

CIVIL PARTNERSHIPS

Financial provision on dissolution

With case law still awaited, Conrad Adam considers the financial issues when dealing with the dissolution of a civil partnership and the relationship with matrimonial law



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This article sets out to do three things. First, briefly to review where we are now in relation to civil partnership registrations in terms of the numbers, and other data available. Secondly, to remind practitioners of the powers of the court in relation to financial provision on dissolution, under the Civil Partnership Act 2004 (CPA), and finally to consider how the courts might apply those statutory powers, and to what extent in doing so they may apply principles of case law established on the basis of marriage breakdown.

But first let's start with some recent words from the President of the Family Division, Mark Potter, speaking in *Wilkinson v Kitzinger* [2006]: 'The intention of the government in introducing the legislation was not to create a "second class" institution, but a parallel and equalising institution.'

Assuming that when it comes to financial division at the dissolution of civil partnerships, the courts agree with these comments, then the following scenario should be possible.

Two men aged 41 and 36 register a civil partnership. They have dated for four years but not lived together before registration. After almost three years the civil partnership is dissolved. Mr A is wealthy – there is considerable debate as to how wealthy, but certainly well in excess of £18m. Mr B is not wealthy and gave up a job paying £85,000 pa when the civil partnership was formed. Children are not an issue. The civil partnership is brought to an end when Mr A forms a new relationship. Mr B claims that when forming his civil partnership with Mr A he had a legitimate expectation of an affluent lifestyle thereafter. On dissolution of the civil partnership the court awards Mr B £5m capital including provision for income. These of

course replicate in brief the facts of *Miller v Miller* [2006].

Is that outcome under the CPA possible or likely? If not, why not? It has been suggested by a number of commentators that on the breakdown and dissolution of civil partnerships the court will be likely to apply principles established in case law relating to the breakdown of marriages. If civil partnerships are, in the words of Mark Potter, to be considered as 'parallel' to marriages, then this scenario must be possible. Would that outcome be fair? Or, perhaps any less fair than some might say of *Miller*? If it was considered to be inappropriate by the court, then fundamental questions need to be asked as to why.

Current legislation does not allow same-sex partners to marry in England and therefore the most they can do is register civil partnerships. If on the dissolution of those civil partnerships they are treated differently to married couples, where similar facts exist, then that would clearly be discrimination. Any differences cannot be justified merely on the grounds of gender or sexual orientation.

Where are we now?

Available statistics for civil partnerships, between their introduction in December 2005 and currently, cover a nine month period to the end of September 2006. During that time there were in excess of 15,600 civil partnerships registered in the UK. The government has hailed the legislation as a great success. The vast majority (over 14,000) took place in England. There was a flurry of activity in December 2005 itself, with almost 2,000 partnerships being formed. The averages then dropped, as one might expect, and on average between January and March 2006 some 1,600 took place each month, falling to just below 1,500 per month between July and September. 25% of all

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civil partnerships between December 2005 and September 2006 took place in London. Throughout the UK more civil partnerships were registered in relation to male couples than female couples, and in London there were three times as many male partnerships formed as female partnerships.

Analysis in terms of age indicates that, to start with, older couples (presumably in more established relationships) favoured registration, but as time has passed that trend has diminished. Perhaps established partners were waiting for legislation to enable registration. In December 2005 just 12% of all civil partners were aged under 35. That percentage had doubled by September 2006. The proportion of partners aged 50 and over halved during that period from 50% to just under 25%. Age distribution among men has changed significantly. Between December 2005 and March 2006 over half of men forming partnerships were aged 50 and over. That number had reduced to one in four by September 2006. Age distribution among women forming partnerships has been more consistent over time.

Reliable data in relation to numbers of applications for dissolution is not currently available, and whilst there have been two widely publicised applications to dissolve (that publicity being based on being the first male couple and the first female couple to apply), practitioners are not yet dealing with many dissolutions.

Financial consequences of dissolution

There are no reported cases on the financial consequences of dissolution and few reported cases on the CPA so far. *Wilkinson* does not deal with financial provision but does provide comment on the nature of civil partnerships, as compared to marriage, and might therefore provide an initial focus for the courts when determining financial issues on dissolution.

Before looking at the issues that the courts will need to grapple with, and how they may apply the statutory provisions, and perhaps principles of existing matrimonial case law, we should be reminded briefly of the powers available to the court. All references are to the CPA.

