FORSTERS

Update on same sex marriage/partnership in the UK paper

Overview of partnership and marriage for same sex couples in England and Wales

Last month marked the paper anniversary for the first same sex couples to marry in England and Wales following the commencement of the Marriage (Same Sex Couples) Act 2013 (the "MSSCA"). Some same sex couples may be approaching the tenth anniversary of their marriage; since December 2014, it has been possible to convert an existing civil partnership into a marriage, whereupon it is deemed to have existed since the original civil partnership was formed.

This update to a paper first delivered to the New York Bar Association and STEP 10th Annual International Estate Planning Institute in 2014 looks at the present status of same sex couples in English law. Broadly, this covers cohabitation, civil partnerships and the extension of marriage to same sex couples.

1. Cohabitation in England and Wales

1.1 What is meant by cohabitation?

The term "common law marriage" has been used in England and Wales to refer to unmarried, cohabiting opposite sex relationships. However, this is merely a social usage. It is a misapprehension that these couples are treated as "common law" spouses. The correct way to describe this relationship in the UK is "cohabitation". The treatment is the same for both opposite sex and same sex cohabiting couples.

1.2 The legal position of cohabitees

Some couples enter into cohabitation agreements to give them financial provisions that they would not otherwise have as cohabitees and/or specifically to estopp any hostile claims against property. Cohabitees have no claims against each other for maintenance on the breakdown of their relationship. A claim might arise in respect of property interests in the law of equity (Jones v Kernott). A cohabitation agreement could include details of the property where the couple are to live or intend to live together. Such an agreement may not necessarily be legally enforceable, but might be useful as evidence of the couple's intentions.

1.3 The tax position of cohabitees

1.3.1 Income tax

Cohabitees are taxed individually at the normal tax rates. For the 2015/16 tax year, the rates are shown below.

Taxable income	Rate of tax
0 - £5,000	10 % (savings only)
0 - £31,785	20 % (basic rate)
£31, 786 - £150,000	40 % (higher rate)
Over £150,000	45 % (additional rate)

Dividends from company shares are taxed slightly differently, depending on the rate at which the individual is taxed.

Each partner is entitled to a personal allowance when calculating the extent of their income tax liability. An individual's personal allowance reduces by £1 for every £2 of income above £100,000, regardless of age. The higher allowance available to people born before 6 April 1938 also reduces by £1 for every £2 of income above £27,700. However, unless that income exceeds £100,000, the reduction will stop once it matches the allowance for people born on or after 6 April 1938.

Personal allowance	**2015/16 tax year**
Basic personal allowance for people born on or after 6 April 1938	£10,600
Personal allowance for people born before 6 April 1938	£10,660

1.3.2 Capital gains tax (CGT)

CGT is payable upon the sale or transfer of an asset where the value of that asset has increased. The gain is calculated on the basis of either the asset's original cost (in relation to assets owned post March 1982) or the asset's value as of 31 March 1982, and taxed accordingly.

The current rate of CGT is 18% for basic rate income taxpayers and 28% for higher and additional rate income taxpayers (see 1.3.1). All individuals have a CGT annual exemption which, in the 2015/16 tax year is £11,100.

Unmarried couples are treated as "unconnected persons" and therefore taxed individually for the purposes of CGT. This means that when assets are passed from one cohabitee to another, CGT will be chargeable at the time of transfer.

A main home or principal private residence is free from CGT in most circumstances. In the context of a cohabitation relationship, the partners are "unconnected" and can therefore potentially each elect a different property as their main home.

1.3.3 Inheritance tax (IHT)

Should one partner die without leaving a will, the surviving partner will only inherit property held jointly with the deceased. There is no automatic inheritance for the survivor of a cohabiting couple, although they may be able to apply to court under the Inheritance (Provision for Family and Dependants) Act 1975 if they do not have sufficient funds to live on and wish to claim more from the estate.

Any property which is inherited by the surviving partner is subject to inheritance tax. The rate of IHT in the UK is 40% on any property above the "nil rate band" threshold (currently £325,000). This may be reduced to a rate of 36% if more than 10% of the deceased's estate is left to charity.

1.4 Exceptions to the rule: remittance basis

Individuals who are UK resident but not UK domiciled, including individuals who have become UK "deemed domiciled" for inheritance tax purposes (if they have lived in the UK for seventeen of the past twenty tax years), can elect to be taxed on the remittance basis. Individuals who are taxable on the remittance basis are subject to income tax on only:

- their UK source income on an arising basis; and
- their foreign source income only if and to the extent that they remit it to the UK.

