Hayes and Williams' Family Law

Fourth Edition

STEPHEN GILMORE

LL.B (Hons) Leics, LL.M (Family Law and Policy) U.E.A, M.St Oxon of Lincoln's Inn, Barrister, Senior Lecturer in Law, King's College London

LISA GLENNON

LL.B, PhD

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The formation of adult relationships

INTRODUCTION

At one time family law recognised only one sort of status relationship between adult partners, namely marriage between persons of the opposite sex. Today, however, same-sex relationships are similarly recognised in that such couples can register a civil partnership, and since the enactment of the Marriage (Same Sex Couples) Act 2013, can enter into a same-sex marriage. Over time, the law has also given increasing recognition to couples who cohabit outside marriage or civil partnership, although as we shall see cohabitants have fewer rights and remedies in family law than married couples or civil partners.[1] This chapter looks at the creation of these adult relationships and their legal consequences.

Marriage and civil partnership are regarded as 'formal' in nature, since certain legal formalities must be complied with for their creation (and indeed dissolution). A failure to do so may mean that the legal relationship of marriage or civil partnership will not have been created, and the parties will not have the legal rights, obligations, and privileges which attach thereto. By contrast, other relationships, such as cohabitation outside marriage and civil partnership, or home-sharer relationships, are 'informal' in nature. Whether such informal relationships exist depends on the factual nature of the relationship. Proposals for reform of the law to give cohabitants rights on relationship breakdown have struggled with the difficulty of defining cohabitation.[2] Marriage and civil partnership, on the other hand, are proved simply by evidencing the status, for example by production of a marriage certificate.

This chapter deals first with formal relationships of marriage and civil partnership, and then with cohabitation and finally with other home-sharer relationships.

1 Marriage

1.1 Marriage today

Although Lord Nicholls stated in *Bellinger v Bellinger (Lord Chancellor Intervening)*[3] that marriage is 'an institution, or a relationship, deeply embedded in the religious and social culture of this country', marriage is no longer as popular as it was, and increasing numbers of couples opt to cohabit rather than marry.[4] Also, the nature of marriage has changed over the years. In 1886, Lord Penzance in the case of *Hyde v Hyde*[5] said: 'I conceive that marriage, as understood in Christendom, may…be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.' Today, this definition[6] is no longer accurate. First, the Christian conception of marriage no longer predominates. Many marriages today are civil marriages, and it is possible to marry in a Muslim mosque or a Hindu temple, not just in

[1] For discussion of the differences and of legal developments and policy, see A. Barlow, S. Duncan, G. James, and A. Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Oxford: Hart, 2005).
[2] See Chapter 2. [3] [2003] UKHL 21. [4] See Chapter 2. [5] [1866] LR 1 P & D 130.
[6] Or a defence of a particular view of marriage, see R. Probert, '*Hyde v Hyde*: Defining or Defending Marriage?' [2007] Child and Family Law Quarterly 322.

a Christian church. Marriage is also not necessarily regarded as being for life, as many marriages end in divorce. Also, some polygamous marriages are recognised in this country where the parties have come from an overseas jurisdiction where such marriages are lawful. Furthermore, since the enactment of the Marriage (Same Sex Couples) Act 2013, same-sex couples can enter into a legally valid marriage which has the same effect as opposite-sex marriage, extending both existing and future legislation applicable to opposite-sex spouses to same-sex spouses.[7] The only part of Lord Penzance's definition, therefore, which remains material today is that marriage involves a voluntary union, a fact which has been reinforced in recent years by reforms giving greater protection to victims of forced marriage.[8]

Talking point

According to Government statistics,[9] the number of marriages has declined significantly over the years, but has remained relatively stable in the last few years. The provisional number of marriages registered in England and Wales rose by 1.7 per cent in 2011 to 247,890 (from 243,808 in 2010).[10] The long-term picture for UK marriages has been one of decline, from a peak of 480,285 marriages in 1972, with figures for 2010 showing the first increase since 2004. In 2011, the provisional male marriage rate remained at 22.0 men marrying per 1,000 unmarried men aged 16 and over, and the provisional female marriage rate decreased to 19.8 women marrying per 1,000 unmarried women aged 16 and over (from 20.0 in 2010). The average age of marriage has increased over the years, in 2011 the number of marriages was greatest among men and women aged 25 to 29. The provisional mean age for men marrying in 2011 was 36.3 years, and for women was 33.8 years. Due to the high incidence of marriage breakdown, many marriages are second marriages. In 2011, provisional figures show that 34 per cent of all marriages in England and Wales were remarriages for one or both of the parties. Since 1992, there have been more civil ceremonies in England and Wales than religious ceremonies. In 2011, civil ceremonies accounted for 70 per cent of all ceremonies, an increase from 64 per cent in 2001. Increasing numbers of marriages now take place in approved premises, such as hotels, stately homes, and historic buildings. In 2011, 58 per cent of all marriages took place in such premises.

1.2 The right to marry

Key legislation

The right to marry is a human right under Article 12 of the European Convention for the Protection of Human Rights (ECHR),[11] which provides that: 'Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of this right.'

This is a 'strong' right, as illustrated by the House of Lords decision in *R (Baiai and Others) v Secretary of State for the Home Department*.[12] In that case a legal challenge was made to the immigration rules which required persons subject to immigration control to obtain the written permission

[7] Section 11 and Schs 3–4 of the Marriage (Same Sex Couples) Act 2013. There are some differences between same- and opposite-sex marriages which will be explained later in this chapter.

[8] See Section 5 of this chapter.

[9] Published by the Office for National Statistics (www.statistics.gov.uk).

[10] Office for National Statistics, Marriages in England and Wales (Provisional) 2011 (2012). Marriage statistics for 2011 are provisional and will be finalised early in 2014 when the majority of marriage returns have been received from register offices and the clergy.

[11] On the right to marry, see R. Probert, 'The Right to Marry and the Impact of the Human Rights Act 1998' [2003] International Family Law 29.

[12] [2008] UKHL 53, [2008] 2 FLR 1462.

of the Home Secretary to marry in the UK, unless they intended to enter into an Anglican marriage. These provisions were held to breach Article 12 and Article 14 (discrimination in respect of a Convention right) of the ECHR. The House of Lords held that, although the right to marry under Article 12 can be regulated by national laws both as to procedure and substance, such laws must not deprive persons of full legal capacity of the right to marry, or substantially interfere with their exercise of that right.[13]

1.3 The creation of a valid marriage

Marriage is an arrangement in which the state has an interest and thus it is not a contract which can be created and terminated at the will of the parties. For this reason there are legal rules governing its formation and dissolution.[14] In order to create a valid marriage in England and Wales, both parties must have the capacity to marry, and the marriage must not fall foul of various grounds in section 11 of the Matrimonial Causes Act (MCA) 1973 upon which a marriage may be regarded as void.

1.4 Capacity to marry

As marriage involves a *voluntary* union between a man and a woman, each party must consent to the marriage and thus have the capacity to consent. In *Re E (An Alleged Patient); Sheffield City Council v E and S*[15] a local authority sought to prevent E, a young woman of 21 who was functioning at the level of a 13-year-old, from marrying a 37-year-old man who had a substantial history of sexually violent crimes. The local authority were concerned that the relationship was an abusive one. As a preliminary issue the question arose as to the test for capacity to marry. Munby J, drawing on earlier authority,[16] explained that the test for capacity is whether a person is able to understand the nature of the marriage contract, and whether he or she is mentally capable of understanding the duties and responsibilities that normally attach to marriage.[17] His Lordship went on, however, to indicate that this requires merely an understanding of the essence of the agreement, which is 'to live together, and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance.' Munby J was concerned not to set the test of capacity to marry too high, 'lest it operate as an unfair, unnecessary and indeed discriminatory bar against the mentally disabled'[18] or become 'too easy to challenge the validity of what appear on the surface to be regular and seemingly valid marriages'.[19]

The High Court's inherent jurisdiction[20] can be invoked to protect vulnerable adults who lack the capacity to marry but who may be at risk of being forced into a marriage. For instance, in *M v B, A and S (By the Official Solicitor)*,[21] the local authority was concerned that the parents of a young woman aged 23 with a severe learning difficulty were organising a marriage for her in Pakistan. The High Court, exercising its inherent jurisdiction, granted declarations, on the local authority's application, that she lacked the capacity to marry and that it was not in her best interests to leave the jurisdiction of the UK.[22]

[13] See also *O'Donoghue and Others v UK* (App no 34848/07) [2011] 2 FCR 197. [14] See Chapter 2.

[15] [2004] EWHC 2808 (Fam), [2005] 1 FLR 965. [16] *Re Estate of Park* [1954] P 112.

[17] *Re E (An Alleged Patient); Sheffield City Council v E and S* [2004] EWHC 2808 (Fam), [2005] 1 FLR 965. See R. Gaffney-Rhys, '*Sheffield City Council v E & Another*—Capacity to Marry and the Rights and Responsibility of Married Couples' [2006] 18 Child and Family Law Quarterly 139. [18] Ibid, para [144]. [19] Ibid, para [145].

[20] The High Court's inherent jurisdiction is a parental sort of jurisdiction, of which wardship is also a part, see Chapter 9. [21] [2005] EWHC 1681 (Fam), [2006] 1 FLR 117.

[22] See also *X City Council v MB, NB and Mab (By His Litigation Friend The Official Solicitor)* [2006] EWHC 168 (Fam), [2006] 2 FLR 968 where an autistic man (aged 25) who lacked capacity to marry was given protection by Munby J under the inherent jurisdiction of the High Court on the application of the local authority, in order to prevent him being taken abroad by his parents to be married in Pakistan.

1.5 The law of nullity

Key legislation

The law of nullity of marriage is laid down in Part I of the MCA 1973.[23] This is where a marriage is ended by being declared not valid. This can either be because the marriage was void (not allowed by law) or because the marriage was voidable (the marriage was legal but there are circumstances that mean it can be treated as if it never took place).

A void marriage is one which is not valid because of a fundamental defect. The marriage is void *ab initio*; there never was a valid marriage right from the beginning. Parties to a void marriage are therefore free to marry, and there is no need to apply for a decree to annul the 'marriage'.[24] However, the advantage of obtaining a decree of nullity is that it removes any uncertainty as to the status of the parties, and the grant of a decree gives the court jurisdiction under Part II of the MCA 1973 to grant finance and property orders equivalent to those which can be made on divorce.[25] Third parties, not just the parties to the marriage, can apply for a decree of nullity on the ground that the marriage is void and they can do so during the lifetime of the spouses or after their deaths.[26] In some circumstances, a marriage may be regarded as a 'non-marriage', one which departs so far from the formalities required to contract a valid marriage in England and Wales that it cannot even be regarded as a void marriage.[27]

A voidable marriage, on the other hand, is a valid and subsisting marriage unless and until it is annulled by the court on application of one of the parties during the lifetime of both parties.[28]

Talking point

Nullity petitions are rarely sought and are much less commonly sought than divorce. According to Government statistics, only 290 nullity decrees were filed in the courts in England and Wales in 2009 compared with 132,144 petitions for divorce.[29]

A decree of nullity is granted in two stages: decree nisi followed by a decree absolute. On or after the grant of a decree of nullity, the court has jurisdiction to make finance and property orders under Part II of the MCA 1973 equivalent to those which can be made on divorce. Nullity differs from divorce, however, in that the grounds for nullity are different, and there is no prohibition on bringing nullity proceedings in the first year of marriage as there is for divorce.[30] Also, the procedure for nullity is very different from that of divorce. Thus, whereas undefended divorces are dealt with by what is essentially an administrative procedure with little judicial involvement and there usually being no need to attend court, nullity proceedings, whether or not defended, are heard in open court with the parties giving oral evidence. This can be distressing and embarrassing for the parties, particularly in forced marriage cases

[23] Which also governs the law of divorce (and judicial separation), see Chapter 4.

[24] The parties to a void first 'marriage' will not commit the crime of bigamy if they enter into a second one without annulling the first.

[25] See Chapter 4.

[26] Eg a third party who wishes to prove there is no valid marriage in order to establish that the children of the relationship have no automatic right to succeed to any property on the death of a party to the 'marriage' who has died intestate.

[27] See Section 2.3.1 of this chapter.

[28] MCA 1973, s 16.

[29] *Judicial and Court Statistics 2009* (Ministry of Justice, 2010), Ch 2, Table 2.5.

[30] See MCA 1973, s 3.

where the petitioner may already be considerably distressed by the experience of being forced into marriage. There has been discussion about whether the law should be changed to remove the need for nullity proceedings to be heard in open court, and a significant majority of persons who responded to a Government consultation were in favour of the court having the power to make nullity orders without hearing oral evidence, but having a discretion to require a hearing where appropriate.[31]

2 Void marriages

Key legislation

The grounds on which a marriage may be void are laid down in section 11 of the MCA 1973, which provides that:

> A marriage celebrated after 31 July 1971 shall be void on the following grounds only, that is to say—
>
> (a) That it is not a valid marriage under the provisions of the Marriage Acts 1949-1986 (that is to say where—
>
> (i) the parties are within the prohibited degrees of relationship;
>
> (ii) either party is under the age of sixteen; or
>
> (iii) the parties have intermarried in disregard of certain requirements as to the formation of the marriage);
>
> (b) that at the time of the marriage either party was already lawfully married…[32]
>
> (d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.
>
> For the purposes of paragraph (d) of this subsection a marriage may be polygamous although at its inception neither party has any spouse additional to the other.

The grounds which render a marriage void are considered in more detail in the following sections.

2.1 Marriage within the prohibited degrees of relationship

A marriage is void under section 11(a)(i) of the MCA 1973 if the parties are within the prohibited degrees of relationship. The law of England and Wales prohibits marriage between certain relationships of consanguinity (blood relations) and affinity (family relationship created by marriage). The rules governing relationships of consanguinity are more restrictive than those for relationships of affinity.

Under the rules which apply to relationships of consanguinity,[33] a person may not marry his or her parent, grandparent, child, grandchild, sibling, aunt or uncle, niece or nephew. These prohibitions on marriages between persons related closely by blood are founded on biological, moral, and social reasons. The biological reasons are based on genetic factors, as inherited disorders are more liable to arise within the same genetic pool. The moral and social policy reasons which prohibit such marriages relate to what is acceptable to public opinion. People have a strong sense of taboo

[31] See the consultation document, *Family Procedure Rules: A New Procedural Code for Family Proceedings*, CP 19/06.

[32] Section 11(c), which stated that the parties must be respectively male and female, has been deleted by the Marriage (Same Sex Couples) Act 2013. As a result, marriage is now available to same-sex couples. This will be discussed later in the chapter. See Section 7.

[33] See the Marriage Act 1949, Sch 1, Pt I.

about sexual relationships taking place between persons who are closely related. Marriage between cousins is permitted, however, despite evidence to show that children of cousin-parents are more likely to suffer from genetic diseases which may cause disability or death. Cousin marriage is particularly common in the Pakistani and Bangladeshi immigrant community, and Baroness Deech has expressed the view that, although human rights and religious and cultural practices are respected by not prohibiting such marriages, those cousins who do marry should be made aware of the possible genetic consequences for their children.[34]

There are also prohibitions on marriages taking place between persons who are related by reason of marriage.[35] These prohibitions are based on social policy considerations designed to discourage sexual relations within the family which cut across taboos of what is generally regarded as acceptable behaviour. However, these prohibitions were made less restrictive by the Marriage (Prohibited Degrees of Relationship) Act 1986, which amended the relevant provisions of the Marriage Act 1949 and permitted certain persons related by marriage to enter into a valid marriage. Thus, it became possible for a step-parent to marry his or her stepchild (the son or daughter of his or her former spouse), provided both parties were over the age of 21 and the step-parent had not treated the stepchild as a child of the family before the stepchild reached the age of 18. It also became possible to marry a former in-law provided both parties to the marriage were over 21 and the parties' former spouses were dead. Thus, for example, a man could marry his mother-in-law, provided his former wife and his former father-in-law were both dead. However, the restrictions on former in-law marriages were removed on 1 March 2007, as they were held by the European Court of Human Rights (ECtHR) in *B and L v UK*[36] to be in breach of the right to marry under Article 12 of the ECHR.