Financial relief

The orders available to the court on dissolution, nullity, or on making a separation order are governed by parts

1-4 of Schedule 5 at s72(1). Available orders mirror very closely those available under the Matrimonial Causes Act (MCA) and include periodical payments, lump sum or sums, property adjustment orders and pension sharing/attachment.

Matters which the court must consider when making financial orders are governed by part 5 of Schedule 5 and mirror those contained in the MCA.

In relation to the exercise of any of those powers against a civil partner in favour of a child of the family who is not that civil partner's child, the court must have regard to:

- whether that civil partner had assumed responsibility for the child's maintenance;
- if so, the extent to which, and the basis upon which, that civil partner assumed such responsibility and the length of time for which that civil partner discharged it;
- whether, in assuming such responsibility, that civil partner did so knowing that the child was not that civil partner's child;
- the liability of any other person to maintain the child.

The application of the criteria in s25 MCA, as mirrored by part 5 of Schedule 5, are of course well known to us in the context of marriage breakdown. However, given that in many respects the arrangements and roles undertaken by civil partners might be different from the more traditional roles often adopted in marriage, it is questionable whether the courts will be able to apply these provisions and concepts in a way which is uniform with recent case law developments regarding financial provision on marriage breakdown. Areas and concepts which might cause a degree of difficulty or departure may well relate to the following:

- Cohabitation – the extent to which pre-civil partnership cohabitation should be counted towards the duration of the civil partnership, given that registration has only been possible for the last two years.
- Needs – particularly in the context of income and the relevance and the extent of orders for maintenance, especially if there are no children.
- Financial provision for children – these issues will largely rely on court determination, as the Child

Support Agency would not be likely to have jurisdiction in very many instances.

- Contributions – will the emphasis be primarily on financial contributions?
- Compensation and sharing – not mentioned in the Act, nor mentioned in the MCA, but now developing as concepts within the matrimonial arena.
- Pre-existing arrangements and legal agreements between the parties – the effect and weight to attach to these.
- Whether in principle it is the right approach, and if so, to what extent it is possible, to effectively apply recent case law in the matrimonial arena to civil partnership issues. Will, or should, the court effectively treat civil partnerships as if they were marriages, or will a 'second tier' (some might say 'second class') level of financial provision actually follow.

Cohabitation

The ability to count, and effect of tagging on, the period of pre-marriage cohabitation, where there has been a seamless transition, is a relatively new but now firmly embedded concept (for example, *GW v RW* [2003] and *Co v Co* [2004]) – perhaps offset to some extent by the length of marriage becoming seemingly less important as a factor. Many civil partnerships (at least in the early days of the CPA) will be based on relationships that have subsisted for a considerable period of time – where couples who have been together for many years have in effect been waiting for the possibility of being able to form a civil partnership. This certainly appears to be backed up by the early statistical evidence, which indicates that those registering early on under the new regime tended to be older couples, presumably already in longer-term relationships.

Is it likely that the court will treat pre-registration cohabitation as counting towards the length of the civil partnership if there has been a seamless transition? It would seem inequitable not to do so given that this practice has developed in divorce cases. However, one must question whether, in forming civil partnerships, many or any of those doing so would have appreciated that the length of any prior cohabitation may have an effect on the financial outcome should the civil partnership be dissolved, even if that dissolution occurs relatively soon thereafter.

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If case law developments in financial provision on divorce are to be applied to civil partnerships, then it seems inescapable that pre-registration cohabitation will have to be taken into account and thus, almost immediately, criteria not explicitly set out in the legislation will be used by the court as one of the determining factors. At least with the MCA there was a considerable period of time from the legislation being enacted before which the court started to introduce and rely on factors and concepts not explicitly set out to assist in determining outcomes.

Needs

Will the court return to regarding this concept in a more restrictive and narrow sense compared with how that term has come to be interpreted in matrimonial

US is fairly well established now, and it is likely that that trend will further develop in the UK. This is reinforced by the recent introduction of the Equality Act 2006 and was further strengthened by the implementation of the Equality Act (Sexual Orientation) Regulations 2007 in April last year.

Where there are children it necessarily follows that it is not possible for both partners to be the biological parent of any given child, and given it is less likely that the biological parent would be the non-resident parent (after *Re G (Children) (Residence: Same-sex partner)* [2006]), the court, rather than the Child Support Agency, will primarily be involved in determining issues relating to the level of child maintenance.