Individuals who are taxable on the remittance basis are also subject to UK CGT on gains realised on only:

- their UK assets on an arising basis; and
- their foreign assets only if and to the extent that they remit them to the UK.

Individuals are prohibited from arranging for a person close to them to make remittances instead of them (i.e. connected persons or, for the purpose of the legislation "relevant persons").

Under sections 809M(2)(a), (b) and (c) and (3)(a) of the Income Tax Act 2007 a "relevant person" includes the taxpayer's spouse or civil partner as well as "anyone with whom he lives as though they were married or in a civil partnership." Consequently, cohabiting couples are caught by the "relevant person" net, despite not being "connected persons" for the purposes of CGT. This is one of the rare situations where a UK tax statute treats cohabitees in the same way as married couples.

Remittance basis taxpayers are also subject to an annual charge of £30,000 once they have been resident for seven of the previous nine tax years, which rises to £50,000 when they have been resident for twelve of the previous fourteen years. From April 2015, the £50,000 charge will be increased to £60,000 and for those who have been resident for seventeen of the previous twenty years, there will be a further rise to £90,000.

The government is consulting on whether to restrict a taxpayer's ability to elect to be charged on the remittance basis to once every three years.

1.5 Domicile, residence and relocation considerations

Because cohabitation is not generally a recognised relationship under English law, domicile and residence will depend on the origins, movements and intentions of each cohabitee. A detailed analysis of how residence and domicile are determined in English law is outside the scope of this note, but broadly, residence is ascertained by reference to the UK Statutory Residence Test. By contrast, domicile is a less tangible concept that essentially requires a person's main residence to be established in the relevant jurisdiction and for there to be a demonstrable intention to live in the jurisdiction permanently and indefinitely.

It is worth noting that an individual with an unmarried partner who is resident in the UK is deemed to have a family tie in the UK for the purposes of the UK Statutory Residence Test.

Despite the fact that for UK purposes, a cohabitee's domicile will not be decided by their partner's (or vice

versa) prima facie, the nature of being in such a relationship will undoubtedly have a bearing on the two key elements of domicile: establishing a "main residence" in a particular jurisdiction, and demonstrating intention to reside there permanently and indefinitely.

For a cohabiting couple looking to relocate from one country to another, it will be important to consider whether the couple's relationship will be recognised by the destination country (or by the state within that country if recognition varies domestically).

A cohabiting partner of a British citizen or individual who is settled in the UK, can apply to move to/remain in the UK provided that the couple satisfy certain conditions including that:

- the couple are not related to each other in a way that would mean they could not marry under UK law;
- the relationship is "genuine and subsisting" (the Home Office look at a number of factors, such as visiting each other's home countries and families and sharing responsibility for children and finances);
- the couple have been living together in a relationship akin to marriage or civil partnership for at least two years prior to the date of the application;
- any previous relationship has permanently broken down; and
- the couple plan to live together permanently in the UK.

2. Marriage in England and Wales

The majority of the MSSCA is now in force and rather than creating a new separate status (like that of civil partnerships), it has extended the availability of legal marriage to same sex couples. There are some differences (see 4 below), but for the most part, the laws relating to marriage in England and Wales now apply equally to same sex and opposite sex couples. This includes individuals who change their legal gender whilst married.

A legally valid marriage should be evidenced by either a certified copy of an entry in a UK register of marriages or a marriage certificate issued in the country of marriage.

An individual can get married from the age of sixteen in the UK, although prior to eighteen parental consent is required in England and Wales.

2.1 "Valid", "voidable marriage" and "non-marriage"

There are three possible ways to categorise "marriage":

1. Valid:
    a. compliant with the English Marriage Acts (1949 to 1994);
    b. ended by divorce; and
    c. financial relief available under Matrimonial Causes Act 1973.

2. Void or voidable (in accordance with sections 11 and 12 of the Matrimonial Causes Act 1973):
    a. ended by a nullity suit; and
    b. financial relief not available.

3. A non-marriage or non-existent marriage:
    a. status of cohabitees at best; and
    b. financial relief not available.