Key case

In *B and L*, a father-in-law (B) and his daughter-in-law (L) wished to marry after each of their marriages had ended in divorce, but the superintendent registrar at the register office refused to give them permission to marry as they were prohibited from doing so on the ground that both their former spouses were alive. B and L took their case to the ECtHR, claiming that this bar on 'in-law' marriages was a breach of their fundamental right to marry under Article 12.

The Court allowed their claim, holding that the relevant sections of the Marriage Act 1949 were incompatible with Article 12 of the ECHR as the prohibition was neither rational nor logical and served no useful purpose of public policy.

After the decision in *B and L v UK*, the UK Government was forced to change the law and remove the restrictions that both former spouses should be dead.[38] Although the UK Government was not obliged to remove the age restriction, as the ECtHR had not considered this matter (as B and L were both over 21), it nonetheless decided to remove the incompatibility with Article 12 'across the board' by removing the age restriction.[39]

[34] R. Deech, 'Cousin Marriage' [2010] Family Law 619.

[35] See Marriage Act 1949, Sch 1, Pts II and III.

[36] (App no 36536/02) [2006] 1 FLR 35.

[37] For a discussion of *B and L v UK* and whether the decision has other implications for the law on the prohibited degrees of relationship, see L. Schäfer, 'Marrying an In-Law: The Future of Prohibited Degrees of Affinity and Consanguinity in English Law' [2008] Child and Family Law Quarterly 219.

[38] It did so by passing the Marriage Act 1949 (Remedial Order) 2007, which amended s 1 of and Sch 1 to the Marriage Act 1949, and applied to marriages solemnised on or after 1 March 2007.

[39] The Government was of the view that there would be very few cases involving a party under 21 (because the younger person must have been 16 or over to enter into the first marriage, and could not divorce for at least one year afterwards; and because very few couples marry at so young an age).

2.2 Marriage under the age of 16

Under section 11(a)(ii) of the MCA 1973, a marriage is void if either party to the marriage is under the age of 16.[40] One of the reasons for making 16 the minimum age for marriage is that it is a criminal offence for a man to have sexual intercourse with a girl aged under 16, and the notion that a man could nonetheless be entitled to have sexual intercourse with a girl under 16 under the cloak of marriage was regarded as offensive to law reformers. The view was taken that it was 'essential that the minimum age of marriage and the age of consent for sexual intercourse should be the same'.[41]

If a party is aged 16 but under 18, the age of majority, the consent of certain persons is required as a preliminary formality. These persons include each parent with parental responsibility (or guardian), a special guardian, anyone with whom the young person lives or is to live under a child arrangements order, and a local authority if the child is in care.[42] The absence of parental consent does not render a marriage void although it does mean that the celebrant can refuse to marry the couple; if the child is a ward of court, the court's consent is required. Consent can be dispensed with, however, if a person whose consent is needed is absent, inaccessible, or suffers from a disability.

2.3 Failure to comply with the required formalities for marriage

As marriage changes the status of the parties and gives them various rights and responsibilities it is important to make sure that a marriage has been contracted. For this reason, various formalities must be complied with. The aim of these formalities is to ensure that the parties have the capacity to marry and consent to doing so, that there are no impediments to the marriage, and that there is proof by registration that a marriage has taken place. These rules are complex and breach of certain formality requirements can attract criminal sanctions.[43]

The exact nature of the formalities differs depending on whether the marriage is a civil or religious marriage, and whether it takes place in a religious building, a register office, or approved premises. With respect to religious marriages, there are also different rules depending on whether or not the marriage is an Anglican marriage, in other words one celebrated in the Church of England. The different formalities are explained in the following sections.

Preliminary formalities: the parties must satisfy certain preliminary formalities before the marriage can take place. The rules are the same for all marriages, except those which are to be celebrated in the Church of England.

In the case of a non-Anglican marriage, the parties must first obtain a superintendent registrar's certificate giving them approval to marry. Various requirements must be satisfied before the certificate can be granted, and these are laid down in the Marriage Act 1949. Thus, the parties must give notice of the marriage in prescribed form to the superintendent registrar in the district(s) in

[40] Immigration rules contain certain restrictions on the settlement of foreign spouses or civil partners in the UK. Paragraph 277 of the Immigration Rules states that the spousal visas required to enter the UK will only be granted where both parties are over the age of 21. The purpose of this restriction was to deter forced marriages, where at least one party enters the marriage without his or her free and full consent through force or duress, including coercion by threats or other psychological means. However, while the Supreme Court in *R (Quila and another) v Secretary of State for the Home Department* [2011] UKSC 45 held that this was a legitimate aim, its efficacy was, according to the majority, highly debatable [58]. The Supreme Court held that the Secretary of State had failed to produce robust evidence that the restriction had any substantial deterrent effect on the number of forced marriages. It was concluded that the restriction would keep a substantial number of bona fide young couples apart or force them to live outside the UK [54], far exceeding the number of forced marriages that would be deterred. Thus the Supreme Court held that the restriction was an infringement of the parties' rights under Article 8 of the ECHR.

[41] *Report of the Committee on the Age of Majority*, Latey Committee (Cmd 3342, 1967), para 177.

[42] See Marriage Act 1949, s 3.

[43] Eg giving a false declaration constitutes the criminal offence of perjury.

which each of them has resided for at least the previous seven days, and to the register office where the ceremony is to take place (if this is different). The parties must declare that: there are no lawful impediments to the marriage; the residence requirements have been satisfied; and the required consents have been given. Notice of the marriage is then entered in the marriage notice book and publicly displayed in the register officer for 15 days after which the superintendent registrar issues a certificate (provided there has been no objection to the marriage). The marriage must take place within three months of notice in the marriage notice book. The Registrar-General has the power in exceptional circumstances to reduce the 15-day period; and under the Marriage Act 1983 special provisions permit a person who is housebound due to illness or disability, or who is detained in prison or due to mental ill-health, to marry in the place where he or she is residing or is detained.

A Church of England marriage can only be solemnised after the publication of banns,[44] or after the completion of one of the formalities listed earlier. In the case of other religious marriages a superintendent registrar's certificate must be obtained, but there are additional preliminary formalities for some religions. Thus, under the provisions of the Marriage Act 1949, Quakers must make special declarations when giving notice; and both parties to a Jewish marriage must profess to belong to the Jewish faith.

The marriage ceremony: in England and Wales the ceremony of marriage can take place in a register office, a religious building (such as a church or mosque), or in approved premises.[45]

A marriage ceremony in England and Wales must comply with certain legal formalities which differ depending on whether the marriage is civil or religious. In the case of a civil marriage, once the parties have satisfied the preliminary formalities (see earlier) and obtained the approval of the superintendent registrar (or the Registrar-General) to marry, the marriage can take place in a register office or in 'approved premises', or, in special cases, at the location where a person is housebound or detained. 'Approved premises' are premises which have been approved by the local authority for the purpose of conducting a civil marriage,[46] and include premises such as hotels, stately homes, castles, and other approved places. The civil ceremony, which is public and secular, may be followed by a religious ceremony, but it is the civil ceremony which creates the marriage. At the civil ceremony, the parties must declare that there are no lawful impediments to the marriage and they must exchange vows. At least two witnesses must attend.

In the case of a religious marriage, once the preliminary formalities have been complied with, the marriage is celebrated according to the rites of the particular religion and in the presence of at least two witnesses. Quaker and Jewish marriages are celebrated according to their own religious rites, but they need not take place in a registered building or in public or before an authorised person. There are special rules for the registration of Quaker and Jewish marriages. In the case of other religious marriages, the superintendent registrar's certificate will state where the ceremony is to be held, which will usually be a registered building in the district where at least one of the parties resides. Under the Marriage Act 1949, a 'registered building' is one which is registered by the Registrar-General as a place of meeting for religious worship, and includes not only Christian churches but also Sikh and Hindu temples and Muslim mosques. A non-Anglican religious marriage must be attended by a registrar or an 'authorised person' (such as a religious cleric) and must take place in the presence of at least two witnesses and be open to the public. The ceremony can take any form, provided that during the ceremony the required declarations are made.

[44] An announcement of the intended marriage made by the vicar or rector on three successive Sundays in the parish church of each of the parties.

[45] According to statistics published by the Office for National Statistics, civil ceremonies are more popular than religious ceremonies, and many marriages now take place in approved premises.

[46] Under the provisions of the Marriage Act 1994 and in government regulations.

2.3.1 'Non-marriages'

A failure to comply with the formalities required for contracting a valid marriage will usually mean that the marriage is void, but in some circumstances the court may hold that there was no marriage at all; in other words there was a 'non-marriage'.[47] The distinction between a void marriage and a 'non-marriage' is important because, if there is a 'non-marriage', then a party will not be entitled to a decree of nullity and will therefore be unable to apply for finance and property orders under Part II of the MCA 1973. A 'non-marriage' is one where the formation of the 'marriage' is so flawed that it cannot even be considered a void marriage; it is meaningless in the eyes of the law.

Whether there is a non-marriage depends on the facts of the case, including, for instance, whether the participants, in particular the celebrant, reasonably believed and intended the ceremony to be one which created a lawful marriage. In *Ghandi v Patel*,[48] for instance, a Hindu marriage ceremony conducted by a Brahmin priest in a London restaurant was held to be 'non-marriage'.[49] The court came to the same conclusion in *Alfonso-Brown v Milwood*[50] as the parties had lacked the necessary intent at the time of the ceremony. Neither party had believed that the ceremony, which took place in Ghana, was anything other than an engagement ceremony. By contrast in *Gereis v Yagoub*[51] a couple went through a marriage ceremony at a Coptic Orthodox Church which was not licensed for marriage. The ceremony was conducted by a priest who was not licensed to conduct marriages, and who told the couple that they would also require a civil ceremony to effect a valid marriage. The court held that the ceremony bore all the hallmarks of an ordinary Christian marriage[52] and that the marriage had been treated as a subsisting marriage by all those who had attended. The court rejected the submission that there was no marriage at all, and granted a decree of nullity under section 11(a)(iii) of the MCA 1973, on the basis that the parties had knowingly and wilfully disregarded the formalities.[53]

These authorities were reviewed in *Hudson v Leigh*[54] by Bodey J who took the opportunity to outline the factors which should be considered when deciding whether a marriage was a void marriage or a non-marriage. In this case Miss Hudson was religious and wanted a religious marriage, but Mr Leigh was an atheist. The couple therefore agreed to have a religious ceremony for Miss Hudson's benefit to be followed by a civil ceremony of marriage. The religious ceremony took place but Mr Leigh subsequently refused to go through with the civil ceremony and the question arose as to the status of the religious ceremony. That ceremony was conducted by a minister who was aware of the couple's intentions with respect to the two ceremonies. It was agreed that he would omit the usual words required by law to effect a lawful marriage. So the minister did not ask if the parties knew of any lawful impediments to the marriage, made no reference to them as 'lawful husband or wife', and did not declare that they were 'lawfully married'. Bodey J found on the facts that the ceremony was a non-marriage. Neither the parties at the time of the ceremony, nor the celebrant, intended or believed it to be legally binding. While Bodey J emphasised that the test for non-marriage is a flexible one, with questionable ceremonies being addressed on a case-by-case basis, he provided a non-exhaustive list of factors for consideration. First, whether the ceremony or event set out or purported to be a lawful marriage;[55] secondly, whether it bore all or enough of the

[47] See R. Probert, 'When Are We Married? Void, Non-Existent and Presumed Marriages' [2000] 22 Legal Studies 398.

[48] [2002] 1 FLR 603. See also *A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6.

[49] The law's classifications are arguably unsatisfactory. A father/daughter marriage is void, yet the ceremony in *Ghandi v Patel* is merely a non-marriage. See R. Probert, 'When Are We Married? Void, Non-Existent and Presumed Marriages' [2000] 22 Legal Studies 398.

[50] [2006] EWHC 642 (Fam), [2006] 2 FLR 265.

[51] [1997] 1 FLR 854.

[52] See R. Probert, 'When Are We Married? Void, Non-Existent and Presumed Marriages' [2000] 22 Legal Studies 398 for criticism of this arguably unjustifiable emphasis on the Christian nature of the ceremony.

[53] See also *B v B* [2007] EWHC 2492 (Fam), [2008] 1 FLR 813.

[54] [2009] EWHC 1306 (Fam).

[55] Bodey J subsequently clarified in *El Gamal v Al Maktoum* [2011] EWHC 3763 that he was referring here to a lawful marriage under English law, at [81].

hallmarks of marriage; thirdly, whether the three key participants (most especially the officiating official) believed, intended, and understood the ceremony as giving rise to the status of lawful marriage; and finally the reasonable perceptions, understandings, and beliefs of those in attendance.[56]

Bodey J had the opportunity to consider the issue again in *El Gamal* v *Al Maktoum*[57] where a private Muslim ceremony was conducted by an Imam in a flat. It was argued by the wife that the most important factor was whether the parties intended to create a valid marriage, and that if they did then this could convert a ceremony which was, in effect, a non-marriage into a void marriage. Bodey J gave this short shrift dismissing the submission that the parties' belief or intent that a ceremony would be valid could convert something which would otherwise have been a non-marriage into a marriage, albeit a void one.[58]

Talking point

Clarifying the role of the parties' intention in deciding such matters, Bodey J said 'I have no doubt that intention is relevant to the status achieved or not achieved by a questionable ceremony, as being one of the many considerations which need to be taken into account. It is particularly relevant in the presumably unusual circumstances where the parties did not intend to create a valid marriage, or where they realised that for some reason they would not be able to do so. But the converse does not apply. It is not the law, in my judgment, where no or minimal steps are taken to comply with the Marriage Acts and so the marriage does not set out or purport to be a marriage under those Acts, that it nevertheless suffices if the participants hopefully intended, or believed, that the ceremony would create one.'[59]

It can be said with some certainty, therefore, that the intention of the parties, while a relevant consideration, cannot convert a ceremony which had little or no purported compliance with the legal formalities under the Marriage Acts into either a valid or a void marriage. In *Dukali v Lamrani*,[60] for example, the parties married in a civil ceremony at the Moroccan Consulate. While the ceremony fully complied with Moroccan law, it did not comply with the formalities required under English law even though both parties and the staff of the Moroccan Consulate believed that it did. Relying on *El Gamal v Maktoum*,[61] the court held that just because the parties believed in the validity of the marriage under English law did not mean that it was valid. Due to the wholesale failure to comply with the formalities, the ceremony could not be regarded as giving rise to a valid marriage.[62] Further, it was not a void marriage because it did not even purport to be a marriage under the Marriage Acts. The judge concluded therefore that this was a 'non-marriage'.