This will herald a return to the practice of court-based solutions on child

contributions of a homemaker or child-rearer must be given equal weight to the financial contributions of the other party (save for in the rare 'stellar' instances). This of course has added much weight to the argument that in many cases equal division of assets is appropriate, at least as a starting point. However, with the possible removal, in many cases, of the non-financial contributions argument, it would seem to be that there will be much greater scope, not limited to just rare, 'stellar' contributions, to argue the financial contributions point as a reason for departure from equality. Will the 'yardstick of equality' be applied to cases of dissolution at all? It must be remembered that that concept is a creature of case law developed over 25 years to redress perceived prejudice based on gender roles, and of course mentioned nowhere in either the MCA or the CPA as a starting point. Would it be appropriate to introduce, via the application of matrimonial case law, a concept to interpret the CPA (such a recent piece of legislation) that has developed to interpret a separate piece of legislation now over 25 years old? If issues of equality or presumptions of such as starting points had been in the mind of Parliament when drafting the Act, there is no valid reason for not making reference to this.

Is it likely to be the case that the court will be willing to treat pre-registration cohabitation as counting towards the length of the civil partnership if there has been a seamless transition?

proceedings? Might it only be in a case of real need or potential hardship where the court is minded to make an order for periodical payments as between ex-partners? It is questionable whether in the majority of CPA cases traditional marriage-type gender stereotypes will have existed, although no doubt in some this will have been the case. Will the court adjust capital or income to recognise one party's greater need purely by reference to inequality of income or earning capacity, not caused by any sacrifice or prejudice in the employment market due to actual gender, or gender role (such as occasioned by child-rearing)? Or will it perhaps be more likely that the award will have less to do with needs, and more to do with why those needs might exist? Will a clean break or deferred clean break order be made even after a long partnership, notwithstanding considerable disparity of income and earning potential?

Children

The existence of children in same-sex relationships as an issue will arise. Many same-sex couples actively seek to adopt and some seek to create a family model based on the nuclear family unit. Adoption by homosexual couples in the

maintenance, as was the case in relation to opposite-sex relationships prior to the introduction of the Child Support Act. This should at least allow for an overall consideration of financial issues to be undertaken where there are children, in contrast to the current situation in many divorce cases where that (often key) element is outside the jurisdiction of the court. Where children are not an issue – assumed to be the case in the majority of same-sex relationships – the court will be less concerned with resolving matters based on the stereotypical gender role division still often associated with marriage.

Contributions

The non-financial contribution argument relating to homemaking will be relevant, but (being in the main based on child-rearing in divorce cases) likely only in a minority of cases. This might suggest that contributions arguments will in the main be run along a financial basis instead.

Because it is impossible for the non-financial contribution of a homemaker and child-rearer to be given a value in financial terms, this has inevitably led to the widely accepted principle in marriage cases that the non-financial

Compensation and sharing

Can we by and large forget about these new concepts in relation to the dissolution of civil partnerships? The number of incidences in which the compensation argument could effectively be run would appear to be fewer, relating to the likely lesser occurrence of children cutting short a career, but arguments relating to sharing may still have some weight. In particular these arguments may be relevant to longer civil partnerships, or partnerships where there has been a considerable period of pre-registration co-habitation, or a mixing of financial resources and pooling of income in the true sense of a partnership – that is, where even if the incomes and earning capacities are wildly different, the parties have genuinely thrown in their lot together.

In these circumstances is the idea of an element of sharing of income going forward justified? Is it somehow more justifiable for a husband and wife on divorce than for same-sex partners,

*Co v Co (Ancillary relief:
Pre-marital cohabitation)*
[2004] 1 FLR 1095

*GW v RW (Financial provision:
Departure from equality)*
[2003] 2 FLR 108

H v H
[2007] EWCH 459 (Fam)

Lambert v Lambert
[2002] EWCA Civ 1685

*Miller v Miller and
McFarlane v McFarlane*
[2006] UKHL 24

Re G (Children)
(Residence: Same-sex partner)
[2006] UKHL 43

White v White
[2000] UKHL 54

Wilkinson v Kitzinger
[2006] EWHC 2022 (Fam)

on dissolution? If in answer to these questions we find ourselves saying that one set of concepts holds good for marriage but another for civil partnerships then we appear to commit an act of discrimination, based solely on the sexual orientation of the individuals concerned. Perhaps this specific issue will in any event become less relevant as post-*McFarlane v McFarlane* [2006] decisions develop to cap what might be achievable in that regard in the context of marriage (see *H v H* [2007]).

