potentially significant problems.

[28] Note also the Universal Declaration of Human Rights, Article 16(2) states, "Marriage shall be entered into only with the free and full consent of the intending spouses."

Children

27. The applicability of the common law presumption of parentage is another area of difference between same and different sex marriage. MSSCA 2013 Schedule 4 Part 2 states the common law position:

(1) Section 11 does not extend the common law presumption that a child born to a woman during her marriage is also the child of her husband.

(2) Accordingly, where a child is born to a woman during her marriage to another woman, that presumption is of no relevance to the question of who the child's parents are.'

However, Section 42 of the Human Fertilisation and Embryology Act 2008 (HFEA 2008) extended the presumption with respect to a woman in a civil partnership at the time of the fertility treatment to provide that '… *the other party to the civil partnership is to be treated as a parent of the child..'.*

28. Therefore, currently only women in a civil partnership have the benefit of the legal presumption of parentage.

29. Human Fertilisation and Embryology Act 2008

The Act defines who would be considered as the child parents in

a. full surrogacy arrangements – i.e. where the commission couples sperm and egg is implanted into the surrogate mother. This would have to be in a licensed clinic in the UK;
b. partial surrogacy arrangements – i.e. where the surrogate mother's egg is inseminated with the commissioning males sperm;

30. section 3 Meaning of "mother"

(1)The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.

i.e. the surrogate

31. There are two routes by which the court can secure the permanent transfer of parental responsibility from the surrogate mother to the commissioning parents (same sex or opposite sex). The first is by making a parental order under HFEA 1990, s 30 i.e. an order that the commissioning parents should be treated in law as the child's parents rather that the surrogate/ donor. The second is by adoption.

32. In order for the Court to make a parental order, certain conditions must be satisfied (s.54): -

c. There has been artificial insemination;
d. The gametes of one of the applicants has been used;
e. The applicants must be married, civil partners, an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.

f. Must apply within 6 months;

33. Application may be made for section 4 Parental orders The meaning of “father” is provided for in section 35 HFEA in this regard.

34. If a woman and man are not married when artificial insemination is used than the man would need to satisfy the fatherhood conditions which relate to consents and notice in section 37.

35. Since the 2008 Act legal parenthood is conferred on two women in a civil partnership whilst undergoing treatment so the other party will be treated as the parent to the child so long as they have consented to the treatment. If the other party has not consented the child would be treated as not having a father. See section 42 HFEA 2008.

36. If female partners are unmarried they would have to satisfy the agreed parenthood conditions for the other partner to be recognised. See section 42

37. These provisions are strictly applied: *AB v CD and the Z Fertility Clinic* [2013] EWHC 1418 (Fam). Mr Justice Cobb

> *‘Public policy*
>
> [90] I have been asked by Mr Kingerley to determine that there are public policy reasons for granting AB parental status notwithstanding the non-compliance with the statutory regime set out in the HFEA 1990 and HFEA 2008 and supporting guidance.
>
> [91] He contends that (with reference to s 58 of the Family Law Act 1986) I should indeed decline to make a declaration under s 55A as ‘to do so would manifestly be contrary to public policy'.
>
> [92] His argument is that AB, and he suggests other parents, should not be deprived of parental status simply because the procedure undertaken did not correspond strictly with the requirements of the law. He contends that the conclusion to which I am driven by the application of statute does not sufficiently recognise the Art 8 rights of same-sex couples such as AB and CD, is discriminatory, and argues further that such a declaration does not ‘consider the societal and legal developments in respect of alternative and diverse family structures'.
>
> [93] I reject these arguments. As indicated by the House of Lords in *Re R (IVF: Paternity of Child)* (see para [48](i) above) the HFEA 2008 is to be construed ‘and applied in a way that creates as much certainty as possible'; if I were to accede to Mr Kingerley's submissions I would be laying the ground for considerable uncertainty. I do not regard the provisions as discriminatory; on the contrary, the modification of the law under the HFEA 2008, and the corresponding amendments to the Children Act 1989 expanded the categories of person to whom ‘parentage' could apply.
>
> [94] I must respect the carefully crafted legislative scheme which provides statutory authority for regulating assisted reproduction. As Hale LJ said in *U,*

Mrs v Centre for Reproductive Medicine at para [24] (for the fuller quote see para [48](v) above):

'Centres, the HFEA and the courts have to respect that scheme, however great their sympathy for the plight of particular individuals caught up in it.'

[95] If there is any public policy argument engaged here, it points in favour of upholding the tightly regulated regime of assisted reproduction, not relaxing it.

Conclusion: *summary*

[96] For the reasons discussed above, I therefore conclude, on the balance of probabilities, that:

(i) The parent consent forms (WP and PP) were neither signed nor submitted to the Z Fertility Clinic prior to treatment on 4 May 2009. They were probably obtained by CD from the internet; I accept CD's evidence that she filled in part of the form on the morning of 5 May 2009 and the balance after the second procedure on 5 May 2009; only then did she hand the forms to the nurse at the clinic.