Whether the ceremony or event in question is held either to be a non-marriage, a valid marriage, or a void marriage depends not only on the extent to which the purported marriage bore any of the hallmarks of a valid marriage under English law, but also on the extent to which the parties were aware that the ceremony did not comply with the legal formalities. In *MA v JA*[63] the parties underwent a marriage ceremony, conducted by an authorised celebrant, in a registered mosque. The parties believed that the ceremony would create a valid marriage under English law. While the celebrant was aware that the ceremony did not comply with the legal requirements, he did not inform the couple of this. Moylan J held while all the formalities were not complied with, the marriage was in its character 'of the kind' contemplated by the Marriage Acts. In other words, it

[56] For a discussion of this case, see R. Gaffney-Rhys, '*Hudson v Leigh*—The Concept of Non-Marriage' (2010) Child and Family Law Quarterly 351.

[57] [2011] EWHC 3763. [58] [2011] EWHC 3763, [86]. [59] Ibid. [60] [2012] EWHC 1748.

[61] [2011] EWHC 3763.

[62] The parties did not give notice, the Consulate was not registered as approved premises, and the celebrant was not an authorised person, ibid, [36]. [63] [2012] EWHC 2219 (Fam).

bore the hallmarks of a valid marriage. It was conducted in an authorised building in the presence of an authorised person, and there was no lawful impediment to the marriage. The marriage was, therefore, valid as the parties did not 'knowingly and wilfully breach' the requirements of the Marriage Acts.[64]

In short, therefore, it seems that a non-marriage will be found where the ceremony or event bears no resemblance to the requirements of a valid marriage under English law, regardless of the intention of the parties. A valid marriage will be found where the ceremony meets some of the requirements of the Marriage Acts and the parties intended to create a valid marriage. A void marriage will be found where there was some compliance with the formalities (to distinguish it from a non-marriage) but the parties knowingly and wilfully disregarded the full extent of the formal requirements.

2.3.2 The presumptions of marriage

In some cases it may be necessary to rely on the common law presumptions of marriage in order to make a finding that there is a valid marriage.[65] There are two presumptions of marriage. There is a presumption of marriage arising from cohabitation after a ceremony of marriage. In such cases everything necessary for the validity of the marriage is presumed in the absence of decisive evidence to the contrary. A second presumption arises merely from long cohabitation, where a couple have cohabited for such length of time and in such circumstances as to acquire the reputation of being married, even though there is no positive evidence of a ceremony. This presumption can be rebutted only by strong and weighty evidence. In *Chief Adjudication Officer v Bath*[66] the respondent, Kirpal Bath had gone through a marriage ceremony with Mr Bath at a Sikh Temple in 1956 when she was 16. The couple believed the marriage ceremony to be legally valid and were ignorant of the requirements of the Marriage Acts. They had two children and lived together for 37 years until Mr Bath's death. Mr Bath had paid National Insurance contributions as a married man. On his death, however, Mrs Bath was declined a state widow's pension on the ground that there was not a valid marriage ceremony, since there was no evidence that the Sikh temple was registered at the material time. However, there was also no positive evidence that it was not registered. In those circumstances the Court of Appeal held that the presumption of marriage from long cohabitation was not rebutted and Mrs Bath was entitled to her pension.[67] Evans and Schiemann LJJ also held that since Mr and Mrs Bath had not knowingly and wilfully married in disregard of the formalities contrary to section 49 of the Marriage Act 1949, there was no provision in the Marriage Act which rendered the marriage void.[68]

2.4 A party must not already be married

Under section 11(b) of the MCA 1973 a marriage is void if at the time of the marriage either party was already lawfully married. As Lord Penzance said in 1866 in *Hyde v Hyde*,[69] marriage is 'the voluntary union for life of one man and one woman to the exclusion of all others'. A person who

[64] For an in-depth discussion of these cases see R. Probert, 'The Evolving Concept of Non-marriage' (2013) Child and Family Law Quarterly 314.

[65] See A. Borkowsi, 'The Presumption of Marriage' [2002] Child and Family Law Quarterly 251.

[66] [2000] 1 FLR 8.

[67] The parties, in this case, had lived together as man and wife for 37 years. By contrast, in *Dukali v Lamrani* [2012] EWHC 1748 the parties had only lived together for seven years. The court held that this was insufficient to give rise to the presumption of marriage based on the parties' long cohabitation. While Holman J did not specify what would constitute sufficient length, he said that 'a longer period then seven or eight years must be required', [33].

[68] See also *Pazpena de Vire v Pazpena de Vire* [2001] 1 FLR 460 (marriage by proxy in Uruguay with neither party present at the ceremony was held to be valid by applying the presumption of long cohabitation, as the parties had lived in England for 35 years as husband and wife); and *A-M v A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6.

[69] (1866) LR 1 P & D 130.

enters into a subsequent marriage without the previous marriage being terminated by annulment, divorce, or death, may commit the criminal offence of bigamy.[70] If a spouse has disappeared and is thought to be dead, the other spouse should therefore consider applying for a decree of presumption of death and dissolution of marriage which, if granted, prevents the second marriage being void or possibly bigamous even if the first spouse reappears.

3 Voidable marriages

A voidable marriage is a valid and subsisting marriage unless and until a decree of nullity is granted. Unlike a void marriage, a voidable marriage can only be annulled during the lifetime of both parties and only the parties to the marriage can petition for a decree. However, like a void marriage, on a decree being granted the court has jurisdiction under Part II of the MCA 1973 to make finance and property orders equivalent to those which can be made on divorce.[71]

The grounds upon which a marriage may be declared voidable are laid down in section 12 of the MCA 1973, which provides that:

Key legislation

A marriage celebrated after 31st July 1971 shall be voidable on the following grounds only, that is to say—

(a) that the marriage has not been consummated owing to the incapacity of either party to consummate it;
(b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it;
(c) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;
(d) that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1983 of such a kind or to such an extent as to be unfitted for marriage;
(e) that at the time of the marriage the respondent was suffering from venereal disease in a communicable form;
(f) that at the time of the marriage the respondent was pregnant by some person other than the petitioner;
(g) that an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the time of the marriage, been issued to either party to the marriage;
(h) that the respondent is a person whose gender at the time of the marriage had become the acquired gender under the Gender Recognition Act 2004.[72]

Each of these grounds is now considered in turn.

3.1 Non-consummation

A marriage is voidable under section 12(a) of the MCA 1973 if there is non-consummation owing to the incapacity of either party to the marriage; or under section 12(b) if non-consummation is due to wilful refusal on the part of the respondent. Sexual intercourse for the purposes of

[70] Offences Against the Person Act 1861, s 57. See C. Barton, 'Bigamy and Marriage—Horse and Carriage?' [2004] Family Law 517.

[71] See Chapter 4.

[72] Sections 12(g) and 12(h) were inserted by the Gender Recognition Act 2004.

consummation must be 'ordinary and complete, and not partial and imperfect'.[73] Incapacity to consummate, unlike wilful refusal to consummate, can be brought by either party to the marriage and can therefore be based on either the petitioner's or respondent's incapacity. The incapacity must be permanent and incurable. It is unclear whether a transsexual person can consummate a marriage. In *Corbett v Corbett*[74] Ormrod J stated *obiter* that a male-to-female transsexual person with an artificially constructed vagina was incapable of consummating. However, the courts may not take the same view now that the Gender Recognition Act 2004 permits transsexual marriage. In *W v W (Physical Inter-Sex)*[75] Charles J distinguished *Corbett* in holding that an intersexual person who had had surgery was not necessarily incapable of consummating.

It has been held that incapacity to consummate can include not just physical incapacity, but also 'an invincible repugnance to the respondent due to a psychiatric or sexual aversion'.[76] With wilful refusal to consummate, 'a settled and definite decision not to consummate without just excuse' must be established.[77]

Incapacity to consummate and wilful refusal to consummate are closely linked even though the two grounds are conceptually quite different. A petitioner who wishes to plead that the marriage has not been consummated may be unsure which of the two grounds is the relevant one, and may decide to plead them in the alternative. The question of whether a marriage had not been consummated due to incapacity or wilful refusal sometimes arose in the earlier case law on forced marriage.[78] In some religions it is the practice to have a civil ceremony of marriage followed by a religious ceremony. Only after the religious ceremony are the parties deemed to be married in the eyes of their religion whereupon consummation can take place. In some of these cases there was held to be wilful refusal to consummate if a party refused to go through with the religious ceremony,[79] refused to make arrangements for the religious ceremony when it was his duty to do so,[80] or postponed the religious ceremony indefinitely.[81] Such behaviour has been held to be wilful refusal because the defaulting party knew that, by failing to satisfy the religious requirements, he or she was in effect refusing to have sexual intercourse.[82] However, a woman who has been forced into marriage and who refuses to consummate the marriage cannot petition on the basis of her own wilful refusal to consummate, but could instead prove incapacity to consummate, which can include not just a physical incapacity but 'an invincible repugnance to the respondent due to a psychiatric or sexual aversion'.[83]

[73] *DE v AG* (1985) 1 Rob Ecc 279, *per* Dr Lushington. This should be contrasted with the law of rape, and adultery, where sexual intercourse occurs where the penis makes the slightest penetration of the vagina. Case law has established that a marriage is consummated where there is *coitus interruptus* (where the husband withdraws before ejaculation (*White v White* [1948] 2 All ER 151 and *Cackett v Cackett* [1950] 1 All ER 677); or where the husband is not capable of ejaculation (*R v R (Otherwise F)* [1952] 1 All ER 1194). The use of contraceptives does not prevent consummation occurring (*Baxter v Baxter* [1947] 2 All ER 886); and it is the fact of intercourse which is the sole issue, not whether it is qualitatively satisfactory (*S v S (Otherwise W) (No 2)* [1962] 3 All ER 55).

[74] [1971] P 83.

[75] [2001] Fam 111, FD, *per* Charles J.

[76] See *Singh v Singh* [1971] 2 WLR 963 (see further at n 83), where the Court of Appeal held that the evidence was not sufficient to prove an invincible repugnance.

[77] *Horton v Horton* [1947] 2 All ER 871, *per* Lord Jowitt LC.

[78] See further at p 21 (Section 5).

[79] *Jodla v Jodla* [1960] 1 WLR 236.

[80] *Kaur v Singh* [1972] 1 WLR 105.

[81] *A v J (Nullity Proceedings)* [1989] 1 FLR 110.

[82] In *Kaur v Singh* [1992] 1 WLR 105 the husband's refusal to arrange the Sikh wedding ceremony after the civil ceremony was held to constitute wilful refusal to consummate the marriage and his wife was successful in obtaining a nullity decree.

[83] In *Singh v Singh* [1971] 2 WLR 963 the wife petitioned on the ground of her husband's incapacity to consummate due to her invincible repugnance to him (she had never met him until the civil ceremony and went back to live with her parents and refused to take part in a Sikh religious ceremony). Her petition was dismissed, as her refusal to go through with the religious ceremony was held to be a very long way away from having an invincible repugnance to sexual intercourse. See *D v D* (1982) 12 Fam Law 150.

3.2 Lack of consent to the marriage

Consent is regarded as an essential component of marriage. As Lord Penzance said in *Hyde v Hyde*[84] marriage involves a '*voluntary* union' between a man and a woman. Under section 12(c) of the MCA 1973 a marriage is voidable if 'either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise'. Most of the reported case law has concerned duress, mistake, and lack of capacity to marry.

3.2.1 Duress

With regard to duress, the question is what degree of duress suffices to vitiate consent. At one time the test for establishing duress was much more stringent. In *Szechter v Szechter*[85] Simon P said that the test was whether the will of one of the parties had been 'overborne by a genuine and reasonably held fear caused by threat of immediate danger (for which the party is not himself responsible), to life, limb or liberty.'[86] This test was approved and adopted by the Court of Appeal in *Singh v Singh*[87] in refusing the claim of a 17-year-old Sikh woman that she had been forced by her parents into an arranged marriage to a man whom she had never met and who was neither handsome nor intelligent as she had been told. The *Szechter* test made it particularly difficult for victims of forced marriages to obtain a decree on this ground.[88] However, in *Hirani v Hirani*[89] a different and less stringent test for establishing duress was adopted.

Key case

In *Hirani v Hirani* the petitioner, a woman aged 19, formed an association with an Indian Muslim. Her parents, who were Hindus, were horrified at this relationship and quickly arranged for her to marry a Hindu man, Mr Hirani, whom she had never met. Reluctantly, and crying throughout, she went through a ceremony of marriage with Mr Hirani. After the marriage, the wife petitioned for nullity on the ground of lack of consent owing to duress. She claimed that she was wholly dependent on her parents and that they had threatened to throw her out of the house if she did not go through with the marriage. The Court of Appeal held that a threat to life, limb, or liberty, as required in *Szechter*, was no longer required. Instead, the crucial question was whether the threats, pressure, or other acts were sufficient 'to destroy the reality of consent and overbear the will of the individual'.[90] This test is a subjective test, considering whether the particular petitioner's will has been overborne, not whether a reasonable person would find there to be lack of consent due to duress. As the Court of Appeal found that the petitioner's will had been clearly overborne by parental pressure, it held that she had not consented to the marriage and was therefore entitled to have the marriage annulled.

In *NS v MI*[91] Munby J drew attention to the different approaches in the cases and preferred the *Hirani* approach, declaring that the *Szechter* approach no longer represents the law, if it ever did. The preferred approach in practice is certainly the subjective approach in *Hirani*.[92] However, the conflict as a matter of doctrine at Court of Appeal level[93] has not been resolved, since the Court of Appeal decision in *Singh v Singh* (which adopted the objective test) was not cited in *Hirani*. In *NS v MI* the petitioner had been taken to Pakistan by her parents when she was 16, supposedly for a

[84] (1886) LR 1 P & D 130 at 133. [85] [1970] 3 All ER 905. See also *Buckland v Buckland* [1968] P 296.
[86] Ibid, 915. [87] [1971] 2 All ER 828.
[88] In *Singh v Kaur* (1981) 11 Fam Law 152 a young man petitioned for a decree on the basis that the pressure put upon him by his parents was so great that his consent had no validity. The Court of Appeal dismissed his case holding that it did not wish to see the *Szechter* test watered down. [89] (1983) 4 FLR 232.
[90] Ibid, *per* Ormrod LJ at 234. [91] [2007] 1 FLR 444.
[92] See eg *P v R (Forced Marriage: Annulment: Procedure)* [2003] 1 FLR 661, *per* Coleridge J.
[93] See A. Bradney, 'Duress, Family Law and Coherent Legal System' [1994] Modern Law Review 963.

two-month holiday. She was stranded in a remote region of Pakistan for over a year, because her mother held her passport, and eventually it emerged that arrangements had been made for her to marry a cousin there. She went through the ceremony under great family pressure to go ahead with the marriage. Upon her return to England she sought a decree of nullity on the ground of lack of consent. Applying a subjective approach Munby J granting the decree, commenting:

> where the influence is that of a parent or other close and dominating relative, and where the arguments and persuasion are based upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations, the influence may…be subtle, insidious, pervasive and powerful. In such cases, moreover, very little pressure may suffice to bring about the desired result.[94]

The 'overborne will' test for duress has made it easier for victims of forced marriage to succeed in obtaining a decree of nullity based on lack of consent. Forced marriages are condemned by the courts and by the Government, and various provisions in addition to nullity exist to protect victims.[95]

3.2.2 Mistake

Consent to marriage may be vitiated where there is mistake, and this may entitle either party to the marriage to a decree of nullity. Mistake can relate either to the identity of the other person or to the nature of the ceremony. However, with respect to identity, a mistake as to a party's attributes or characteristics does not constitute a mistake and will not invalidate a marriage. Mistake as to the nature of the ceremony could include, for example, a situation where a party mistakenly believes that he or she is taking part in an engagement ceremony not a marriage ceremony.[96]

3.3 Mental disorder rendering a person unfitted for marriage

Under section 12(d) of the MCA 1973 a marriage is voidable on the ground that 'either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1983 of such a kind or to such an extent as to be unfitted for marriage.' This ground differs from unsoundness of mind for the purposes of consent discussed earlier, in that a party is capable of giving a valid consent, but the state of his or her mental health is such that it would be appropriate to annul the marriage. A petitioner may rely on his or her own mental disorder for the purpose of petitioning for a decree of nullity on this ground.