Pre-existing agreements

It is more likely that on the dissolution of a civil partnership, as opposed to marriage, there might be a pre-existing agreement, for example by way of a cohabitation agreement, or declaration of trust. To what extent will the court rely on those when determining financial outcome? Presumably it will be argued under s25 of the MCA 1973 that entering into such agreements constitutes 'conduct', in the same way that those arguments are used in relation to pre-nuptial agreements prior to marriage. Of course there is also the catch-all of 'all the circumstances of the case', which gives the court its wide discretion. It will be interesting to see to what extent the court is more minded to follow, or at least in some way reflect, any pre-registration agreements made. The fact that they might exist more commonly in civil partnerships, and the lack of an obvious public policy reason for not giving them effect, is likely to mean that they can be relied upon more heavily.

Applying matrimonial case law

White v White [2000] of course needs no introduction. The main principle, that the objective of the court is to achieve fair solution, heavily emphasises that there can be no discrimination between husband and wife based on the roles that they undertake. Of course this usually translates, in the context of a marriage case, to there being no distinction or discrimination between the traditional roles often adopted by husband as breadwinner, and wife as homemaker (see *Lambert v Lambert* [2002]). However, it is questionable to what extent in the majority of civil partnerships such differentiation of roles will be apparent, or at least clearly apparent. If both partners are working full-time and there are no children then both are in the role of 'breadwinning' and probably of 'homemaking' as well. To what extent will the fact that there may be significant differences in the level of that contribution (which by its nature can only be measured in financial terms) be relevant? This will be particularly significant where the civil partnership, or the civil partnership combined with any period of pre-civil partnership cohabitation, is shorter rather than longer. Will the presumption of equality – developed largely to combat perceived prejudice based on gender role – be adopted by a system now dealing with same-gender partners? Will there be as many clear-cut and distinctive breadwinning/homemaking role patterns to justify the adoption of that presumption?

What of *Miller and McFarlane*? It might be difficult to envisage a similar outcome to *Miller* notwithstanding similar facts – but why? To arrive at a different result one would have to accept that the formation of a civil partnership created a lesser expectation than that created upon marriage. If that is right (and there is no obvious reason for suggesting it is right) then shouldn't same-sex couples be given the opportunity of creating equivalent expectations by making marriage available to them? If, however, it is held that the expectations created upon registration of a civil partnership are akin to those created on marriage then it seems inescapable that a *Miller* outcome must be possible.

McFarlane was on its facts a hard case, and perhaps it is now becoming recognised that the category of cases where there can be a 'compensation' adjustment are, even in the context of marriage breakdown, relatively few and far

between. However, this still leaves the questions of sharing and to what extent that concept, developed within the matrimonial arena and still in its infancy, will have any weight in the context of a partnership dissolution. Where there are children or where there has been some career sacrifice for any other legitimate reason by one of the partners, then the principle of the disadvantaged partner being able to share in the enhanced income of the more financially powerful partner would seem to hold good. However, we will need to see whether these concepts – recently developed as a way of stretching and expanding awards based on the long-standing and established institution of marriage (an institution almost universally heralded as one that is for the benefit of society as a whole) – will be embraced in the context of the fledgling institution of civil partnership.

Conclusions

Before long financial cases relating to civil partnership dissolution will start to come before the courts. We are told in *Wilkinson* by the President of the Family Division that civil partnerships are marriages in all but name. However, it is difficult to see how certain case law developed in relation to the breakdown of the marriage, particularly more recent case law, can effectively be applied to the dissolution of civil partnerships. Many high-profile matrimonial cases have conformed to factual matrices based on established gender stereotypes not always applicable to civil partnerships. There are also recent cases relating to length of marriage and the reducing importance of that fact in relation to financial provision on divorce, even where there are no children, and we will need to see whether those concepts are also wholeheartedly transposed into civil partnership dissolution cases.

Without any apparently valid or logical reason why it might be so, one might envisage that, where there are no children, the length of the partnership will often be the primary determining feature in a way that is no longer the case in relation to marriage breakdown. If this is borne out then it is likely that the provision made will in those cases be less than in a marriage situation, in which case will the words of the President in *Wilkinson* hold true? And if not, will the debate regarding same-sex marriages be back on the agenda? ■