ENGLAND AND WALES

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Marriage and Civil partnership

As from March 2014, England and Wales permits same-sex marriages: Marriage (Same Sex Couples) Act 2013.

As from December 2019, England and Wales permits opposite-sex couples to enter into a civil partnership, where previously this was restricted to same-sex couples: Civil Partnerships, Marriages and Deaths (Registration Etc) Act 2019 and Civil Partnership (Opposite-sex Couples) Regulations 2019 SI 2019/1458.

A. New Developments in the Field of Divorce (since September 2002)

The existing legislation on divorce is to be replaced by new provisions provided for by the Divorce, Dissolution and Separation Act 2020 (DDSA), which is expected to be brought into force late in 2021. The Act takes the form of re-wording ss 1-10 of the Matrimonial Causes Act 1973 (MCA), rather than as a free-standing Act.

The key features of the new law are:

As before, no application for divorce can be made until one year has passed following the date of the marriage.[1]

The sole ground for divorce remains that the marriage has broken down irretrievably.[2] But unlike the previous law, which required proof of one of five facts before that breakdown could be established, under the new law, all that is required is that the applicant or applicants (applicants will no longer *petition* for a divorce but instead make *an application* for a Divorce Order)[3] make a statement that the marriage has broken down

1 DDSA 2020, Sch 1, para 3, substituting a new s 3 into the MCA 1973.
2 DDSA 2020, s 1(1), substituting a new s 1(1) into the MCA 1973.
3 DDSA 2020, s 1(3), substituting a new s 1(3) into the MCA 1973.

irretrievably.[4] That statement alone is conclusive evidence of the irretrievable breakdown of the marriage.

The divorce process begins by the applicant, or a couple jointly, filing a statement of marital breakdown. This will be the first time that joint applications for divorce may be made. Following the filing of the statement, a period of 20 weeks must elapse before the application can be progressed to the making of a conditional order (this term replaces the term 'decree nisi'). However, the court will not be able to make a conditional order until the applicant in the case of a sole application, or joint applicants in the case of a joint application, have confirmed to the court that they wish the application to continue.[5]

After the making of the conditional order a further period of six weeks must elapse before the final order (this term replaces the term 'decree absolute') can be made.[6] The marriage only formally ends upon the making of the final order.

The respective 20 and six weeks periods can be adjusted by means of secondary legislation.[7] However, any change cannot extend the combined timeframe of 26 weeks.

Procedurally, it is envisaged that as, under the existing law, statements of marital breakdown will be filed at a Regional Divorce Centre, where the application will be considered by an Assistant Justices' Clerk (also known as a Legal Adviser)[8], and can be done online. A complete online divorce service from initial application through to decree absolute has been up and running from January 2020.

The making of a final order does not require a separate court hearing but is obtained upon application by either party separately or jointly. Unless the respondent has applied to the court for consideration of their financial position after the divorce (see below) a final order will be granted automatically.

Under the new law although challenges to the divorce proceedings can still be made upon the basis of lack of jurisdiction, validity of marriage, fraud and procedural irregularities,

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4 DDSA 2020, s 1(2), substituting a new s 1(2) into the MCA 1973.
5 DDSA 2020, s 1(5), substituting a new s 1(5) into the MCA 1973.
6 DDSA 2020, s 1(4) and (5), substituting a new s 1(4) and (5) into the MCA 1973. These periods can be amended by statutory instrument: s 1(6) and (7).
7 DDSA 2020, s 1(6), substituting a new s 1 (6) into the MCA 1973.
8 The Justices' Clerks and Assistants Rules 2014: SI 2014 No. 603 (L.8).

it will not be possible to oppose the divorce upon the basis that it has not irretrievably broken down.

But after a conditional order has been made, the respondent can apply to the court for consideration of their financial position after the divorce. [9] This will delay the making of a final order by the court. However, to prevent a respondent from abusing the provision, the court can, even if it finds that the applicant has not made such reasonable financial provision, nonetheless make the final order if it appears that there are circumstances making it desirable that the final order should not be delayed *and* the court has obtained a satisfactory undertaking from the applicant that he or she will make such financial provision for the applicant as the court may approve.[10]

As under the existing law, a conditional order may be postponed to encourage the obtaining of a divorce according to religious rites.[11]

Dissolution of Civil Partnerships

The DDSA 2020 amends (with effect from late 2021) the Civil Partnerships Act 2004 (CPA 2004) with regard to the dissolution of civil partnerships so as to replicate those for divorce. Consequently while the sole ground remains that civil partnership has broken down irretrievably, all that is required is that the applicant or applicants make a statement that the civil partnership has broken down irretrievably.[12] The same time limits and procedure that apply to divorce will apply to the dissolution of civil partnerships.