3.4 Venereal disease

Under section 12(e) a marriage is voidable where the respondent was suffering from venereal disease in a communicable form at the time of the marriage. The basis of this ground clearly ties in with the non-consummation grounds, as it is looked upon as an impediment to sexual intercourse.

3.5 Pregnancy by another man

Section 12(f) provides a husband with a ground for nullity if he can prove that at the time of the marriage his wife was pregnant by some person other than himself. Thus, if at the time of the marriage the wife conceals from her husband the fact that she is pregnant by another man, he can

[94] [2007] 1 FLR 444 at [34].

[95] See Section 5.

[96] See eg *Mehta v Mehta* [1945] 2 All ER 690 where the wife mistakenly thought that the marriage ceremony was one of conversion to the Hindu religion, and who was granted a decree of nullity on this basis.

subsequently seek an annulment. The petition must be presented within three years of the marriage,[97] so that if a wife keeps the child's true paternity secret for more than three years, then the marriage cannot be annulled on this ground.

3.6 Gender recognition as a ground for nullity

Two new grounds for establishing a voidable marriage were introduced into section 12 of the MCA 1973 by the Gender Recognition Act 2004 which was passed to give transsexual persons new rights, including the right to enter into a valid marriage in their acquired gender on the issue of a full gender recognition certificate granted by a Gender Recognition Panel.[98] If a person who applies to a Gender Recognition Panel meets the statutory criteria and is unmarried, the Panel will issue a full gender recognition certificate which will entitle this person to a new birth certificate reflecting their acquired gender, thus allowing marriage in this new gender. However, if a married applicant applies to the Gender Recognition Panel for recognition of his or her 'acquired' gender, the Panel, on the satisfaction of the criteria, will only issue an interim gender recognition certificate (due to the existing marriage). This becomes a ground for annulment of the existing marriage as under section 12(g) of the MCA 1973 a marriage is voidable if an interim gender recognition certificate has, after the time of the marriage, been issued to either party to the marriage.[99] Under section 12(h) a marriage is voidable if the respondent is a person whose gender at the time of the marriage had become the acquired gender under the Gender Recognition Act 2004. In other words, a marriage is voidable if at the time of the marriage one party to the marriage did not know that the other was previously of another gender and had obtained a gender recognition certificate.

3.7 Bars to relief

There are certain statutory prohibitions (bars) to relief in respect of voidable marriages. Thus, under section 13 of the MCA 1973 there are time limits for certain nullity petitions, and for all petitions there is a general bar based on the approbation of the petitioner.

A nullity petition must be instituted within three years of the date of the marriage unless the petitioner is relying on incapacity or wilful refusal to consummate the marriage.[100] Where the ground relied on is venereal disease or pregnancy by another man, the petitioner must be ignorant of those facts at the date of the marriage.[101] Where a decree is sought on the basis of the issue of an interim gender recognition certificate,[102] the proceedings must be instituted within six months of the interim gender recognition certificate being issued.[103]

A general bar based on approbation by the petitioner applies to all nullity petitions brought on the basis that a marriage is voidable.[104] Thus, the court must not grant a decree if the respondent proves that the petitioner knew that it was open to him or her to have the marriage annulled but led the respondent reasonably to believe that he would not seek to do so; *and* that it would be unjust to the respondent to grant the decree. It will be very difficult to satisfy this test, as the facts of *D v D*

[97] MCA 1973, s 13(2). [98] See Section 7.1.

[99] Where a person obtains a decree absolute of nullity on this ground, the court must issue that person with a full gender recognition certificate. This has been amended by the Marriage (Same Sex Couples) Act 2013 to allow transsexual people to change their gender without having to legally end their existing marriage, see Section 7.2 which explains the situation more fully.

[100] See s 13(2). This is subject to the proviso that the period may be extended where the petitioner has suffered from a mental disorder during the three years, and it is just to do so (s 13(4)). For a case involving the non-availability of a nullity petition after three years (on the ground of lack of consent), see *SH v NB* [2009] EWHC 3274 (Fam).

[101] Section 13(3). [102] Under s 12(g). [103] Section 13(2A). [104] Section 13(1).

(Nullity: Statutory Bar)[105] illustrate. The wife had a physical impediment, preventing consummation, which could have been cured by a comparatively common operation but the wife refused and the marriage was never consummated. Although the husband knew he could have the marriage annulled, the couple fostered then adopted two children at the request of the Church of England Children's Society. The husband subsequently sought a decree of nullity. Dunn J found that the first limb of section 13(1) was fulfilled but it could not be shown that there would be any injustice to the wife. She would have access to the same orders for financial provision as on divorce.

3.8 Should the concept of the voidable marriage be abolished?

There are arguments in favour of abolishing the concept of the voidable marriage, something which has been done in Australia.[106] One argument is that there are so few nullity petitions today that it would cause no great hardship if the voidable grounds were abolished. In 2009, only 290 nullity petitions were filed in the courts in England and Wales, with 199 decrees absolute of nullity being granted, whereas 116,576 decrees absolute of divorce were granted in that year.[107] The reasons why there are so few nullity petitions is partly because the facts upon which a nullity petition can be based do not often arise, and partly because of the ease with which it is now possible to obtain a divorce. Also, divorce no longer carries the stigma that it once did.[108]

Another argument is that some of the grounds seem rather archaic and with little or no relevance today. Thus, for instance, should non-consummation be abolished as a ground for nullity on the basis that it is an archaic relic of medieval ecclesiastical law? In the view of the Church, marriage is important for begetting children, and hence there is a need to consummate the marriage. However, some couples may choose to marry for companionship and may not consider consummation to be particularly important, whether or not they are capable of it. Probert[109] has argued that it might be better if non-consummation were abolished in order to 'define marriage in a way that is relevant for the twenty-first century'[110] since it is arguably too intrusive and embarrassing for the law to examine parties' sexual lives in this way. Furthermore, doing away with the grounds based on non-consummation would remove the possibility that transsexual marriages are always voidable for lack of capacity. If non-consummation were abolished as a ground for nullity, a person who wished to terminate the marriage could still do so by petitioning for a divorce on the ground of unreasonable behaviour[111] due to the respondent's failure to consummate the marriage. The only disadvantage of this would be that the petitioner would have to wait for one year after the marriage to do so as there is a statutory prohibition on divorce in the first year of marriage. A decree of judicial separation, on the other hand, is available at any time after the marriage.

Some of the other grounds for rendering a marriage voidable are also open to criticism, and might justifiably be abolished. Thus mental disorder as a ground for nullity under section 12(d) seems somewhat outmoded and offensive, as it stems from the days when mental illness was misunderstood and those suffering from such illness were regarded with fear and suspicion. It is also difficult to understand why mental illness should be singled out as a ground for nullity when an adult who is prone to violence or paedophilia, for example, may also be equally unfit for marriage. The venereal disease ground in section 12(e) is also out of touch with developments in medical science and is also somewhat limited. It is difficult to know what to make of this ground today as,

[105] [1979] Fam 70. [106] By the Family Law Act 1975, s 51.

[107] *Judicial and Court Statistics 2009* (Ministry of Justice, 2010), Ch 2, Table 2.5.

[108] The Law Commission's claim in its 1970 *Report on Nullity of Marriage* (Law Com No 33), about the stigma associated with divorce, but not with nullity, is no longer true today.

[109] R. Probert, 'How Would *Corbett v Corbett* Be Decided Today?' [2004] Family Law 382.

[110] It should also be noted that consummation has no relevance to the annulment of a civil partnership.

[111] Under the MCA 1973, s 1(2)(b), see Chapter 2.

when it was first introduced in 1937, antibiotics were not available. Medical practitioners today no longer talk about 'venereal diseases' but about 'sexually transmitted diseases'.

The pregnancy by another man ground for nullity under section 12(f) is also questionable. The Law Commission's original explanation for this ground was that a husband who marries in these circumstances has given conditional consent only to the marriage. The ground therefore appears to rest on one of two bases. Either the husband has married a woman knowing her to be pregnant and believing that he is the father of the child, in which case he might then argue that, but for the pregnancy, he would not have married her. Alternatively, he might argue that he was marrying a woman who was chaste, but the lack of chastity has self-evidently been demonstrated. Whichever of these two bases applies, it is suggested that such thinking has no place in the law today. In 1937, when the ground was first introduced, men might well be forced to marry if they were believed to be responsible for the pregnancy of a woman. This would not normally be the case nowadays; but if it was, the ground of duress might apply. The chastity basis is not relevant or sensible in today's society. There are other forms of behaviour by a spouse which could just as easily be said to strike at the fundamental root of a marriage, in the sense that a spouse is giving conditional consent to the marriage. For example, the woman who marries a man not knowing that he is a convicted rapist, or paedophile, could claim her consent to the marriage should be characterised as conditional. However, her escape route is to use the law of divorce. It is suggested that, similarly, divorce is a more appropriate response in the case of pregnancy by another man.

Nevertheless, the fact that the woman is pregnant by another man undoubtedly strikes at the heart of the marriage. A man is unquestionably entitled to say that he certainly would not have married his wife had he known she was carrying another man's child. But is a woman not equally entitled to state that she would not have married her husband if, at the time of the marriage, she had known that another woman was pregnant by him? It is suggested that the law should treat spouses in an equal manner in this regard.

If voidable marriages were abolished, the parties to a marriage would instead have to seek a divorce. The question which therefore arises is whether divorce can provide an adequate alternative to nullity in the case of voidable marriages. In its 1970 *Report on Nullity of Marriage*[112] the Law Commission referred to the stigma associated with divorce. Today, however, there is little stigma attached to divorce, and it could be argued that greater stigma may attach to the grounds for nullity. Thus, there may be a stigma attached to a finding that a person has wilfully refused to consummate the marriage or a woman has deceived a man into marrying by concealing the true paternity of the baby. For these reasons, the Law Commission's arguments about stigma are no longer so valid. As regards the Law Commission's comments in its Report about the Christian Church's distinction between nullity and divorce, it can be argued that this distinction is no longer so valid now that society is more secular and multicultural. It could be argued that it is inappropriate for the Christian Church to have such a large influence on the law relating to marriage when only a minority of the population attend organised Christian worship and when many people today are either of a religious persuasion which is not Christian, or have no religion at all.

The Law Commission's argument in its *Report on Nullity of Marriage* in favour of retaining the concept of voidable marriage, because there was no advantage to be achieved in abolishing it, is perhaps the strongest argument for retaining the concept. Thus, if the concept of voidable marriage is useful for a few parties to a marriage, then why do away with it? Although the number of nullity decrees compared with decrees of divorce is small, they do show that nullity is still useful for some people. One of the main advantages of nullity is that a petition can be brought straightaway after a marriage whereas with divorce there is an absolute bar on bringing a petition in the first year of marriage. Also, there may be a small number of persons who choose to have their marriage annulled for religious reasons, perhaps because they may wish to marry in the future and be able

[112] Law Com No 33.

to marry in a church or other religious building. Some religions will not allow a divorced person to marry in church, but other religions are now less strict about this. Thus, while the Church of England teaches that marriage is for life, it recognises that marriages do break down and since 2002 has permitted divorced persons to marry in church provided the local parish priest agrees to this. Other churches are more lenient about remarriage after divorce, but the Catholic Church's view on this matter is much stronger and it does not tolerate divorce. Another important reason in favour of retaining the concept of a voidable marriage is that it allows victims of forced marriages to have their marriage annulled, for instance on the ground that there was no consent as a result of duress. However, if consent is regarded as a fundamental flaw existing at the inception of a marriage, which the formalities for marriage show it to be, then lack of consent should be a ground for rendering a marriage *void*, not voidable. This would give victims of forced marriages the option of nullity, instead of having to rely on divorce. It would also send out a strong message that consent is a requirement going to the root of a marriage in England and Wales and that lack of consent will not be tolerated.

4 Sham marriages

A 'sham' marriage, or what is sometimes called a 'marriage of convenience', is a marriage which is entered into for an ulterior motive, such as to gain British citizenship and/or to enter the UK. With respect to immigration, the immigration authorities are keen to ensure that these sorts of marriages do not take place as they allow the parties to circumvent the immigration rules. For this reason the immigration rules attempt to prevent such marriages taking place. However, although this is a legitimate role for immigration law, it was held by the House of Lords in *R (Baiai and Others) v Secretary of State for the Home Department*[113] that the powers of the immigration authorities must not interfere with the right to marry in Article 12 of the ECHR. Thus, the immigration authorities must exercise their powers in a proportionate and non-discriminatory way.

5 Forced marriages

A forced marriage is a marriage which is entered into without the true consent of one or both of the parties and where some degree of duress is involved, which may include, for example, physical, psychological, financial, sexual, and emotional pressure, and even violence. A forced marriage is different from an 'arranged marriage', which is one where the families of both parties take a leading role in choosing a marriage partner but where consent to the arrangement remains with the parties themselves. The courts are not opposed to arranged marriages but are strongly opposed to forced marriages. In *NS v MI*[114] Munby J said that while forced marriages were utterly unacceptable, arranged marriages were to be respected and supported. Forced marriages are common in some religious and ethnic groups and are sometimes used for immigration purposes, such as to enable a foreign relative to gain entry into the UK. Forced marriage victims can suffer traumatic and distressing experiences, which may include physical and emotional threats, violence, blackmail, abduction, and imprisonment in the home.

In recent years there has been increasing recognition of the problem of forced marriages and the need to prevent them happening and to protect victims. A special unit, the Forced Marriage Unit (FMU) based in the Foreign & Commonwealth Office,[115] was established in 2005 as a joint

[113] [2008] UKHL 53, [2008] 2 FLR 1462. [114] [2006] EWHC 1646 (Fam), [2007] 1 FLR 444.

[115] See the Foreign & Commonwealth Office website: www.fco.gov.uk. The Unit, together with relevant government departments and agencies, has published practice guidelines for police officers, health professionals, social workers, and education professionals on how to deal with forced marriage cases.

initiative with the Home Office. It is responsible for developing Government policy on forced marriages and for providing support, information, and advice for actual and potential victims and for practitioners working in the field. Most cases of forced marriage in the UK involve South Asian families, particularly families of Pakistani and Bangladeshi origin, which is partly due to the fact that there is a large South Asian population in the UK.[116] Some cases occur within the UK and have no overseas element, but others involve a party coming from overseas or a British citizen being sent abroad. Most cases involve young women, but some cases involve the coercion of men. Many cases go unreported.