(ii) To be effective to bestow parental status on AB, the forms would have had to be submitted before the treatment.

(iii) If I were wrong about that (and I am conscious that I am trying to divine a forensic 'fact' from an imperfect set of recollections), I nonetheless am satisfied that the consent forms were completed and submitted in breach of the clinic's licence obligations in that:

(a) there was no offer of counselling to the parties on this issue;

(b) the 'consent' on the forms was not 'informed consent' as defined/discussed in the Guidance (set out above).

[97] In the circumstances, the agreement was not effectively achieved within the licensed terms of clinic; that is to say, the 'treatment' was not 'provided to W under' the strict conditions of 'that licence': s 43 HFEA 2008.

[98] Therefore I propose to make the declaration that AB is not the parent of E and F.

This might be thought to be in striking contrast to the President's treatment of time limits in the context of surrogacy in *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWFC 4.

38. <u>S v D & E [2013] EWHC 134 (Fam)</u>

MR JUSTICE BAKER considered linked applications from two men in a same sex relationship S and T. S donated his sperm to D and E (who were in a civil partnership) who became pregnant by artificial insemination at home and had F in September 2008 so before the Act was in force. There was a dispute between on the one hand what D and E said about the agreement and intention of S's involvement and what S said. Regardless, when F was born there was regular informal contact with the families socialising together. When D and E wanted a second child they approached S and a second child was born in September 2010 called G. Therefore, S was the legal father of F but not of G.

D and E introduced S and T to their friends, called X and Y (also civil partners). This time T donated his sperm to X who had a baby Z in April 2010. Again T had regular contact from birth but he was not the legal father.

‘Conclusions

134. When considering an application by a biological father for leave to apply for an order under s.8 of the Children Act 1989 in respect of a child conceived using his sperm by a woman who, at the time of her artificial insemination, was party to a civil partnership, the reforms implemented in ss 42,45 and 48 of the Human Fertilisation and Embryology Act 2008, and the policy underpinning those reforms - to put lesbian couples and their children in exactly the same legal position as other types of parent and children – are relevant factors to be taken into account by the court, alongside all other relevant considerations, including the factors identified in s.10(9) of the Children Act. In some cases, the reforms, and the policy underpinning those reforms, will be decisive. Each case is, however, fact specific, and on the facts of these cases, having considered all submissions from all parties, I find that the most important factor is the connection that each applicant was allowed by the respondents to form with the child.

135. I therefore grant leave to S and T to make applications for contact orders in respect of G and Z respectively. I refuse S leave to apply for a residence order.

136.I make it clear, however, that it does not follow that any substantive order for contact will be made in either case. Furthermore, if contact is ordered, it may well be significantly less frequent than the applicants are seeking. Decisions on whether there should be contact, and if so the frequency of that contact, will be determined applying the decisions of s.1 of the Children Act. The respondents will continue to deploy a number of the arguments that have been raised at this hearing concerning their autonomy as parents, the integrity of their family units, the risk of disruption to those units and consequential harm to the children. Those arguments are manifestly material considerations for the court in the exercise of its welfare jurisdiction.

137. Equally, the fact that leave has been granted does not lead automatically to a lengthy process of litigation. I remind the parties of the observation of Black LJ in *Re B (Paternal Grandmother: Joinder as Party)* (supra) that the court has a broad discretion to conduct the case as it considers appropriate. In some cases, a full inquiry will be directed. In other cases, the discretion will be exercised by limiting the scope of the proceedings very considerably. I shall in due course hear representations as to the scope of the proceedings in these cases.

39. JP v LP & Others [2014] EWHC 595 (Fam)

JP and LP (man and woman) were married and wanted a baby but JP had undergone a hysterectomy. They sought the help of SP who was a friend of JP to undergo a partial surrogacy arrangement. SP agreed to help and was artificially inseminated with LP’s sperm and CP was born on 1st March 2010.

The parties agreed a surrogacy arrangement which was drawn up by a firm of solicitors in Birmingham.

The marriage between JP and LP broke down within 3 months of CP’s birth and JP left the FMH with CP. JP issued for a residence order and a shared

residence order was agreed on the 15th July 2010. At that hearing JP and LP undertook to regularise CP's parental status by applying for a parental order.

JP did not apply for the parental order. The application was listed for directions in November 2010 and eventually dismissed in December 2010. The relationship between JP and LP deteriorated and JP issued for specific issue order on March 2011 with the parents undertaking to apply of the parental order and then sole residence in September 2012.
By the time the matter reached conclusion at the High Court the adults have put aside their differences and agreed on shared residence.
The parties agreed that CP should be a ward of Court with all issues of parental responsibility delegated to JP and LP.

