

VII.B Family Law in England and Wales

by John Darnton

1. Definitions

CA	means “the Children Act 1989”
CMS	means “the Child Maintenance Service”
CPA	means “the Civil Partnership Act 2004”
CPMD	means “the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019”
CSA	means “the Child Support Act 1991”
IPFDA	means “the Inheritance (Provision for Family and Dependants) Act 1975”
MCA	means “the Matrimonial Causes Act 1973”
MFPA	means “the Matrimonial and Family Proceedings Act 1984”
<i>Radmacher</i>	means “ <i>Radmacher v Granatino</i> [2010] UK SC 42”
The MA(SSC)A	means “the Marriage (Same Sex Couples) Act 2013”
The Marriage Act	means “the Marriage Act 1949”
<i>White</i>	Means “ <i>White v White</i> [2001] 1 AC 596”

2. Recitals

- 2.1 The law stated is at January 2020.
- 2.2 References to England shall mean England and Wales.

3. Family relationships

- 3.1 English law recognises two forms of formal family relationship namely **marriage** and **civil partnership**. For many years marriage was only open to individuals of opposite sex but in 2013 same-sex marriage was legalised (MA(SSC)A).
- 3.2 Since 2005, same-sex couples have been able to enter into civil partnerships (CPA) and since 2 December 2019 it has been possible for opposite-sex couples to enter into civil partnerships (CPMD).
- 3.3 Many of the principles which apply to married couples apply with equal force to civil partners.
- 3.4 England does not have a statutory framework for *de facto* relationships and disputes between **cohabitants** are resolved utilising a patchwork of different statutory and equitable principles.

4. Invalidity of marriage and civil partnerships

- 4.1 The MCA allows the court, in strictly limited circumstances, to declare a marriage either "void" or "voidable".
- 4.2 A marriage will be void in situations that include the following:
 - 4.2.1 where the parties are too closely related to each other; or
 - 4.2.2 where either party was under 16 years of age at the time of the ceremony; or
 - 4.2.3 where either party was already lawfully married (MCA, s11).
- 4.3 If a marriage is void, it never existed. A decree is therefore not needed to end the marriage but as a decree is needed to secure **financial orders**, one is often obtained.
- 4.4 The court can declare a marriage voidable in the following situations:
 - 4.4.1 **non-consummation**, either due to incapacity of one party or wilful **refusal** (note: non-consummation does not give rise to a voidable civil partnership or same sex marriage);
 - 4.4.2 **lack of consent** for example due to duress;
 - 4.4.3 one party was suffering from a **mental disorder** such as to make them unfit for marriage; or
 - 4.4.4 an interim gender recognition certificate was issued to the respondent after the marriage.
- 4.5 A voidable marriage continues until such time as a **decree of nullity** is obtained. A bar to obtaining a decree can exist if the **respondent** satisfies the court, first, that the **petitioner**, knowing that the marriage could be ended, behaved in such a way as to lead the respondent reasonably to believe that he would not seek to end it and, secondly, that it would be unjust to the respondent to **grant a decree** (MCA, s13(1)).
- 4.6 Generally the petitioner must apply for the decree within three years of the date of the marriage although this does not apply to non-consummation cases, nor to those based on an interim gender recognition certificate. The court also has a discretion to extend the time limit (MCA, s13(4)).

5. Divorce and dissolution (including judicial separation)

- 5.1 A **petition for divorce** cannot be presented to the court before the end of a period of one year from the date of the marriage (MCA, s3).
- 5.2 There is only one ground on which a petition for divorce may be presented and that is that the marriage has **broken down irretrievably**. Moreover, the court cannot hold that the marriage has broken down unless the petitioner satisfies the court that one or more of the five facts are made out (although there is no need for there to be causal connection between the facts and the breakdown).