Forced marriages are not tolerated in England and Wales, being regarded by the Government and the courts as a gross abuse of human rights and as a form of domestic violence. In *NS v MI*[117] where a nullity decree was granted to the petitioner who had entered into a forced marriage, Munby J said that 'the court must not hesitate to use every weapon in its protective arsenal if faced with what is, or appears to be, a case of forced marriage.' In *Re K; A Local Authority v N and Others*[118] Munby J described forced marriage as an 'appalling practice' and 'a gross abuse of human rights'. He said it was 'a form of domestic violence that dehumanises people by denying them their right to choose how to live their lives'. In addition to remedies for victims under the general law,[119] the Government has taken steps to give greater protection to victims and, as a result, there are now specialised remedies in family law and there are also plans to make forced marriage a specific criminal offence.

Family law provides actual and potential victims of forced marriage with the following remedies: annulment of the marriage; protection under the High Court's inherent and wardship jurisdictions; and forced marriage protection orders under the Forced Marriage (Civil Protection) Act 2007. A multi-agency approach is taken in forced marriage cases involving a wide range of agencies, such as social workers, the police, and health authorities. If a victim is under 18, the Children Act 1989 will be relevant, as forcing someone to marry may constitute significant harm for the purposes of that Act.[120]

5.1 Annulment

A person who enters into a forced marriage can have the marriage annulled on the ground that the marriage is voidable under section 12 of the MCA 1973. In most cases, victims will petition on the ground of lack of consent to the marriage as a result of duress caused by parental and/or

[116] Figures published by the Forced Marriage Unit (FMU) in 2012 (see its website, www.gov.uk/forced-marriage) show that the unit gave advice and support to 1,485 cases that year, 82 per cent of which involved females and 18 per cent males. The majority of reportings to the FMU involved families of Pakistani (47.1 per cent) and Bangladeshi (11 per cent) origin, with smaller percentages of those of Indian, Middle Eastern, European, and African origin. Where the age was known, 13 per cent involved victims below 15 years, 22 per cent involved victims aged 16–17, 30 per cent involved victims aged 18–21, 19 per cent involved victims aged 22–25, 8 per cent involved victims aged 26–30, and 8 per cent involved victims over the age of 31.

[117] [2006] EWHC 1646 (Fam), [2007] 1 FLR 444.

[118] [2005] EWHC 2956 (Fam), [2007] 1 FLR 399.

[119] With regard to the criminal law, there are various criminal offences which can be committed by those perpetrating a forced marriage (such as assault, abduction, kidnapping, and false imprisonment). However, there is currently no specific criminal offence of forcing someone to marry. In addition to the criminal law, there are remedies which can be sought under the civil law. Thus, forcing a person to marry can constitute a tort of trespass to the person, false imprisonment, or harassment under the Protection from Harassment Act 1997, and may give the victim a right to obtain damages by way of compensation and/or protection by way of injunctive relief.

[120] Where there is significant harm, or a risk of significant harm, a local authority has a duty to make enquiries (under s 47) to decide whether to take action to safeguard or promote the welfare of a child; and where there is an actual or potential risk of significant harm a local authority can bring care proceedings (under s 31) to protect a child or young person who is being forced into marriage. See Chapter 10.

family pressure.[121] Thus, for example, in *P v R (Forced Marriage: Annulment)*[122] a 20-year-old woman who had been forced to enter into a marriage in Pakistan successfully petitioned for a decree of nullity on the ground of lack of consent as a consequence of duress. Her brother had threatened her with violence and she believed that if she failed to go ahead with the marriage she would be unable to return to England. She was told by her parents that she would bring shame and disgrace on the family if she did not go ahead with the marriage. During the ceremony in Pakistan she was forced to nod in agreement to the marriage by her mother pushing her head forward three times, and she signed the marriage certificate out of fear. When she returned to the UK, she successfully petitioned for a decree of nullity. Coleridge J found that she had not validly consented to the marriage as her consent had been vitiated by physical and emotional force.

Although a petitioner for a decree of nullity will have to give oral evidence in open court, the court will do whatever it can to protect the petitioner (eg where the petitioner is reluctant to give evidence because of the presence of family members).[123]

5.2 Inherent jurisdiction or wardship

The inherent jurisdiction of the High Court can be invoked to protect a person who is being forced into marriage, or the High Court's wardship jurisdiction if the victim is under 18. Because of the flexible and parental nature of these jurisdictions, they can be invoked, in exceptional circumstances, even though the victim is not present or living in the UK but is living overseas, for instance in Pakistan[124] or Bangladesh.[125] These 'parental' jurisdictions of the High Court can also be invoked where there is merely a risk that someone will be forced into a marriage, and where a person needs protection even though they may have capacity.[126] Forced marriage protection orders (see Section 5.3) now provide protection for such persons but, where there is an overseas element, the High Court's inherent and wardship jurisdictions may be more appropriate because of their more flexible jurisdictional rules. This may include, for instance, the High Court under its inherent jurisdiction making a declaration that a forced marriage entered into overseas is not capable of being recognised as a valid marriage in England and Wales. The inherent jurisdiction may also prove useful in a case where a victim of a forced marriage is unable to petition for a decree of nullity on the ground of lack of consent because of being statute barred under section 13(2) of the MCA 1973.[127]

[121] See MCA 1973, s 12(c). In some of the older reported cases, non-consummation was sometimes used as a ground.

[122] [2003] 1 FLR 661. See also *Re S (Practice: Muslim Women Giving Evidence)* [2007] 2 FLR 461 where a young Muslim woman was granted a decree of nullity because she had entered into a forced marriage after a two-year campaign of family pressure.

[123] *Per* Munby J in *NS v MI* [2006] EWHC 1646 (Fam), [2007] 1 FLR 444.

[124] See *Re B; RB v FB* [2008] EWHC 1436 (Fam), [2008] 2 FLR 1624, where a girl (aged 15) who was a British national living in Pakistan was made a ward of court as it considered her to be a British national who was in desperate need of help, even though her only connection with the UK was that her late father was British.

[125] See *SB v RB* [2008] EWHC 938 (Fam), [2008] 2 FLR 1588 where a girl (aged 11) was made a ward of court because she had been forced to marry a 20-year-old man in Bangladesh. She was subsequently returned to the UK with the assistance of the FMU in London, and the marriage was subsequently annulled.

[126] See *Re SA (Vulnerable Adult With Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867 where the inherent jurisdiction of the High Court was successfully invoked by the local authority as it feared that the girl (aged 17, who was profoundly deaf, unable to speak, and had an intellect of a 13- or 14-year-old) might be taken by her family to Pakistan for the purposes of an arranged marriage.

[127] See *B v I* [2010] 1 FLR 1721 where an English woman of Bangladeshi origin who had been forced into a marriage in Bangladesh but who was unable to petition for nullity, as the 'marriage' had taken place in 2005, was granted a declaration under the court's inherent jurisdiction that the ceremony in Bangladesh had not given rise to a marriage capable of recognition in England and Wales.

5.3 Forced marriage protection orders

Under Part 4A of the Family Law Act 1996, the Family Division of the High Court and county courts have jurisdiction to make a forced marriage protection order, which is an order providing legal protection for an actual or potential victim of a forced marriage or an attempted forced marriage.[128] These provisions were introduced by the Forced Marriage (Civil Protection) Act 2007.[129] The remedies are modelled on those available under Part 4 of the Family Law Act 1996 to protect victims of domestic violence.[130] A multi-agency approach is adopted for dealing with forced marriages, and Government guidance sets out the responsibilities of the various agencies involved in protecting victims.[131] Part 2 of the guidance is issued as statutory guidance under section 63Q(1) of Part 4A of the Family Law Act 1996, and must be taken into account by those exercising a public function.[132]

'Forced marriage' is defined in the Act as a marriage where a person has not given full and free consent;[133] and 'force' is defined to include not just physical coercion but coercion by threats or other psychological means.[134] The court has wide powers to include in the order such prohibitions, restrictions, or requirements or other such terms as are considered appropriate, and the terms of the order can relate to conduct outside and/or within England and Wales.[135] Thus, for example, an order could be made to prohibit a potential victim being taken outside the UK for the purpose of marrying overseas (which could include handing over a passport), or to prevent a family member from molesting or contacting a victim who has escaped from her family and taken refuge elsewhere. An order can be made for a specified period or until varied or discharged.[136]

An application for an order can be made by: a victim, a person on the victim's behalf with permission of the court, or a relevant third party. Local authorities have been specified as relevant third parties. As with certain other family proceedings, the court has the power to make an order of its own motion (in other words, where no application has been made for an order but it is appropriate to make one).[137]

When deciding whether to exercise its power to make an order and, if so, in what manner, the court must consider all the circumstances of the case including the need to secure the health, safety, and well-being of the victim; and when ascertaining 'well-being', it must have regard in particular to the victim's wishes and feelings (so far as they are readily ascertainable) as the court considers appropriate in light of the victim's age and understanding.[138]

Orders can be made without the respondent having been given notice of the proceedings, provided it is just and convenient to do so.[139] In appropriate cases the court can, instead of making an order, accept an undertaking from the respondent, but not if the respondent has used or threatened violence.[140] The court will attach a power of arrest to an order (but not to an order without notice) if the respondent has used or threatened violence against the victim or otherwise in connection with the matters being dealt with in the order.[141] If a power of arrest is attached, a police officer can arrest the respondent without warrant if there is reasonable cause for suspecting that person to be in breach of a forced marriage protection order. Breach of a forced marriage protection order is not

[128] Section 63A(1). Between November 2008 (when the 2007 Act came into force) and June 2011, 339 orders were recorded, see Home Office, Forced Marriage Consultation (December 2011), p 6 www.gov.uk/government/uploads/system/uploads/attachment_data/file/157827/forced-marriage-consultation.pdf.

[129] See G. Vallance-Webb, 'Forced Marriage: A Yielding of the Lips Not the Mind' [2008] Family Law 565.

[130] See Chapter 3.

[131] *The Right to Choose: Multi-Agency Statutory Guidance for Dealing with Forced Marriage* (available at www.fco.gov.uk).

[132] Eg persons performing a child protection function, teachers, police, local authorities, police authorities, youth offending teams, Cafcass, Local Safeguarding Children Board, and NHS Trusts.

[133] Section 63A(4).

[134] Section 63A(6). There does not have to be violence or a threat of violence, see *A v SM and HB (Forced Marriage Protection Orders)* [2012] EWHC 435 (Fam).

[135] Section 63B(1) and (2). [136] Sections 63F and 63G. [137] Section 63C(1).

[138] Section 63A(2) and (3). [139] Section 63D. [140] Section 63E. [141] Section 63H.

currently a criminal offence but a constable may arrest a person whom he has reasonable cause to suspect is in breach or otherwise in contempt of the order. A respondent can be brought back to the original court for it to consider the alleged breach. Failure to comply with an order is contempt of court, which can result in a fine or imprisonment.

5.3.1 Plans to criminalise forced marriage

Concerns were raised, however, about the effectiveness of these remedies in tackling forced marriage. Thus, following a public consultation on the issue in 2011,[142] the Government announced its intention to criminalise both forced marriage and breach of a forced marriage protection order. These offences came into force on 16 June 2014 under the Anti-social Behaviour, Crime and Policing Act 2014.[143]

Talking point

The Prime Minister, David Cameron, said: 'Forced marriage is abhorrent and is little more than slavery. To force anyone into marriage against their will is simply wrong and that is why we have taken decisive action to make it illegal.'[144]

This is not the first time that the issue of criminalising forced marriage was raised. However after a consultation in 2005,[145] the Government decided not to introduce any new criminal offence as there was little support from the Crown Prosecution Service and the Probation Service for such a move. Although the Government recognised that an offence of forcing someone to marry would have advantages (such as creating a change of culture, having a deterrent effect, and empowering young people), it considered that these advantages were outweighed by the disadvantages. In other words, it was of the view that the introduction of a criminal offence of forcing someone to marry might drive forced marriages underground and isolate victims, and also cause racial problems at a time of heightened racial tension. The Government instead introduced civil remedies under the Forced Marriage (Civil Protection) Act 2007.

However, concerns continued to be raised that not enough was being done to tackle forced marriage. In 2011, the Home Affairs Select Committee published a report on the issue which called on the Government to consider, once again, criminalising forced marriage.[146] Aligned with this was the growing trend of criminalising forced marriage across Europe and countries such as Denmark, Germany, Austria, and Belgium have already taken this step. The Government responded decisively by indicating its intention to criminalise breach of a Forced Marriage Protection Order and to consult on making the act of forcing someone to marry a specific criminal offence. In response to the public consultation in 2011, 54 per cent of respondents were in favour of criminalising forced marriage and only 37 per cent were opposed.[147] Further, 80 per cent of respondents felt that the current civil remedies and criminal sanctions are not being used as effectively as they could in tackling forced marriage, indicating the very strong feeling that more needed to be done.[148] Not only, therefore, has breach of a forced marriage protection order become a criminal offence, but a specific criminal offence of forcing someone to marry has been created.[149]

[142] Home Office, Forced Marriage Consultation (December 2011) www.gov.uk/government/uploads/system/uploads/attachment_data/file/157827/forced-marriage-consultation.pdf.

[143] www.gov.uk/government/news/forced-marriage-to-become-criminal-offence. [144] Ibid.

[145] See the consultation paper, *Forced Marriage: A Wrong Not a Right*, published by the Home Office and the Foreign & Commonwealth Office in September 2005.

[146] Home Affairs Select Committee, Report Forced Marriage, 17 May 2011 (Eighth Report, Session 2010–11, HC 880).

[147] Home Office, Forced Marriage – A Consultation: Summary of Responses (June 2012, www.gov.uk/government/uploads/system/uploads/attachment_data/file/157829/forced-marriage-response.pdf. [148] Ibid, p 8.

[149] See C. Proudman, The Criminalisation of Forced Marriage (2012) 42 Fam Law 460.

6 Recognition of an overseas marriage

A marriage contracted in a country outside the jurisdiction of the UK is recognised as valid in the UK provided each party had the capacity to marry according to his or her place of domicile and the formalities required by the law of the place where the marriage was celebrated were complied with.[150] Thus, even though the formalities might be invalid under the law of England and Wales, the court can still recognise the marriage as valid, provided it complied with the rules laid down in the place in which it was celebrated. For this reason an overseas marriage celebrated by local custom can be recognised in the UK.[151] These rules, however, are subject to the overriding rule that an overseas marriage will not be recognised in the UK if it is manifestly unjust or contrary to public policy. Special legal provisions apply to certain overseas marriages, for instance where persons are serving abroad in HM Forces. If the marriage is recognised in England and Wales, then recognition of the marriage will affect the legitimacy of children and the availability of divorce or other marital claims, as well as nationality, immigration rights, inheritance rights, and tax and welfare benefits.

Key case

Whether the courts in England and Wales will recognise an overseas marriage as a valid marriage in the UK depends on the facts of each case. In *Hudson v Leigh*,[152] for example, Bodey J made a declaration that a 'marriage' conducted in South Africa was not a valid marriage in England and Wales as the formal requirements for a valid marriage had not been satisfied. Furthermore, both the parties and the minister who had conducted the religious ceremony did not at the time of the ceremony intend or believe it to be legally binding. Bodey J held that, while the ceremony had the trappings of a marriage, it had fundamentally failed to effect a valid one. Lack of capacity to marry may invalidate an overseas marriage. Thus, for instance, in *City of Westminster v IC (By His Litigation Friend the Official Solicitor) and KC and NNC*,[153] a Muslim arranged marriage which had taken place over the telephone between an autistic man (aged 26, but with a mental age of 3) in England and a woman in Bangladesh, was held to be invalid even though it was agreed by all the parties that the marriage had validly taken place in Bangladesh under Shariah law. The Court of Appeal refused to recognise the marriage as valid as the man, due to his disability, lacked capacity under the law of England and Wales and was therefore unable to give valid consent.[154]

7 The removal of section 11(c) of the MCA 1973

Until recently, section 11(c) of the MCA 1973 stated that the parties to a marriage must be respectively male and female otherwise the marriage is void.[155] This had two main consequences. First, it meant that same-sex marriage was not permitted in law. Secondly, it gave rise to the thorny issue of whether a transsexual person could validly marry in his or her acquired gender, and how to deal

[150] See *Dicey, Morris and Collins on the Conflict of Laws*, 14th edn (London: Sweet & Maxwell, 2010).