B. New Developments in the field of Maintenance between former spouses (since September 2002)

There have been no substantive developments in this field. But there has been a plethora of case law on the application of the principal Act, the Matrimonial Causes Act 1973, including, in particular *Miller v Miller, McFarlane v McFarlane*[13] in which the House of Lords set out the general principles in making financial orders after divorce. Maintenance remains part of the package of financial provision available to former spouses and civil partners on divorce and no distinctions should be drawn between same- and opposite-

9 DDSA 2020, Sch 1, para 10, substituting a new s 10 into the MCA 1973.
10 MCA 1973 s 10(4), as amended by DDSA 2020, Sch 1 para 10 (d).
11 MCA 1973, s 10A, as amended by DDSA 2020, Sch 1, para 11.
12 CPA 2004 s 44 as amended by DDSA 2020, s 3.
13 [2006] UKHL 24.

sex cases as made clear by the Court of Appeal in *Lawrence v Gallagher.*[14] However, the importance of making or dismissing claims for maintenance near the time of divorce (or civil partnerships dissolution) can be drawn from the case of *Wyatt v Vince.*[15] Here a claim for financial provision (which includes, but is not limited to, maintenance) was made but not concluded or dismissed when the parties divorced. It was held that in principle, a claim for financial provision could still be brought some 27 years later. In theory, this could include maintenance, but would be highly unlikely to do so, given the well-established 'clean-break principle', which is set out in s 25A Matrimonial Causes Act 1973. See also *Waggott v Waggott*[16] in which the Court of Appeal set out the principles for awarding continuing spousal maintenance.

C. New Developments in the field of Parental Responsibilities (since December 2004)

Following reforms made by the Children and Families Act 2014, which amended the Children Act 1989 with effect from April 2014, residence and contact orders have been replaced by child arrangements orders. A child arrangements order means[17]

> 'an order regulating arrangements relating to any of the following –
> (a) with whom the child is to live, spend time or otherwise have contact, and
> (b) when a child is to live, spend time or otherwise have contact with any person.'

The general intention behind child arrangements orders is to make two basic distinctions, namely between those orders that provide for the child to spend significant periods with a named person (now commonly referred to as *'live with' orders*) as opposed to those that just provide for the child to see a named person (now commonly referred to as *'time with' orders*); and those orders providing for face-to-face time as opposed to non-physical contact.

There are legal effects attaching to 'live with' orders that do not attach to 'time with' orders. In particular it (a) enables the person named in the order to take the child outside the United Kingdom for a period of less than one month without the need for anyone else's consent or court leave;[18] and (b) it gives parental responsibility to those that do not already have it.[19]

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14 [2012] EWCA 394.
15 [2015] UKSC 14.
16 [2018] EWCA Civ 727.
17 Children Act 1989, s 8 (1) as substituted by Children and Families Act 2014, s 12.
18 Children Act 1989, s 13 (2), as amended. by Children and Families Act 2014 Sch 2 para 22 (3).
19 Children Act 1989, s 12 (1), (1A) and (2), as amended by Children and Families Act 2014 Sch 2 para 21.

In the case of legal parents (ie unmarried fathers and second female parents who have not been named on the child's birth certificate) who do not otherwise have parental responsibility, that responsibility is conferred by a separate parental responsibility order (which *must* be made). In the case of non-parents, such as grandparents or other relatives, or foster parents, parental responsibility is an automatic consequence of a 'live with' child arrangements order. The significance of this lies in the duration of parental responsibility. In the former case, it lasts until the express ending of the parental responsibility order; in the latter, until the ending of the child arrangements order.

By contrast, when making a 'time with' child arrangements order the court only has to *consider* whether make a separate parental responsibility order in the case of legal parents who do not otherwise have parental responsibility while in the case of non-parents it has a *discretion* whether to make provision for parental responsibility in the child arrangements order.

D. New Developments in the field of Property relations between Spouses (since August 2008)

Since 2008, there have been no statutory enactments in this field. Marriage and civil partnership, whether same- or opposite-sex, have no effect on property relations of the couple during the relationship. Separation of property therefore remains during the relationship, but all such formalized relationships are subject to a discretionary distribution of assets on divorce or dissolution. This is known as financial provision or financial relief.

Despite the anticipated implementation of the new Divorce, Dissolution and Separation Act 2020, the Matrimonial Causes Act 1973 Part II will continue to govern the property relations between spouses on divorce and Schedule 5 of the Civil Partnership Act 2004 will continue to govern property relations on civil partnership dissolution.

The Court of Appeal decision in the case of *Lawrence v Gallagher*[20] did confirm in 2012 that the principles and approach developed in case law for financial provision on divorce are to be applied in the same way in the context of financial relief for civil partners on dissolution. By extension, they will also apply on same-sex divorce following the

[20] [2012] EWCA 394.

Marriage (Same Sex Couples) Act 2013. There are not any current proposals for further reform.

