

FRANCO BRITISH LAWYERS ASSOCIATION (SCOTTISH BRANCH)

MEETING ON THURSDAY 16 NOVEMBER 2006

CIVIL PARTNERSHIPS

INTRODUCTION

- **4 Jurisdictions Family Law Conference 2003 - Liverpool**
- **European speaker – Dutch academic- on family law provision for same sex couples**
- **Chart – ranking of European States according to how much recognition each had given to same sex couples**
- **Sliding scale from no recognition at one end through to gay marriage at the other**
- **Belgium had leapt up the chart with a surprise move to allowing gay marriage**
- **UK jurisdictions languishing at the bottom of the chart**
- **At that time, while there had been a couple of notable decisions – eg to recognise a homosexual as a member of his deceased partner’s family for the specific purpose of succeeding to a tenancy { *Fitzpatrick v Sterling Housing Association 2001 I AC 27* } and in Scotland an Adoption Order was approved in favour of a man who was living with his partner in a same sex relationship { *T Petitioner 1997 SLT 724* } there was a complete lack of any coherent official recognition for gay couples within the law.**
- **Then came the Civil Partnership Act 2004.... in one fell swoop adopted a regime *for couples choosing to enter a civil partnership* that gave them rights and responsibilities mirroring those of heterosexual married couples.**

THE LEGISLATION

- UK wide statute
- Parts I & 2 ENGLAND
- Part 3 Sections applicable to Scotland – I and 85 –136 and 225-227
- Separate section for NORTHERN IRELAND
- Thrust of the legislation is to provide parity of treatment with married couples *for those who chose to register a same sex partnership* ; that decision one of social policy – social rather than legal innovation in many ways because of the way in which it has been done
- Method that has been used is to incorporate civil partnership rights into the existing financial provision on divorce law, succession law and protection from domestic abuse ; often by amending existing spousal provisions to add in “ and civil partners”
- To understand this and to see how the French Pacte Civil de Solidarite differs it is important to contrast the rights now afforded to cohabiting couples, both homosexual and heterosexual, under the Family Law (Scotland) Act 2006
- This new legislation has introduced a lesser body/ type of rights for cohabiting couples. Example, for a cohabiting same sex couple, there is no obligation to support each other financially, there is on breakdown of the relationship a right to apply to the court for a lump sum order where one party feels they have been economically disadvantaged through the relationship, but there is no code of principles for the court to apply and the test is wholly discretionary.

- On death, there is scope for an order for payment of a capital sum out of the deceased's net (intestate) estate or an order for transfer of property from the estate to the surviving cohabitant
- But the rights are always secondary to those of a surviving spouse or civil partner.
- Important to understand then that we now have in Scotland a two tier system where the top or first tier of rights are afforded to those who register their relationship either by marriage or civil partnership and the second tier of rights is for those whose relationship is not formalised.
- So civil partners are placed on an equal footing with married couples, and but are not "married" in the traditional sense.
- What are the distinctions as there are between marriage and civil partnership and are they formal matters rather than any of real substance?
- Section 85 – civil partnership cannot be created in a religious ceremony, only through civil registration. Thus in contrast to the Marriage (Scotland) Act 1977 which provides separately for "Religious Marriages" and "Civil Marriages", only "civil" form of civil partnership" is permitted. While this caused considerable consternation in the gay community, it is unlikely to raise any legal issues other than if the European Jurisprudence develops to regard this distinction as incompatible with the European Convention on Human Rights . (see Wilkinson v Kitzinger below)
- During the life of a civil partnership the rights are effectively identical to marriage – the obligation to aliment (maintain) the other partner, the protection from abuse through interdicts called " relevant interdicts" which

are truly matrimonial interdicts with power of arrest provision as with marriage

- At the end of civil partnership, there are one or two differences, but again not of substance legally. One applies for “dissolution” rather than divorce. There are two grounds for dissolution- - irretrievable breakdown of marriage or the issuing of a Gender Recognition Certificate. So far as the first is concerned, the reasons for irretrievable breakdown do not include adultery, which remains a heterosexual concept in Scots Law, but are otherwise identical to divorce – unreasonable behaviour and non cohabitation grounds.
- Financial provision on divorce.
- The full gamut of rights relative to financial provision on divorce available to spouses will apply to civil partners and the existing case law is already there for guidance. The Family Law (Scotland) Act 1985 has been amended (*see Schedule 28, part 2*) to include reference to “civil partners” on this inclusive approach.
- Again, from a legal perspective, as the provisions are designed to provide complete parity with divorcing couples, the courts will have ample authorities on which to rely in deciding the first financial provision for civil partners cases and it is thought unlikely that they will raise any new issues of principle.
- The semantic difference between “ matrimonial property” and “ partnership property” amounts to no more than a consistent attempt to avoid the language of marriage in dealing with civil partners.
- Children

- Of course much financial provision on divorce work involves looking at married couples with children and account can be taken where one party devotes themselves to the care of the family in such a way that results in their economic disadvantage.
- In this context it is important to note the absence of provisions relating to children of Civil Partnerships in the Scottish Part of the Act.
- The English and Northern Irish Parts each have a short body of provisions dealing with the child law aspects of Civil Partnership, including the recognition of civil partners within the adoption legislation.
- The Scottish Part does not contain such provisions partly because it was known that Scotland was undertaking a wholesale review of Adoption and related child law matters which would lead to legislation. Now while the Adoption and Children (Scotland) Bill 2006 is trundling through the Scottish Parliament, it is not yet passed. So at the moment civil partners are not on the same footing as heterosexual married couples so far as adopting children are concerned
- Clauses 31 and 32 of the 2006 Bill provide that couples can adopt a child whether or not they are married or civil partners if they are living together as if they were such and there is also specific provision for civil adoption by civil partners.
- The current position is that only married couples can adopt (section 14 1978 Act) but one person from a homosexual couple could adopt a child as a single person (under s 15) as an individual.
- As time goes on the point could well be raised that the lack of provision for civil partners to adopt as a couple is discriminatory, though unless the

legislation isn't passed in the anticipated timescale, the point may become academic.