For a void marriage, the court must find that there were sufficient elements or characteristics of a true marriage. If not, the marriage is treated as a non-marriage. In Hudson v Leigh, the High Court provided guidance on how it would determine whether a purported marriage is to be treated as void or a non-marriage, namely by considering:

- whether the event set out or held itself out to be a lawful marriage;
- whether the event bore all, or enough, of the hallmarks of marriage;
- whether the purported spouses and the official officiating believed, intended and understood the ceremony as giving rise to the status of lawful marriage; and
- the reasonable perceptions, understandings and beliefs of those present.

The categories of "marriage" are particularly significant when it comes to whether the court can determine financial relief on separation. Only a party to a marriage recognised by English law as valid or as void or voidable can apply for financial relief under Part III of the Matrimonial and Family Proceedings Act 1984. As a non-marriage, neither party in a cohabiting relationship can apply for an order under these provisions.

2.2 The tax position of legally recognised marriage

2.2.1 Income tax

As with cohabitees (see 1.3), legally married couples are taxed as individuals. However, where one spouse was born before 6 April 1935, a married couple's allowance is available. This can reduce the income tax payable and is based on the husband's income for marriages prior to 5 December 2005 and the income of the highest earner for marriages after this date. In April 2015, a marriage allowance becomes available to married couples where one party's annual income is within the personal allowance and the other's is within the basic rate tax band (see 1.3.1.).

2.2.2 Capital gains tax (CGT)

Married couples benefit significantly with regard to CGT in comparison to cohabitees. One spouse can transfer assets to the other spouse without CGT arising. The recipient spouse is deemed to receive the asset at the value it had when the spouse making the gift originally acquired it.

Married couples can only benefit from principal private residence relief on the same property and any additional properties will be subject to CGT on sale. From April 2015, an individual with more than one property will no longer be able to elect which is to be his or her main residence. This means that the majority of cohabiting couples will be in the same position as married couples when it comes to principal private residence relief.

Asset transfers outside of the marriage are subject to CGT at the standard rates (see 1.3.2).

2.2.3 Inheritance tax (IHT)

As with CGT, married couples receive more favourable IHT treatment than cohabitees. Legal spouses are exempt from transfers that might usually give rise to IHT becoming chargeable. There may be restrictions, however, if the recipient spouse is not UK domiciled.

Additionally, any unused nil rate band can be transferred to the surviving spouse. The effect of this is that when the second spouse dies, the percentage of unused nil rate band is added to the second spouse's own nil rate band. This in turn increases the threshold on which IHT will not be payable. For the tax year 2014/15, this means a maximum threshold of £650,000.

2.3 Domicile, residence and relocation considerations

With very limited exceptions (beyond the scope of this note), marriage does not affect a person's domicile, which is determined on an individual basis.

An individual whose spouse is resident in the UK will have a family tie for the purposes of UK statutory residence. Furthermore, subject to limited exceptions, an individual with a minor child who is resident in the UK may continue to have a family tie, even if separated from his or her spouse.

Although it may be safe to assume that, in respect of relocation, under most circumstances the marriage of a UK wedded opposite sex couple will be valid in the destination country, the same can not always be said for UK (excluding Northern Ireland) wedded same sex couples. Moreover, regardless of gender, the issue of "voidable" and "non" marriage could also arise. It is, therefore, important to take local advice when considering relocation.

Provided a marriage entered into abroad is valid in that jurisdiction, it will be recognised in England and Wales, though there are exceptions (see 4.4 below).

3. Civil Partnerships in England and Wales

Civil partnership is a legal relationship that was introduced on 5 December 2005 exclusively for same sex couples. Civil partners are treated in the same way as married couples for tax purposes and otherwise have near equal legal status. However, the relationship is distinct from marriage, created by different formalities. For legal purposes, civil partners cannot refer to themselves as "married" or each other as "husband" or "wife".

New civil partnerships continue to be available to same sex couples following the extension of marriage by the MSSCA.

Since 10 December 2014, it has been possible to convert a civil partnership to marriage using either an administrative or ceremonial procedure. The civil partnership comes to an end when it is converted, but the resulting marriage is deemed to have commenced when the original civil partnership was entered into.

Usually, a will or codicil will be revoked by a marriage or civil partnership, unless it is made in contemplation of that marriage or civil partnership. However, this does not apply when converting a civil partnership to a marriage.