- 5.3 The facts are as follows:
- 5.3.1 the respondent has committed **adultery** and the petitioner finds it intolerable to live with the respondent;
 - 5.3.2 the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
 - 5.3.3 the respondent has **deserted** the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
 - 5.3.4 the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted;
 - 5.3.5 the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the petition.
- 5.4 The present government has indicated an intention to introduce legislation to implement “no fault” divorce. (The Divorce, Dissolution and Separation Bill).
- 5.5 The grounds on which a **decree of judicial separation** may be obtained are the same as the facts that need to be proved to obtain a divorce but there is no need for the parties to show irretrievable breakdown (MCA s17(2)).
- 5.6 A decree of judicial separation does not dissolve the marriage but only releases the parties from the duty to live together. On granting a decree of judicial separation the court can make financial orders broadly similar to those available on divorce save that the court cannot make pension sharing orders.

6. Children

- 6.1 The principal statute governing matters relating to children contains a number of core principles namely:
- 6.1.1 a concept of **parental responsibility** which is defined as being “*all the rights, duties, powers, responsibilities and authorities which by law a parent of a child has in relation to the child and his property*” (CA, s3(1)). The starting point is that married parents have joint parental responsibility but if the parents are not married, only the mother has parental responsibility (unless the father is registered as the father on the child’s birth certificate).
 - 6.1.2 when the court determines any question with respect to either the upbringing of a child or the administration of the child’s property or the application of any income arising from it, the **child’s welfare** shall be the court’s paramount consideration (“the welfare principle”) (CA, s1(1));
 - 6.1.3 when the court applies the welfare principle it is to have particular attention to the seven factors contained in the welfare checklist (CA, s1(3));
 - 6.1.4 when a court is considering whether or not to make one or more orders with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all (CA, s1(5));

- 6.1.5 in any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to **prejudice** the welfare of the child (CA, s1(2)).
- 6.2 An unmarried father can acquire parental responsibility for a child by agreement (in set form) with the child's mother or by way of court order.
- 6.3 CA emphasises the importance of "parental responsibility" and English law no longer contains the concept of custody. CA seeks to set up a flexible system which enables a court to have as wide a choice of orders as possible so that any question which arises with regard to the welfare of a child can be resolved, whatever the nature of the proceedings before the court.
- 6.4 In theory it is possible for a person with parental responsibility to act alone but several cases have limited the right to act unilaterally. So where there is joint parental responsibility, one parent does not have the right to unilaterally change the child's surname and there are other decisions, for example relating to religious upbringing, which ought to be taken by the agreement of all those with parental responsibility (or order of the court in the absence of such agreement).
- 6.5 It is also important to bear in mind that, as a child gets older and more mature, that child will gradually become mature enough to make decisions for themselves. In 1986 the House of Lords stated that "*Parental authority ceases in respect of any aspect of a child's upbringing about which the child himself is sufficiently mature to make decisions for himself*".
- 6.6 In *Hoppe v Germany* [2003] 1 FLR 384 the European Court of Human Rights accepted the primacy of the interests of the child where a balance was required to be struck between competing convention rights. So the paramountcy of the welfare of the child will take priority over a parent's convention rights.
- 6.7 Three broad types of orders can be made in relation to children in private proceedings:
- 6.7.1 **child arrangements orders** (regulating with whom a child lives or spends time);
 - 6.7.2 **prohibited steps orders** (for example preventing the relocation of a child);
 - 6.7.3 **specific issue orders** (for example dealing with a child's education or religious upbringing) (CA, s8).
- 6.8 There is no statutory presumption of "equal" or "shared" care of a child but s.1(2A) CA provides that the court is to presume, unless the contrary is shown, that involvement of a parent in the life of the child concerned will further the child's welfare.

7. Financial provision on divorce

- 7.1 On divorce the court can make a variety of **income and capital orders**. The court can order:
- 7.1.1 spousal maintenance;
 - 7.1.2 the payment of a lump sum or sums;
 - 7.1.3 the transfer of property;
 - 7.1.4 the settlement of property;
 - 7.1.5 the variation of an ante-or post-nuptial settlement; and
 - 7.1.6 the sharing of a pension.