[151] As it was, eg, in *McCabe v McCabe* [1994] 1 FLR 410, where a marriage in Ghana between a Ghanaian woman and an Irish man, involving a bottle of gin and a sum of money, was upheld as valid by the English court, even though the parties were not present at the ceremony. The Court of Appeal held that on the evidence of local law, the essential components of a marriage ceremony (ie, the consent of both parties and of their families) was present and so it was a valid marriage ceremony and would be recognised in the UK.

[152] [2009] EWHC 1306 (Fam), [2009] 2 FLR 1129.

[153] [2008] EWHC 198, [2008] 2 FLR 267.

[154] See R. Probert, 'Hanging on the Telephone: *City of Westminster v IC*' (2008) Child and Family Law Quarterly 395.

[155] This has been deleted by the Marriage (Same Sex Couples) Act 2013 and thus marriage can now take place between two people of the same sex. See Section 8.

with intersexual persons. The issue of same-sex marriage will be discussed later in the chapter. The next sections will consider the development of the law relating to transsexual and intersexual persons.

7.1 Transsexual persons and marriage

Transsexualism is a medically recognised gender identity disorder, gender dysphoria, whereby a person who appears to be biologically of a particular sex believes or feels that he or she is psychologically a member of the opposite sex. Some persons with gender dysphoria opt to have a gender reassignment, which involves hormone treatment and in some cases surgery.[156] The starting point for discussion of the law relating to transsexual persons and marriage is the case of *Corbett v Corbett (Otherwise Ashley)*.[157] April Ashley, a male-to-female transsexual person, had gone through a ceremony of marriage with Arthur Corbett, who at the time was fully aware of Ashley's background. Subsequently, however, Corbett sought a decree of nullity on the basis that Ashley was male. Ormrod J heard medical evidence which accepted at least four criteria for determining a person's sex, namely: (i) chromosomal factors; (ii) gonadal factors (ie, presence or absence of testes or ovaries); (iii) genital factors (including internal sex organs); and (iv) psychological factors. The witnesses were clear, however, that 'the biological sexual constitution of an individual is fixed at birth (at the latest)'. Having regard to this evidence and the essentially heterosexual nature of marriage, Ormrod J concluded that the law 'should adopt in the first place, the first three of the doctors' criteria, i.e. the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.'[158] Accordingly, even though Ashley had undergone gender reassignment surgery and hormone treatment and lived as a woman, 'she' was male, and 'her' marriage to the petitioner was void.

The biological test propounded in *Corbett* made it impossible for transsexual persons to have their acquired gender legally recognised and to enter into a valid marriage in that gender. In a series of cases, transsexual persons took their cases to the ECtHR arguing that UK laws breached their human rights.[159] It was argued that the UK Government was in breach of Article 8 (the right to respect for family life) and Article 12 (the right to marry) of the ECHR taken in conjunction with Article 14 (the right not to be discriminated against in respect of a Convention right). At first the claims failed, the ECtHR affording the UK a wide margin of appreciation on these issues. However, the Court had stressed the need for the law to be kept under review by contracting states and by the European Court itself, having regard to scientific and societal developments. In *Sheffield and Horsham v UK*[160] the Court stressed the importance of the increasing social acceptance of transsexualism and the growing recognition of the problems which post-operative transsexuals encountered.

Key case

Eventually, taking account of these factors, in *Goodwin v UK*[161] (heard with *I v UK*[162]), the ECtHR changed its approach. In *Goodwin*, the applicant, a male-to-female transsexual, claimed that the UK had violated her rights under Articles 8 and 12 of the ECHR because UK law was failing to recognise the legal status of

[156] Gender reassignment is available on the National Health Service.

[157] [1971] P 83, [1970] 2 WLR 1306. For a detailed discussion of this case and its impact, see S. Gilmore, '*Corbett v Corbett*: Once a Man, Always a Man?' in S. Gilmore, J. Herring, and R. Probert, *Landmark Cases in Family Law* (Oxford: Hart, 2011).

[158] [1971] P 83 at 106.

[159] *Rees v UK* (1986) 9 EHRR 56, [1987] 2 FLR 111; *Cossey v UK* [1991] 2 FLR 492; *Sheffield and Horsham v UK* [1998] 2 FLR 928.

[160] [1998] 2 FLR 928.

[161] (2002) 35 EHRR 18, [2002] 2 FLR 487. *Goodwin* was used in argument in *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), [2007] 1 FLR 295, see p 31 (Section 8).

[162] [2002] 2 FLR 518.

transsexual persons in respect of a wide range of matters, such as employment, social security, the state pension, car insurance, and marriage. The UK's defence was that it enjoyed a margin of appreciation in respect of legislating on such matters. However, the European Court refused to accept this argument and unanimously held that both Articles 8 and 12 had been breached.

With regard to Article 8, the ECtHR held that the unsatisfactory situation whereby post-operative transsexuals lived in an intermediate zone where they were not quite one gender or another was no longer sustainable. The UK could no longer claim it enjoyed a margin of appreciation in such matters. As there were no significant factors of public interest which weighed against the interest of the applicant in obtaining legal recognition of her reassignment, the Court held that the fair balance inherent in the European Convention tilted in her favour. It held that a 'serious interference with private life can arise where domestic law conflicts with an important aspect of personal identity, and that the stress and alienation'[163] suffered by a post-operative transsexual could not be considered as a minor inconvenience arising from a formality. The Court also recognised that developments in medical science necessitated a change of approach, and that it was not apparent that chromosomal tests alone should necessarily be decisive for the purposes of attributing gender identity.

With regard to Article 12, the ECtHR held that the term 'man and woman' in relation to the right to marry could no longer be assumed to refer to a test of gender based on purely biological criteria, as had been laid down in *Corbett v Corbett*.[164] It held that such a test was no longer appropriate to the current understanding of transsexualism and could no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. Another factor which influenced the Court to find in favour of the applicants was that the condition of gender identity disorder was recognised by the medical profession and treatment, including surgery, was available on the National Health Service. It held that, as the applicant had no possibility of marrying a man even though she lived as a woman and was in a relationship with a man and would only wish to marry a man, the very essence of her right to marry had been infringed and there was no justification for barring her from enjoying that right in the circumstances.[165] The reasoning in *Goodwin* was adopted by the ECtHR in *I v UK*,[166] heard with *Goodwin*, where the applicant, a male-to-female transsexual, had not been admitted to a nursing course because she had failed to show her birth certificate which stated she was male. The ECtHR found in her favour.

Key case

Around the same time as the *Goodwin* decision, a case involving a transsexual person and the right to marry was progressing through the domestic courts, reaching the House of Lords in 2003. In *Bellinger v Bellinger (Lord Chancellor Intervening)*,[167] the House of Lords had to consider the legal position of transsexuals in light of its obligations under the Human Rights Act (HRA) 1998. The *Bellinger* case was different from the

[163] (2002) 35 EHRR 18, [2002] 2 FLR 487 at [77].

[164] That a person's biological sex is fixed at birth and could only be established by chromosomal, gonadal, and genital criteria, see earlier.

[165] In *Goodwin*, the European Court was referred to the case of *Re Kevin: Validity of Marriage of Transsexual* [2001] Fam CA 1074 where Chisholm J in the Family Court of Australia had strongly criticised the reasoning in *Corbett* and had upheld the validity of a marriage between a woman and a female-to-male transsexual on the basis that sex was to be determined at the date of marriage having regard not just to biological factors but to all other relevant factors, such as life experiences and self-perception.

[166] [2002] 2 FLR 518.

[167] [2003] UKHL 21, [2003] 1 FLR 1043. See S. Gilmore, '*Bellinger v Bellinger*—Not Quite Between the Ears and Between the Legs—Transsexualism and Marriage in the Lords' (2003) 15(3) Child and Family Law Quarterly 295; C. Bessant, 'Transsexuals and Marriage after *Goodwin v United Kingdom*' [2003] Family Law 111; A. Bradney, 'Developing Human Rights? The Lords and Transsexual Marriages' [2003] Family Law 585.

transsexual cases cited earlier in that it involved an application by a transsexual person, Mrs Bellinger, for a declaration under section 55 of the Family Law Act 1986 that her 1981 marriage was a valid and subsisting marriage, even though she was a male-to-female transsexual and had married a man. The High Court and the Court of Appeal by a majority (Thorpe LJ dissenting) refused to grant the declaration as, applying the biological test of gender laid down in *Corbett*, they had not entered into a valid marriage, as section 11(c) of the MCA 1973 required the parties to be respectively male and female.

Mrs Bellinger appealed to the House of Lords arguing that the Court of Appeal's decision was incompatible with the ECHR and was therefore unlawful under section 7 of the HRA 1998. As section 2(1) of the HRA 1998 requires courts in the UK to take account of the judgments of the ECtHR when determining any question arising in connection with a Convention right, the House of Lords had to take into account the decision in *Goodwin v UK* (and *I v UK*), which had been decided after the decision of the Court of Appeal in *Bellinger* but before the case was heard by the House of Lords. As the courts are required by section 3(1) of the HRA 1998 to read and give effect to primary legislation in a way which is compatible with the ECHR, the House of Lords was obliged to consider whether section 11(c) of the MCA 1973, which requires the parties to a marriage to be male and female, was incompatible with the European Convention. However, despite the provisions of the HRA 1998 and the decisions of the European Court in *Goodwin* and *I v UK*, the House of Lords dismissed Mrs Bellinger's appeal on the ground that such an important change in the law was better left to Parliament not the courts, particularly as the UK Government had already said it would introduce legislation to change the law. The House of Lords, however, made a declaration of incompatibility under section 4 of the HRA 1998 that section 11(c) of the MCA 1973 was incompatible with Articles 8 and 12 of the ECHR.

7.2 The Gender Recognition Act 2004

After the decisions of the ECtHR in *Goodwin v UK* and *I v UK*,[168] and *Bellinger v Bellinger (Lord Chancellor Intervening)*,[169] the UK was forced to comply with its Convention obligations and change the law to give transsexuals new rights. The UK Government announced that it would introduce new laws which would include not only changes in respect of birth certificates, inheritance provision, and pension rights, but also give transsexuals the right to enter into a valid marriage or civil partnership in their acquired sex. These changes were enacted in the Gender Recognition Act 2004, which came into force on 4 April 2005, and which gives legal recognition to transsexuals who have shown that they have taken decisive steps towards living fully and permanently in their acquired gender.

Under the Gender Recognition Act, a transsexual person aged 18 who has lived in the other gender or who has changed gender under the law or a country or territory outside the UK can apply for a gender recognition certificate from the Gender Recognition Panel,[170] which it must grant if it is satisfied that: the applicant has or has had gender dysphoria; has lived in the acquired gender for two years ending on the date on which the application is made; intends to continue to live in the acquired gender until death; and complies with certain evidential requirements laid down in section 3 of the Act.[171] There is no requirement that the applicant must have had gender reassignment surgery or have been sterilised. The effect of a full gender recognition certificate[172] is that the applicant's gender 'becomes for all purposes the acquired gender'.[173] Thus, the practical effect of a gender recognition certificate is to provide a transsexual person with legal recognition in the acquired gender, so that he or she is entitled to various rights which include a new birth certificate

[168] See earlier in this section. [169] [2003] UKHL 21, [2003] 1 FLR 1043.

[170] Section 1(1). The Panel is comprised of lawyers and medical practitioners. [171] Section 2(1).

[172] If the applicant is a spouse or civil partner, only an interim gender recognition certificate can be issued (s 4), but, if the marriage or civil partnership is terminated by divorce or dissolution within six months of the issue of the interim certificate, the applicant can seek a full gender recognition certificate (s 5). [173] Section 9(1).

reflecting the acquired gender and the right to enter into a valid marriage or civil partnership in the acquired gender.[174] In the absence of a gender recognition certificate, however, the common law in *Corbett* still applies; indeed it was apparently endorsed by the House of Lords in *Bellinger*.

7.2.1 Application for a GRC by a spouse or civil partner

One consequence of section 11(c) of the MCA 1973, which prohibited a marriage between two persons of the same sex, was that if the applicant was married, the panel would only issue an interim gender recognition certificate.[175] However, the applicant could seek a full gender recognition certificate if the existing marriage was brought to an end by divorce or dissolution within six months of the issue of the interim certificate.[176] This was to ensure that there could be no marriage between persons of the same sex. The same legal requirements apply to a civil partner who applies for a gender recognition certificate. A full certificate will only be issued once the existing civil partnership had been brought to an end. This is to ensure that the requirements of the Civil Partnership Act 2004 are met, that is, that an opposite-sex couple cannot form a civil partnership. In short, if someone who was in a marriage or civil partnership wished to apply for a Gender Recognition Certificate to legally change their gender, the existing marriage or civil partnership would have to be terminated because the law did not allow same-sex couples to be married, or opposite-sex couples to be in a civil partnership.

This was challenged before the European Court of Human Rights in *Parry* v *UK*.[177] In this case a husband and wife were married. The husband subsequently changed gender and wanted to apply for a full gender recognition certificate but also wished to remain married. It was argued that the requirement to end the existing marriage before the certificate could be issued was in breach of the parties' rights under the ECHR. The ECtHR rejected this complaint on the basis that English law did not permit same-sex marriage, thus explaining the legal requirement to annul the existing marriage before a full gender recognition certificate could be issued. Once these steps were followed and the parties were both legally of the same sex, it was open to them to formalise their relationship by entering into a civil partnership. This meant that their rights under the ECHR had not been violated.

Talking point

However, this position has now been changed by the legalisation of same-sex marriage under the Marriage (Same Sex Couples) Act 2013. Section 12 of the 2013 Act brings into effect Schedule 5 which amends the Gender Recognition Act 2004 to allow individuals to change their legal gender without first having to end their existing marriage which, according to the LGBT Partnership, caused great distress to the transsexual community: 'for many trans people, same-sex civil marriage will mean an end to the distressing and inconvenient practice of having to dissolve one's existing marriage to obtain a GRC'.[178]

Permitting same-sex marriage now enables those in a marriage, when one of the couple legally changes their gender, to remain married, should the parties wish to do so. However, as an opposite-sex couple still cannot form a civil partnership, it remains the case that an existing civil partnership must be brought to an end if one of the parties wishes to apply for a GRC.

[174] With regard to parenthood, however, the grant of a gender recognition certificate does not affect the applicant's parental status as a father or mother, so that it is not thereby possible to remove parental rights and responsibilities: see s 12, and S. Gilmore, 'The Gender Recognition Act 2004' [2004] Family Law 741.

[175] Section 4.

[176] Section 5.

[177] App no 42971/05.

[178] Equal Marriage: The Government's response (December 2012), para 8.7. For a discussion of the impact of the legalisation of same-sex marriage on the Gender Recognition Act 2004 see S. Gilmore, 'The Legal Status of Transsexual and Transgender Persons in England and Wales' in J. M. Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia, 2014, forthcoming).