3.1 Domicile and residence considerations

As with cohabiting and married couples, the domicile of each civil partner will be determined on an individual basis.

In the UK, the approach to residence in relation to civil partnerships is identical to that of marriage; a UK resident civil partner falls under the family tie of the UK Statutory Residence Test.

With regard to the overseas recognition of UK civil partnerships, it is necessary to establish whether the destination country:

- recognises UK civil partnerships; and
- if so, whether the partnership will be treated as a marriage or whether there is a comparable registered partnership in the new jurisdiction.

Unlike marriage, there is no international consensus as to how to approach the recognition of civil partnerships and so the local laws of each country must be consulted on a case by case basis.

Other than marriage, any type of legal relationship available to same sex couples in another jurisdiction (for example the "união estável" in Brazil) will be treated and taxed as a civil partnership for UK purposes, provided the relevant criteria in Part 5, Chapter 2 and Schedule 20 of the Civil Partnership Act 2004 have been met.

3.2 Future of civil partnerships?

Section 15 of the MSSCA required a review of the future of civil partnerships, in particular whether to abolish or phase them out, or alternatively to extend eligibility to opposite sex couples. The report published in June 2014 concluded that there would be no changes in the foreseeable future, considering it more appropriate to revisit the matter when more information becomes available about uptake of marriage by same sex couples and whether this impacts upon the number of couples entering into civil partnerships.

This corresponds with the European Court of Human Rights refusal to hear a case on whether the inability of opposite sex couples to enter into civil partnerships amounts to discrimination (Ferguson and others v United Kingdom).

In Burden v United Kingdom, the European Court of Human Rights also dismissed the claim of two elderly cohabiting sisters, who had argued that the UK inheritance tax treatment that would apply on the first of their deaths contravened the European Convention of Human Rights. The sisters contended that their relationship could be compared with that of husband and wife or civil partnership, since they had chosen to live as they had and had assumed a responsibility to one another when doing so (and so should be able to take advantage of a transferable nil rate band). The Court held that the relationship between adult siblings on the one hand and between spouses of civil partners on the other was qualitatively different. The very essence of the sibling relationship was consanguinity, whereas the precise opposite was true of marriage or civil partnership.

4 Differences between civil partnerships, same sex and opposite sex marriages

4.1 Religious ceremonies

Same sex civil partnership is an exclusively civil procedure. By contrast, for marriage, couples are generally entitled to choose either a civil or religious marriage (though in some cases a religious ceremony alone will not be valid and a civil marriage may also be needed). However, same sex couples can not marry in the Church of England or Church in Wales (which otherwise have a legal duty to marry their parishioners).

Members of other religious groups can only perform same sex marriage ceremonies if the relevant religious body has "opted in" under the MSSCA. The Equalities Act 2010 has been amended by the MSSCA so that refusal by a religious body or representative to carry out a same sex marriage does not constitute unlawful discrimination.

4.2 Occupational pension schemes

Civil partners and same sex married couples are, under an exception still in place under the Equality Act 2010, only entitled to benefits from their spouse or civil partner's occupational pension scheme accrued before 5 December 2005 (though individual pension providers can opt to provide benefits for periods of service before this date if they wish). This can cause significant complications in terms of estate planning, particularly where the pension is the most sizeable asset owned by one partner.

The MSSCA required the pension position to be reviewed and the results of the consultation were published in June 2014. The government concluded that the issue needs to be looked at in more detail, particularly the cost implications, before a decision can be made about whether or not to change the law.

The issue will be looked at separately later this year by the Court of Appeal when it considers whether the exception in the Equalities Act 2010 is compatible with EU employment law (Innospec v Walker).

4.3 Private legal documents

References to a "spouse" and other terms related to marriage in a legal estate planning document, such as a will or trust instrument, should generally be deemed to apply to same sex and opposite sex married partners. However, this only applies to any such references in legal documents executed on 13 March 2014 or later. Steps may have to be taken to update legal instruments executed before this date if same sex spouses are intended to be covered by the document.

Civil partners are not covered by references to a "spouse" at all and so the term "civil partner" must be expressly provided for in a legal estate planning document, regardless of when it was executed.

4.4 The "dual domicile rule"

For a marriage to be valid under English law, it must comply with the formalities required by the jurisdiction in which the ceremony takes place. However, a person's capacity to marry is governed by the law of the parties' respective domiciles immediately before the marriage. Provided at least one of the parties is able to marry under the law of his or her domicile, capacity to marry will be governed by English law and the marriage will therefore be valid in England and Wales (Sottomayor v De Barros).