The Law Commission did consider reform in 2014, but did not make any specific recommendations as it did not consider there was a need for substantive reform.[21] It did urge the Family Justice Council to provide guidance clarifying the meaning of the term 'financial needs', given the likely increase in litigants in person, following the withdrawal of legal aid for most private family law matters.[22] This guidance was first published in 2016 and was revised in 2018.[23]

Marital and pre-nuptial agreements

Traditionally, pre- and post-marital agreements (in contrast to separation agreements) have been unenforceable in England and Wales. Despite proposals for reform, made by the Law Commission in 2014,[24] there has not been any legislative provision. However, there have been some important case law developments. First, in *Macleod v Macleod*[25] a post-nuptial agreement, limiting financial provision on divorce, was upheld but distinguished from pre-nuptial situations. Whilst it remains the position that pre-nuptial agreements are not strictly binding, in 2010, the Supreme Court gave a landmark decision on this matter in the case of *Radmacher v Granatino*.[26] The majority judgment held that the court should give effect to a nuptial agreement that is freely entered into by each party, with a full appreciation of its implications, unless in the circumstances prevailing, it would not be fair to hold the parties to their agreement.[27] Where a pre-nuptial agreement is challenged, the court must now first decide if it was fairly entered into. If so, it will be enforced unless the party seeking to set it aside can demonstrate that in the circumstances, it would not be fair to enforce it.

Another development in this field occurred in the case of *Wyatt v Vince*.[28] Where a claim for financial provision was made but not concluded or dismissed at the time of the divorce, it was held that in principle, a claim could still be brought some 27 years later.

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21 Law Commission for England and Wales, *Matrimonial Property, Needs and Agreements*, LAW COM No 343. London: TSO, 2014.

22 Legal Aid Sentencing and Punishment of Offenders Act 2012.

23 Family Justice Council, *Guidance on "Financial Needs2 on Divorce,* 2nd edition, London: TSO, 2018.

24 Law Commission for England and Wales, *Matrimonial Property, Needs and Agreements*, LAW COM No 343. London: TSO, 2014.

25 [2008] UKPC 64.

26 [2010] UKSC 42.

27 See Judgment of Lord Wilson, at para. 75.

28 [2015] UKSC 14.

The facts here involved a couple who had lived frugally, but the husband had subsequently become very wealthy. The wife had made considerable non-financial contributions to the welfare of the family by raising their child alone and was herself still living very modestly.

Other points to note are that in terms of **inheritance and succession**, any provisions relating to spouses and civil partners, now also apply equally to same-sex spouses and opposite-sex civil partners, following the Marriage (Same Sex Couples) Act 2013 and Civil Partnerships, Marriages and Deaths (Registration Etc) Act 2019 respectively.

Similarly, any **pension rights** available to spouses/civil partners are also available to both same and opposite-sex spouses and civil partners, equally, with no distinctions any longer being drawn.

E. New Developments in the field of De Facto Partnerships (since February 2015)

Aside from the introduction of equal civil partnerships through the Civil Partnerships, Marriages and Deaths (Registration Etc) Act 2019 which came into force in December 2019 and entitles opposite-sex couples to register civil partnerships and previously restricted to same-sex couples, there has been no legislation affecting de facto partnerships.

Statistics show that cohabiting families remain the fasted growing family type in the UK, now involving 3.5 million couples. The proportion of families cohabiting has increased from 15% to 18% in the decade to 2019.[29]

There have been no significant changes in property law affecting cohabiting couples. A Private Member's Bill, The Cohabitants' Rights Bill, 2017-2020, modelled on the Law Commission's 2007 proposals[30] remains before Parliament, but is unlikely to become law without government backing. Public confusion around the rights of cohabiting couples remains, according to a question asked on the nationally representative British Social Attitudes Survey published in 2019, where 47% of the population and 53% of couples with children falsely believe that cohabiting couples have the same rights as if they were married (the so-called 'common law marriage myth').[31]

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29 ONS, 2019. *Families and Households in the UK: 2019*. London: Office for National Statistics.

30 See Law Commission for England & Wales, *Cohabitation: The financial consequences of relationship breakdown* Law Com no 207, London: TSO, 2007.

31 Albakri M, Hill S, Kelley, Rahim N, (2019), 'Relationships and gender identity'. In J. Curtice, E. Clery, J. Perry, M. Phillips and N. Rahim, (eds.), *British Social Attitudes: The 36th Report*, London: The National

Pensions

De facto couples remain unable to claim their partner's state pension. However, with regard to employer pension schemes, in the case of *An Application by Denise Brewster for Judicial Review (Northern Ireland)*[32], the Supreme Court decided that a requirement for cohabitants to have to opt in, (unlike married couples), to nominate a partner for pension rights on death was unreasonable. However, this does not result in an automatic change of practice and much will depend on the terms of each pension scheme, but it does entitle a cohabiting partner to challenge a decision to refuse to award the pension in such cases.

Centre for Social Research. See also, A. Barlow, 'Modern marriage myths: the dichotomy between legal rationality and lived law', in R.C. Akhtar, P. Nash and R. Probert, *Cohabitation and Religious Marriage* Bristol: Bristol University Press, 2020.

[32] [2017] UKSC 8.