An alternative option made possible by the 2013 Act is for such a couple to convert their civil partnership into a marriage[179] which would then allow one of the couple to apply to change their gender.[180]

7.3 Intersexuals and marriage

The law treats transsexual and intersexual persons differently. An intersexual person is one whose biological sex is ambiguous at birth and in *W v W (Physical Inter-Sex)*[181] Charles J distinguished *Corbett* on that basis. In *W v W* the respondent to an application for a decree of nullity had been diagnosed with a physical intersex condition. At birth her chromosomal sex was male, but the external genital appearance was ambiguous. She had no internal sex organs or genitalia of a woman and no vaginal opening, although she subsequently had gender reassignment surgery. Her body now looked more female than male, and she chose to live as a woman. Charles J concluded that the decision whether the respondent was male or female was to be ascertained at the time of the marriage, having regard to her development and all of the indicia of sex listed in *Corbett* (ie, the biological factors, psychological factors, hormonal factors, and secondary sexual characteristics, such as distribution of hair, breast development, physique etc)[182] Applying those criteria, the respondent was female and the decree was refused.

8 The development of gay and lesbian rights

The development of same-sex rights in England and Wales mirrors the 'standard sequence' of events usually associated with gay and lesbian emancipation in most countries.[183] This sequence tends to start with the protection of the *individual* rights of gays and lesbians to recognising the *partnership status* of same-sex relationships. Broadly speaking, the protection of individual rights in the gay and lesbian reform agenda begins with the decriminalisation of homosexual acts[184] and the equalisation of the age of consent for sexual activity between adults.[185] It is usually followed by legislation which protects the rights of gay and lesbian individuals in different contexts. For example, legislation was passed in 2003 which outlawed discrimination in the workplace on the grounds of sexual orientation,[186] greater protection from homophobic hate crimes was developed in 2003,[187] and it was in the same year that the infamous section 28 was abolished.[188] These measures, which

[179] Section 9 of the Marriage (Same Sex Couples) Act 2013.

[180] Equal Marriage: The Government's response (December 2012), para 8.5.

[181] [2001] Fam 111, FD, *per* Charles J. See A. Barlow, '*W v W (Nullity: Gender) and B v B (Validity of Marriage: Transsexual)*—A New Approach to Transsexualism and a Missed Opportunity?' [2001] Child and Family Law Quarterly 225 and also P.-L. Chau and J. Herring, 'Defining, Assigning and Designing Sex' (2002) 16 International Journal of Law, Policy and the Family 327 and J. Herring and P.-L. Chau, 'Assigning Sex and Intersexuals' [2001] Family Law 762.

[182] Ibid, 146.

[183] K. Waaldijk, 'Standard Sequence in the Legal Recognition of Homosexuality—Europe's Past, Present and Future' (1994) 4 Australasian Gay and Lesbian Law Journal 50; K. Waaldijk, 'Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe' (2000) 17 Canadian Journal of Family Law 62. See also L. Glennon, 'Displacing the Conjugal Family in Legal Policy—A Progressive Move?' (2005) 17 Child and Family Law Quarterly 141.

[184] Homosexual activity was decriminalised in England and Wales by the Sexual Offences Act 1967.

[185] The Sexual Offences (Amendment) Act 2000 equalised the age of consent for homosexual and heterosexual activity.

[186] The Employment Equality (Sexual Orientation) Regulations 2003, which implemented Council Directive 2000/78/EC, made it unlawful to discriminate on grounds of sexual orientation in employment and vocational training.

[187] The Criminal Justice Act 2003 imposed a statutory requirement on judges to treat as an aggravating factor when sentencing, assaults involving or motivated by hostility based on sexual orientation (or presumed sexual orientation).

[188] Section 122 of the Local Government Act 2003 repealed section 2A of the Local Government Act 1986 (known as section 28) which prohibited local authorities from intentionally promoting homosexuality or publishing material with the intention of doing so or from promoting teaching in schools of the acceptability of homosexuality as a 'pretended' family relationship.

aim to protect the rights of gay and lesbian individuals, tend to be followed in most countries by legal moves to recognise the *partnership status* of same-sex relationships either through civil partnership legislation or the introduction of same-sex marriage. This evolutionary process can be seen in England and Wales with the introduction of civil partnerships for same-sex couples in 2004, followed by the legalisation of same-sex marriage almost a decade later in 2013. The following sections will discuss each in turn.

8.1 The road to civil partnership

Persons in a same-sex relationship have been able to enter into a registered civil partnership since the enactment of the Civil Partnership Act 2004.[189] However, even before the introduction of civil partnership, the law had begun to give same-sex couples various rights. Same-sex partners could seek protection against domestic violence under Part IV of the Family Law Act 1996,[190] and gay and lesbian couples have been able to adopt children jointly since 2002.[191] One of the most significant milestones in the development of gay and lesbian rights was *Fitzpatrick v Sterling Housing Association Ltd*[192] where the House of Lords held that a same-sex partner was capable of being a member of the other partner's family for the purpose of the Rent Act 1977 thus enabling the applicant to succeed to a tenancy held in the name of their deceased partner.[193] This was a seminal case in family law policy because it recognised, for the first time, that same-sex couples could form a family unit. As such it represented a powerful endorsement of the sexual partnership of gay and lesbian relationships at a time when such relationships were not fully legitimised either in law or social consciousness. Indeed, section 28 was still on the statute books which meant that the House of Lords legitimised same-sex partnerships at a time when 'official discourse' still referred to them as 'pretended family relationship[s]'. It is also noteworthy that the decision pre-empted the jurisprudence of the European Court of Human Rights which has only recently accepted that same-sex couples can be classed as a 'family' for the purposes of Article 8 of the ECHR.[194] Thus as well as contrasting starkly with the demeaning representation of same-sex relationships under section 28, *Fitzpatrick* also contrasted with human rights jurisprudence with, at the time, required respect for the 'sexual identity of lesbians and gays but not their relationships'.[195]

Talking point

The timing of *Fitzpatrick* coincided with the liberalisation of attitudes towards homosexuality. Indeed, surveys have shown that attitudes towards homosexuality have gradually liberalised since 1998.[196] In 1983, 62 per cent of respondents to a survey though that sexual relations between two people of the same sex were

[189] The Act came into force in December 2005. See R. Deech, 'Civil Partnership' [2010] Family Law 468. On the history of the legal treatment of homosexuality, see S. Cretney, *Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage'* (Oxford: Oxford University Press, 2006). See also the government consultation paper, *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (Women and Equality Unit of the Department of Trade and Industry, June 2003), which set out the proposals for reform.

[190] See Chapter 3.

[191] Under the Adoption and Children Act 2002, see Chapter 11.

[192] [2001] 1 AC 27, [2001] 1 FLR 271.

[193] The decision was reached by a narrow three-to-two majority with Lords Hutton and Hobhouse of Woodborough dissenting. For a discussion of *Fitzpatrick* see L. Glennon, '*Fitzpatrick v Sterling Housing Association*: A Perfectly Pitched Stall' in S. Gilmore, J. Herring, and R. Probert (eds), *Landmark Cases in Family Law* (Oxford: Hart, 2011).

[194] *Schalk and Kopf v Austria* (App no 30141/04) 24 June 2010.

[195] B. Hale, 'Same-Se Relationships and the House of Lords' Incorporated Council of Law Reporting Lecture 2007, 14.

[196] A. Ross and A. Stacker, 'Understanding the Dynamics of Attitude Change' in A. Park et al (eds), British Social Attitudes 2009–2010: the 26th Report (Sage Publications, 2010), pp 115–33.

'always' or 'mostly wrong'.[197] This rose to 75 per cent in 1987 but steadily declined to 36 per cent in 2007.[198] In 1999, the year of the *Fitzpatrick* decision, 49 per cent of respondents still felt that homosexual sex was wrong but by 2003 this had dropped to 40 per cent.[199]

The next major legal development in the gay and lesbian rights agenda was the decision of the House of Lords in *Ghaidan v Godin-Mendoza*.[200] In *Fitzpatrick* it was held that a same-sex partner could succeed to his deceased's partners tenancy by being classed as a member of his family,[201] but that he could not be classed as 'living with the original tenant as his or her husband or wife'.[202] In *Ghaidan*, this difference in treatment was considered in light of the Human Rights Act 1998 where the House of Lords held that it infringed Article 14 of the ECHR. In reaching this decision the court accepted that both opposite- and same-sex relationships can be marriage-like in nature, with the result that any difference in treatment between the two was based upon sexual orientation which had no objective or reasonable justification.[203]

Talking point

Baroness Hale said '[h]omosexual couples can have exactly the same sort of interdependent couple relationships as heterosexuals can…Some people, whether heterosexual or homosexual, may be satisfied with casual or transient relationships. But most human beings eventually want more than that. They want love…And many couples also come to want the stability and permanence which go with sharing a home and a life together, with or without the children who for many people go to make a family. In this, people of homosexual orientation are no different from people of heterosexual orientation.'[204]

This was significant. Although the decision in *Ghaidan* related to a specific statutory provision, it called into question the legitimacy of other provisions which conferred rights on unmarried opposite-sex but not same-sex couples.[205] It thus brought same-sex rights within the mainstream political agenda and a short time later the Civil Partnership Act 2004 was passed. The Consultation Paper preceding the Act highlighted the plight of same-sex couples: '[s]ame-sex couples face many problems in their day-to-day lives because there is no legal recognition of their relationship. In many areas, each partner in the couple is treated as a separate individual; they are denied rights and responsibilities that could help them to organise their lives together. Opposite-sex couples have the choice to marry and have the relationship recognised by law. Same-sex couples have no such choice.'[206] The Civil Partnership Act 2004 thus established a same-sex registered partnership system and gave registrants marital-like rights and duties. This followed the trend in other European countries to enact registered partnership schemes for same-sex couples.[207] As such, it was a significant milestone in the gay and lesbian reform agenda in England and Wales. In the parliamentary debates during the passage of the Civil Partnership Bill, the Deputy Minister for Women and Equality noted the evolutionary nature of legal developments in this area: '[w]e have equalised the age of consent, outlawed discrimination in the workplace on the grounds of sexual orientation, secured protection

[197] Ibid. [198] Ibid. [199] Ibid. [200] [2004] UKHL 30, [2004] 2 AC 557, [2004] 2 FLR 600.

[201] Under para 3(1) of Sch 1 to the Rent Act 1977.

[202] Under para 2(2) of Sch 1 to the Rent Act 1977 which states that 'a person who was living with the original tenant as his or her wife or husband shall be treated as a spouse of the original tenant'. This has now been amended by the Civil Partnership Act 2004 (Sch 8, para 13) to include 'a person who was living with the original tenant as if they were civil partners'. [203] Applying *Karner v Austria* (App no 40016/98) (2004) 38 EHRR 24.

[204] [2004] UKHL 30, p 142.

[205] R. Bailey-Harris and J. Wilson, '*Mendoza* v *Ghaidan* and the Rights of de facto Spouses' (2003) 33 Family Law 575–9.

[206] DTI, Women and Equality Unit, 'Civil Partnership: A framework for the legal recognition of same-sex couples', 2003, p 10. [207] Registered partnership legislation was first introduced in Denmark in 1989.

from homophobic hate crimes and supported the abolition of section 28 … The Civil Partnership Act, in [representing an] historic step on what has been a long journey to respect and dignity for lesbians and gay men in Britain … [creates] a new legal relationship for same-sex couples.'[208]

The Government's intention in introducing civil partnership in 2004 was to create an institution which would be parallel, but not identical, to marriage. It was keen to emphasise that civil partnership would not undermine the institution of marriage or offend religious beliefs. Marriage, at this time, was still regarded as a union which was only possible between a man and a woman. As Lord Nicholls said in *Bellinger v Bellinger (Lord Chancellor Intervening)*, marriage is 'deeply embedded [in the religious and social culture of this country] as a relationship between two persons of the opposite sex'.[209]

Talking point

Baroness Scotland, introducing the second reading of the Civil Partnership Bill in the House of Lords, said:

> The Bill offers a secular solution to the disadvantages which same-sex couples face in the way they are treated by our laws.… This Bill does not undermine or weaken the importance of marriage and we do not propose to open civil partnership to opposite-sex couples. Civil partnership is aimed at same-sex couples who cannot marry. However, it is important for us to be clear that we continue to support marriage and recognise that it is the surest foundation for opposite sex couples raising children.[210]

Although the Government has been keen to stress that civil partnership is not 'gay marriage', civil partnership is in fact almost identical to marriage as it creates a status from which virtually the same rights and responsibilities flow. One of the reasons for refusing to equate civil partnership with marriage is that marriage is considered by many to be a religious sacrament, and the law of marriage has ecclesiastical origins. This approach is questionable given that, first, we live in a multi-ethnic and multi-religious society and, secondly, civil partnerships can be celebrated in religious premises.[211] Civil partnership does, however, have the following differences from marriage. Adultery is not a ground for the dissolution of a civil partnership as it is in the case of divorce; and non-consummation and venereal disease are not available as grounds for the voidability of a civil partnership.[212] In essence, there is therefore very little difference between the status relationship of civil partnership and that of marriage.

Talking point

According to Government statistics, in 2012 there were 7,037 civil partnerships registered in the UK, an increase of 3.6 per cent since 2011.[213] The Government Equalities Office originally predicted that there would be between 11,000 and 22,000 civil partners in Great Britain by 2010, but there were over 79,000 people in civil partnerships at the start of 2010. The number of civil partnerships peaked in the first quarter of 2006 at 4,869. This is likely to be explained by the number of same-sex couples in long-standing relationships who took the opportunity to formalise their relationship as soon as the legislation was implemented in December 2005. The number of civil partnerships has since fallen to an average of 1,759 per quarter in 2012. Initially the numbers of males forming civil partnerships were much higher than females, but now there is little difference. In 2012, there were slightly more female civil partnerships (51 per cent) in the UK than male, while in 2011, there were slightly more male civil partnerships (51 per cent) than female.

[208] Hansard, HC Deb, vol 425, col 174 (12 October 2004).
[209] [2003] UKHL 21.
[210] Hansard, HL 22 April 2004, col 388.
[211] See s 202 of the Equality Act 2010. The Marriage and Civil Partnerships (Approved Premises) (Amendment) Regulations 2011.
[212] See Sections 3.1 and 3.4.
[213] Office for National Statistics, Civil Partnerships in the UK, 2012.

The mean age at formation of civil partnership fell slightly from 40.1 years in 2011 to 40.0 in 2012 for men, and for women from 38.3 years in 2011 to 37.6 in 2012. In 2012, 74 per cent of civil partnerships formed in the UK were to couples where both partners were single. However, 11 per cent of men and 19 per cent of women forming a civil partnership in the UK in 2012 had been in a previous marriage or civil partnership.

8.2 The legal formation of a civil partnership

A civil partnership is defined in the Civil Partnership Act 2004 as 'a relationship between two people of the same sex…which is formed when they register as civil partners of each other'.[214] To be able to register a civil partnership, the parties must be of the same sex, and each party must not be under 16, not be within the prohibited degrees of relationship, and not be already civil partners or lawfully married.[215] The ban on opposite-sex couples forming a civil partnership is another example of the Government's attempt to safeguard the privileged position of marriage. By limiting registration to same-sex couples, it ensured that an alternative legal structure was not offered to opposite-sex partners.