The MSSCA did not explicitly address whether the dual domicile rule applies to same sex marriages. If it does, the effect would be to invalidate the marriage in England of a same sex couple domiciled in a jurisdiction that does not permit same sex marriage.

Civil partnerships may be more appropriate in these circumstances, as they are not subject to the dual domicile rule. Where relevant, this should also be carefully considered by couples wishing to convert their civil partnerships to marriages.

4.5 Adultery and consummation

In the absence of a statutory definition, case law has defined adultery as voluntary sexual intercourse between a man and a woman who are not married to each other but one or both of whom is or are married (Clarkson v Clarkson).

Adultery can be committed in same sex marriages, but only if it is with a person of the opposite sex. As adultery is defined in the context of marriage, sexual intercourse between a civil partner and someone of the opposite sex does not amount to adultery.

Similarly, as "consummation" does not include same sex intercourse, it not required for civil partnerships or marriages of same sex couples to be deemed legally valid.

5 Divorce and dissolution

The process for ending a civil partnership is dissolution rather than divorce and the legal requirements are broadly the same for both.

5.1 Legal requirements

The applicant (known as the "petitioner") must have:

- been married/in a civil partnership for at least one year before the application;
- resided/been domiciled in the UK for long enough to satisfy the jurisdictional authority; and
- shown that the marriage/civil partnership has broken down irretrievably.

5.2 Divorce

The only ground for divorce under English law is the irretrievable breakdown of the marriage (Matrimonial Causes Act 1973). The petitioner must be able to demonstrate one of the following:

- adultery (when carried out with a person of the opposite sex, as per 4.5 above);
- unreasonable behaviour;
- desertion;
- two years' separation and the consent of the respondent; or
- five years' separation (no consent needed).

5.3 Dissolution

The ground for dissolution is the same as that of divorce. The criteria which the petitioner should establish are also the same, save that adultery does not apply for the reasons referred to above.

If a civil partner has reason to believe that their partner has been unfaithful, it should be included as an example of unreasonable behaviour. This also applies to a spouse in a same sex married couple where the third party is of the same sex.

5.4 Jurisdiction of the Court to hear divorce and dissolution proceedings

By section 5 of the Domicile and Matrimonial Proceedings Act 1973, courts in England and Wales have the power to deal with divorce proceedings only where one or more of the following criteria can be shown:

- both parties are resident and/or domiciled in England and Wales;
- both parties were last resident in England and Wales and one party still resides there;
- the respondent is resident in England and Wales; and/or
- the petitioner is resident and/or domiciled in England and Wales and has lived there for at least one year immediately before the petition is filed.

The jurisdictional criteria for the dissolution of civil partnerships is the same as that for divorce, save that the criteria that both parties are domiciled in England and Wales is not included (part 3 of the Civil Partnership Act 2004).

With regard to divorce, if none of the criteria apply on the facts, the UK courts may still gain jurisdiction if no court of another EU state has jurisdiction in accordance with the criteria set out in the regulation known as Brussels II revised.

Civil partnerships may still apply for UK jurisdiction where none of the relevant criteria can be shown if no other court has jurisdiction in accordance with the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005 and either:

- the petitioner or the respondent is domiciled in England and Wales on the date the dissolution petition is filed at court; or
- the civil partnership is registered in England or Wales and the court decides it is in the interests of justice to assume jurisdiction.

This provides for circumstances where civil partners had registered their civil partnership in England and Wales and relocated to a country where UK civil partnerships are not recognised.

Conclusion

The change in the legal landscape in England and Wales for same sex couples over the last ten years has been vast. Whereas no formal recognition of same sex relationships existed before 2005, same sex couples are now afforded a legal status commensurate with opposite sex married couples through civil partnerships and the extension of marriage. However, some distinctions mean there is still a degree of inequality. Some argue that the restricted availability of civil partnerships discriminates against opposite sex couples. For same sex couples, the inequality relates primarily to limits on religious marriage and the restrictions on benefits under occupational pensions. Whilst these issues have been reviewed since the commencement of the MSSCA and the status quo maintained for the time being, this is an area of the law that is likely to continue to evolve in the coming years.

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