- And the 2004 Act has had to be amended (by the 2006 Act) to add in appropriate references to children of a family including children of civil partnerships for the purpose of occupancy rights in the family home – so the lacuna in Scottish provisions relating to children of civil partnerships has been noticed.

RECOGNITION OF CIVIL PARTNERSHIPS : IPL ISSUES

- Section I24 – Validity of Civil Partnerships registered outside Scotland
- Where a civil partnership registered in England and Wales or NI is valid in that jurisdiction it will be recognised here, if it would be void there it will be void here and if voidable there voidable here.
- Where a couple have registered an “ apparent or alleged overseas relationship” similarly it will be recognised if valid in the place of celebration
- And the rules on recognition of overseas divorces are mirrored by provisions allowing for the recognition of dissolution of civil partnerships on the same grounds.
- But what about countries that recognise marriage between two people of the same sex?
- There is little doubt that a marriage contracted by a same sex couple in a country that provided for “gay marriage” would be recognised as an “ overseas relationship” (see section 2I5) but could it be recognised as a marriage under our law?

- This was the subject for discussion in *Wilkinson and Kitzinger* [2006] EWHC 2022 (Fam) a decision of Sir Mark Potter the President of the Family Division of the English High Court
- This was a Petition by one party to a same sex couple for declarator that her marriage to her partner, lawful and valid as a marriage under the law of British Columbia should be recognised *as a marriage* in terms of the law on recognition of marriages (s 55 Family Law Act 1986)
- Ms Wilkinson and her partner Celia Kitzinger had lived together as a couple in England for 13 years. They wanted to marry and couldn't do so in any of the UK jurisdictions so they went to British Columbia. They were both domiciled in England at the material time.
- The relevance of the Civil Partnership Act was that it had come into force shortly after the Petition was raised and it was accepted by both sides that the Act had created financial and other material rights that were equivalent to those of married couples, albeit that there were important distinctions in the lack of religious ceremony and other process related matters.
- The argument was focused primarily as a Human Rights point – namely that in accordance with the Human Rights Act 1988 the provisions of the relevant marriage legislation and the Civil Partnership Act should be read in such a manner as to recognise same sex marriages and that if it was not possible to do so, then to declare those provisions to be incompatible with ECHR.
- This couple wanted to “be married” not have legal recognition of their relationship through civil partnership – they wanted to be able to use the language so carefully avoided in the CP Act and have it apply to them

- The judgement provides a good summary of the issues relating to the distinction between civil partnership and marriage that were behind the decision to create a secular status only for same sex couples rather than allow individuals of the same sex to marry.
- In short the Petition was unsuccessful on a number of grounds
- Sir Mark Potter held that because, so far the Convention jurisprudence has not yet recognised a childless same sex relationship as constituting family life in terms of Article 8, he was free to hold that the obligation to respect family life was not apt to bring within the ambit of Article 8 the UK Government's policy choices on the treatment of same sex couples.
- And so far as the Article 12 right to marry is concerned, the English failure to recognise a same sex marriage was argued to be discriminatory by resort to Article 14. But it was held that the decision by the UK to retain marriage as something that can only be entered into between a man and a woman constituted a legitimate aim and the steps taken to secure it were reasonable and proportionate, particularly as one of the pieces of legislation being attacked had effectively removed the substantive differences in financial treatment of same sex couples who choose to formalise their relationship.
- The decision relied heavily upon the recent House of Lords decision in *M v Secretary of State for Work and Pensions* [2006] 2 WLR 637.
- The issue that arose in that case was whether the child support regime in place prior to the passing of the Civil Partnership Act 2004 fell within the ambit of family life for the purpose of Article 8, as it discriminated against the female appellant who was living as a couple with a same sex partner

- The Court of Appeal had characterised the regime as falling within the ambit of family life with the consequences in terms of Convention compliance.
- That decision includes an impressive survey of the European Jurisprudence on the relationships falling within the Article 8 term “family life”. Ultimately (with Baroness Hale dissenting) the House decided that the same sex childless relationship need not be regarded as constituting “family life” for the purpose of the Convention *at the relevant time (2001-2002)* but added that there was little doubt that if the matter was to come before either a Strasbourg Court or a Court in the UK on the same point in respect of the position in 2006.
- I haven’t heard whether on that basis Ms Wilkinson will be taking the matter further in the English Courts and beyond, but the M case brings me full circle to my 2003 thoughts on civil partnerships because it contains (rather like my Dutch academic friend) a comparative list of jurisdictions that have given legal recognition to same sex relationships from unregistered cohabitation through to marriage. (and only three so far have marriage itself – Netherlands, Belgium and Spain)
- If we are looking for the next stage of reform, I would suggest that it is more likely to come from Strasbourg than Edinburgh, where the provisions of the 2004 Act will be interpreted as intended to provide equal treatment before the law for all those who choose to formalise their relationships. The increasing numbers who cohabit informally will have to fight their cause for equal treatment another time...../