40. Mrs Justice King:

'40. It is to be hoped that a multi-agency surrogacy protocol will soon be in place in every Health Authority in England and Wales, drafted in conjunction with their local fertility units and local authorities. Such protocols would go some way to ensuring that in informal surrogacy arrangements the welfare condition is met and the adults will be given important information and advice.

41. Outside the regulated clinics advice is hard to find; there are few firms of solicitors specialising, or even passingly knowledgeable, in the field, perhaps in part because the prohibition contained in *s2, Surrogacy Arrangements Act 1985* prohibiting the negotiating of surrogacy agreements on a commercial basis means that firms are not providing a 'surrogacy service'. Surrogacy is however becoming increasingly common and the number of applications for parental orders around the country is increasing rapidly, particularly since the amendments to the HFEA 2008 now allow same sex and co-habiting opposite-sex couples (but not single people), to apply for parental orders. (s54 (2)).

42. In CP's case, not only did the first firm of solicitors draft an illegal surrogacy agreement, but once Children Act proceedings commenced no one knew, (or checked), the time limits relating to parental orders.

43. The application for and granting of parental orders whist not "routine" is no longer the exclusive province of lawyers specialising in reproduction and human embryology law. An understanding of, and ability to make a proper application complying with the provisions of the HFEA 2008, should be as much a part of the skills set of a competent general family practitioner as is a step parent adoption.'

41. *MA v RS (Contact: Parenting Roles)* [2011] EWHC 2455 (Fam) [2012] 1 FLR 1056. Hedley J.

Facts:
Two children now 10 and 6
[8] The adults in this case are intelligent professional people. The first applicant, who is aged 50, is the biological father of both girls and holds parental responsibility by virtue of the order made in these proceedings on 21 March 2011. The second applicant, who is aged 41, is the first applicant's partner of some 20 years standing. The first respondent, who is aged 45, is the mother of both the girls with whom I am concerned, and the second respondent, who is a year younger, is the mother's partner of some 25 years standing, and she holds

parental responsibility by reason of an agreement made pursuant to a civil partnership, the agreement having been made on 10 April 2008. 9] The girls were conceived by IVF with the agreement and co-operation of all parties. This case provides a vivid illustration of just how wrong these arrangements can go. There are perhaps two particular issues that this cases raises. The first is the need for precise agreement as to the roles that each is to play before any attempt is made to achieve a pregnancy; and secondly, this case, like others that I have been involved with, is bedevilled by a lack of a sufficient vocabulary to explain the true nature of the relationships. It is all too easy in these cases for biological fathers to see themselves in the same position as in separated parent cases in heterosexual arrangements, whereas this arrangement is, and was always intended to be, quite different.

[15] All those attitudes have, of course, hardened over the years since, so that the position as before me this week was that the respondents sought to assert that the original understanding had been in relation to identity contact, whereas the applicants are clearly taking the view that they are in the position, or at least the first applicant is in the position of a traditional separated parent. Both these issues are later developments, but, as I say, it is clear that at the time there was never a proper meeting of minds.

[16] As I have thought about this case, I have tried hard to see whether there are any other concepts than that of mother, father and primary carer, all conventional concepts in conventional family cases. The best that I have achieved, and I confess to having found it helpful in thinking about this case, is to contemplate the concept of principal and secondary parenting. The reason why this case is not equivalent to a separated parent is that there was a clear agreement that the respondents would do the principal parenting and that they would provide the two-parent care to these children. The second respondent clearly believes that her role in this regard has been brought into question, and it is certainly my view that her role in the concept of principal parenting, as one of the two principal parents, needs to be clearly affirmed and respected.

[17] By the same token, I am satisfied that the applicants were acknowledged as having a parenting role, albeit in a secondary capacity. That parenting role was to fulfil at least three purposes. The first was indeed to give a clear sense of identity to the child or children in due course. The second was to provide the male component of parenting which all must be taken to have acknowledged. Thirdly, there was a more general role of benign involvement which would have, but would certainly not be confined to, an avuncular aspect.

42. Children and Families Act which came into effect on the 27th April 2014.

Section 11 Welfare of the child: parental involvement

(1) Section 1 of the Children Act 1989 (welfare of the child) is amended as follows.

(2) After subsection (2) insert—

"(2A) A court, in the circumstances mentioned in subsection (4) (a) or (7), is as respects each parent within subsection (6) (a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare."

Placement of children

43. It is irresistible not to conclude by just examining the treatment of the Courts of

Birth parents objecting to the placement of their children with same sex couple in *Re J and S (children)* 2014 [2014] EWFC 4; and

The refusal by a Council to approve foster carers because of their attitude to homosexuality R (Eunice and Owen Johns) v Derby City Council [20122] EWHC 375.

MARTIN DOWNS 1 Crown Office Row, November 2014