Local registration services are responsible for registration, which involves a process similar to that for a civil marriage. Like a civil marriage, various preliminary formalities must be satisfied, such as residence and notice requirements. Each party must declare that there is no impediment to the formation of the partnership and that the residence requirements are satisfied.[216] Notice of the proposed registration will be published and, after a 15-day waiting period and in the absence of any objections, the registration authority will issue a 'civil partnership schedule' authorising registration to take place.[217] The 15-day waiting period can be reduced in special cases;[218] and special provision exists for housebound persons, hospital patients, and prisoners.[219] Once these preliminary formalities have been satisfied, registration can take place. The Civil Partnership Act 2004 prohibited civil partnership registrations taking place on religious premises. However, section 202 of the Equality Act 2010 and the Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2011 enable civil partnerships to be registered on approved religious premises where permitted by religious organisations, although there must be no religious service at the registration.[220] Registration is completed when each party has signed the civil registration document at the invitation of, and in the presence of, the civil partnership registrar; and in the presence of each other and two witnesses.[221]

8.2.1 Civil partnership agreements

Civil partners can enter into a civil partnership agreement. This is the equivalent of an engagement to marry and the rules which apply are the same as those which apply to engagements. Thus, a civil partnership agreement does not have contractual effect, and the same rules about rights in property apply on the termination of a civil partnership agreement as apply on the termination of an engagement.[222] A party to a civil partnership agreement can also seek protection against domestic violence under Part IV of the Family Act 1996.[223]

8.2.2 Termination of a civil partnership

Under the Civil Partnership Act 2004 a civil partner can apply to have the partnership annulled (on the ground that it is void or voidable) or have it dissolved. These legal processes and the laws which apply are virtually the same as those for married couples who are applying to have their

[214] Section 1(1). [215] Section 3(1). [216] Section 3. [217] Section 8. [218] Section 14.
[219] Section 12. [220] Sections 18–19. [221] Sections 2(1) and 2(5).
[222] See ss 73 and 74. Thus, where a party makes a gift to the other party on the condition (express or implied) that it is to be returned if the civil partnership agreement is terminated, that party is not prevented from recovering the property merely because he or she was responsible for terminating the agreement (s 74(5)). [223] See Chapter 3.

marriage annulled or terminated by divorce. Civil partners can also apply for a separation order, which is equivalent to a decree of judicial separation in the case of married persons; and an order equivalent to the decree of presumption of death.

8.2.3 Annulment of a civil partnership

Under the Civil Partnership Act 2004 the court has the power to make nullity orders in respect of void and voidable civil partnerships. These provisions are virtually the same as those for nullity of marriage.[224] Unlike nullity of a marriage,[225] however, there are no non-consummation and venereal disease grounds to render a civil partnership voidable.

8.2.4 Dissolution of a civil partnership

Dissolution of a civil partnership is the same as the termination of a marriage by divorce, except that there is no adultery ground.

8.3 Recognition of overseas civil partnerships, annulments, and separations

The Civil Partnership Act 2004 makes provision[226] for the recognition of overseas civil partnerships in the UK, and also the recognition of overseas civil partnership dissolutions, annulments, and separations. These are equivalent to the provisions governing the recognition of overseas marriages, divorces, annulments, and separations. This is subject, however, to the provision that an overseas civil partnership will not be recognised if it 'would be manifestly contrary to public policy to recognise the capacity, under the relevant law, of one or both of them to enter into the relationship.'[227] The court has jurisdiction to make finance and property orders after an overseas dissolution, annulment, or legal separation of a civil partnership.[228]

8.4 The legal consequences of civil partnerships

Civil partners have virtually the same rights, responsibilities, and privileges as married couples both during the partnership and onward after its breakdown. Thus, the effect of registration is to give the partners various rights, responsibilities, and obligations broadly analogous to those of married couples.

During the partnership, civil partners, like spouses, have a mutual duty to maintain each other, and a civil partner can apply against the other partner for financial provision in the family proceedings court.[229] Civil partners have the same pension rights as married couples; and they are treated in the same way as married couples for tax and state benefit purposes.

On the grant of a dissolution order or a decree of annulment, the family courts have jurisdiction to make finance and property orders in favour of civil partners equivalent to those which it can make on divorce.

On the death of a civil partner, the surviving partner is in the same position as a surviving spouse. Thus, if a civil partner dies intestate, then the surviving partner is treated in the same way as a surviving spouse in respect of inheriting the deceased's estate. The survivor is also entitled to inherit a tenancy belonging to the deceased partner in the same way as a surviving spouse, and the surviving partner can also bring a claim for financial provision on the death of a partner under the Inheritance (Provision for Family and Dependants) Act 1975 in the same way as a married person.

In respect of children and parenting, a civil partner who is not the biological parent can obtain parental responsibility for his or her civil partner's child by entering into a parental responsibility agreement with his or her partner or by obtaining a parental responsibility order from the

[224] See Section 1.5. [225] Sections 49–54. [226] See ss 233–238. [227] Section 218.
[228] See s 72(4) and Sch 7. [229] Sections 65–72.

court.[230] Provisions have recently been introduced which give lesbian partners (whether or not they are civil partners) 'automatic' parental responsibility for a child of the partnership conceived as a result of assisted reproduction or surrogacy;[231] and which allow a lesbian partner (whether or not a civil partner) of a child's mother to acquire parental responsibility where the partners have a child by means of assisted reproduction or surrogacy.[232] Civil partners can apply for child arrangements orders and other orders under section 8 of the Children Act 1989.[233] They have a duty to provide maintenance for any child of the family; and they can apply for financial provision for a child in the same way as married couples. Like a married couple, they can apply to adopt a child jointly and, in some circumstances, solely.

Civil partners who are actual or potential victims of domestic violence can apply for non-molestation orders and occupation orders under Part IV of the Family Act 1996 in the same way as married couples, and a non-owning civil partner has 'home rights' (a statutory right of occupation in the home) under section 30 of the 1996 Act.[234]

9 The road to same-sex marriage

While the legal obligations between civil partners are based on marriage, same-sex marriage remained unlawful. In *Wilkinson v Kitzinger*, it was held that this was not in violation of the principles of the ECHR.[235] It was also held that a same-sex marriage validly entered into in an overseas jurisdiction is not recognised as a valid marriage in the courts in this country, although it can be recognised as a valid civil partnership.[236]

Key case

In *Wilkinson v Kitzinger* the parties, Ms Kitzinger and Ms Wilkinson, two feminist scholars who lived and worked in England, applied to the English court to have their Canadian marriage, which had been validly entered into in British Columbia, recognised in the UK. They applied for a declaration as to marital status under section 55 of the Family Law Act 1986. They argued that the provisions of the Civil Partnership Act 2004,[237] which treated an overseas marriage as a civil partnership, and section 11(c) of the MCA 1973, which required, at the time, that the parties to a valid marriage in England and Wales be respectively male and female,[238] violated their human rights under the ECHR. They argued that the provisions breached their rights to respect for private and family life (Article 8), to marry (Article 12), and not to suffer discrimination in respect of those Convention rights (Article 14). In the alternative they contended that the common law definition of marriage in English law as a union between a man and a woman[239] should be developed so as to recognise same-sex marriages. They also sought a declaration under section 4(2) of the HRA 1998 that the statutory provisions were incompatible with Articles 8, 12, and 14 of the ECHR.

[230] See Children Act 1989, s 4A and Chapter 7.

[231] See the Children Act 1989, s 2(1A)(a) and (b) and the Human Fertilisation and Embryology Act 2008, ss 42 and 43. 'Automatic' means that parental responsibility arises 'automatically' in the sense that there is no need to apply for it. On parental responsibility generally, see further Chapter 7.

[232] See Children Act 1989, s 4ZA.

[233] See Chapter 9.

[234] See Chapter 3.

[235] [2006] EWHC 2022 (Fam), [2007] 1 FLR 295. See also *Schalk and Kopf v Austria* (App no 30141/04), 24 June 2010. For commentary on *Wilkinson v Kitzinger*, see N. Bamforth, '"The Benefits of Marriage in All But Name"? Same-Sex Couples and the Civil Partnership Act 2004' [2007] Child and Family Law Quarterly 133 and R. Auchmuty, 'What's so Special about Marriage? The Impact of *Wilkinson* v *Kitzinger*' [2008] Child and Family Law Quarterly 475.

[236] Provided the parties had the capacity to marry in the overseas jurisdiction and complied with the required overseas formalities, see the Civil Partnership Act 2004, s 215.

[237] Sections 212–218.

[238] See Section 7.

[239] The common law definition of marriage, as stated by Lord Penzance in *Hyde v Hyde* (1866) LR 1 P & D 130 at 133, 35 LJP & M 57, is: 'The voluntary union for life of one man and one woman, to the exclusion of all others'.

Potter P dismissed the petition on the basis that there had been no violation of their human rights. He said that this was a controversial topic which lacked consensus throughout Europe, with the result that the ECtHR had declared itself slow to trespass into this area. Potter P rejected the Article 8 argument on the basis that Strasbourg jurisprudence did not regard relationships between same-sex partners as 'family life'.[240] (It should be noted that this view no longer holds following the ECtHR's ruling in *Schalk and Kopf v Austria*.[241]) Insofar as the claim was based on a 'private life', Potter P referred to *M v Secretary of State for Work and Pensions*[242] in which the majority of the House of Lords had guarded against an expansive interpretation of Article 8. For the same reasons, Potter P found no breach of Article 8 taken together with Article 14.

Potter P also held that there was no breach of Article 12, the right to marry, because Strasbourg jurisprudence referred to marriage in the traditional sense, in other words as a marriage between a man and a woman. The petitioner in *Wilkinson v Kitzinger* relied on *Goodwin v UK*[243] (a case on transsexuals) to argue that it was possible to apply the 'living instrument' doctrine (which requires the Convention to be interpreted in light of present-day conditions) and to interpret and extend the right to marry in Article 12 to recognise the unqualified right of a man or a woman to marry a person of the same, as well as the opposite, sex. Potter P rejected this argument, holding that there were 'clear limitations' to the 'living instrument' doctrine and that it could not be said that this was an area where there was European-wide consensus on the matter. Potter P therefore declined to find a violation of Article 12. He held that the 'living instrument' doctrine could not be applied to Article 12 to bring it within the scope of Convention issues which were plainly outside its contemplation.

By contrast, Potter P held that Article 12 was engaged for the purpose of Article 14. He concluded, however, that the difference in treatment of same-sex couples pursued a legitimate aim and represented a proportionate response to achieving that aim. Potter P referred to the Civil Partnership Act 2004, which he said Parliament had enacted as a policy choice to create a legal status for same-sex partners while at the same time demonstrating support for marriage. Prefacing his comments with the observation that same-sex relationships are not inferior, he nevertheless adopted a traditional view of marriage to justify his conclusion. He held that marriage is a heterosexual institution, the primary (although not exclusive) aim of which is procreation in a family environment where children are nurtured by both maternal and paternal influences.[244] To allow same-sex couples to marry would, he concluded, 'fail to recognise physical reality'.[245]

Potter P's reasoning in *Wilkinson v Kitzinger* has been criticised as being unconvincing, in particular for its adoption of a 'traditional' view of marriage which, it has been argued, is out of step with other areas of the law and societal trends.[246] The traditional view that marriage can only be a relationship between opposite-sex partners, because one of the main functions of marriage is to have children, is open to challenge now that same-sex couples can adopt children[247] and a lesbian woman who has a child by artificial reproduction or surrogacy, whether or not she is a civil partner, now has parental responsibility for a child of the partnership.[248] If marriage is the best environment for raising children, why deny it to same-sex couples who have children? Bamforth has criticised Potter P for choosing to ignore a line of authority in English law which found that childless same-sex couples were 'family' in other contexts, for instance in the context of the Rent Acts.[249] He also argues that Potter P's view that the parties were adequately compensated by having their union recognised as a civil partnership is unconvincing. Potter P's insistence that marriage

[240] See paras 70–75. [241] (App no 30141/04), 24 June 2010. [242] [2006] UKHL 11, [2006] 2 AC 91.
[243] (2002) 35 EHRR 18, [2002] 2 FLR 487. See further at Section 7.1.
[244] [2006] EWHC 2022 (Fam), [118] and [120]. [245] Ibid, [120].
[246] By Bamforth and Auchmuty (n 235). [247] Under the Adoption and Children Act 2002, see Chapter 11.
[248] See the Children Act 1989, ss 2(1A) and 2(1B) and the Human Fertilisation and Embryology Act 2008, ss 42 and 43.
[249] He referred to *Fitzpatrick v Sterling Housing Association Ltd* [2001] AC 27, [2000] 1 FLR 271 where, as we have seen, the House of Lords had held that a same-sex couple should be considered 'family' for the purposes of tenancy

is the relationship that 'best encourages stability in a well regulated society' means that 'anything else must be second-best, or worse', yet the thrust of Wilkinson and Kitzinger's argument was that they were not being treated equally to those who marry because civil partnership was considered to be different from marriage.

Other countries[250] permit same-sex marriages, and Auchmuty[251] predicted that English law would have to accept same-sex marriage one day. She said that *Wilkinson v Kitzinger* 'bears all the hallmarks of law in transition' and that same-sex marriage 'will doubtless come to the UK, one way or another'. She concluded that a declaration of incompatibility was 'a likely route' as, while Potter P ruled that Article 12 was engaged by Article 14, he nevertheless offered 'a fairly feeble justification for discrimination which should be easy to demolish'.

There are arguments for and against allowing same-sex marriages in England and Wales, and difficult policy issues are involved. Some argue that marriage is for heterosexuals, and same-sex couples should not be 'landed' with the religious 'baggage' and gender dimensions that marriage carries. It can be argued that some same-sex couples have lifestyles different from heterosexual couples and should not be required to conform to norms that are designed for heterosexuals.[252] Indeed, some gay and lesbian activists argue that same-sex marriage is far from a liberating concept. Ettlebrick, for example, argues that same-sex marriage will do little more than reinforce the status of marriage as the primary trigger for the conferment of rights and responsibilities within the law, thus furthering the gap between the privileged position of those couples who formalise their relationship and those who do not (such as unmarried cohabitants).[253] Critics also argue that extending marriage to same-sex couples forces such couples to structure their relationships within a marriage-like framework.[254] Stoddard, in response, cites a number of reasons to support same-sex marriage. First, on a practical level, the status of marriage carries economic and practical benefits which are withheld from those who cannot marry. Secondly, from a political perspective, it is the issue which 'most fully tests the dedication of people who are not gay to full equality for gay people'.[255] In other words, given the privileged position of marriage in social and legal thinking, denying access to gays and lesbians suggests that same-sex relationships are somehow 'less significant, less valuable' than opposite-sex relationships. This is a very compelling argument and given the historic prejudice suffered by gays and lesbians, it is suggested that legalising same-sex marriage is a very powerful state endorsement of gay and lesbian relationships. Thus, although civil partnership is effectively same-sex marriage in all but name, very strong arguments can be made in favour of same-sex marriage.[256] In February 2011, eight couples (four same-sex and four opposite-sex) filed a joint application in the European Court of Human Rights challenging the

succession, and to *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 FLR 600 where Lord Nicholls had stated that the existence of children should not be used as a means of differentiating between heterosexual and homosexual couples.

[250] Such as in Holland, Spain, South Africa, Mexico City, and in some provinces of Canada (Ontario, Quebec, and British Columbia).

[251] Auchmuty (n 235).

[252] K. McK. Norrie, 'Marriage is for Heterosexuals—May the Rest of Us be Saved From It' [2000] Child and Family Law Quarterly 363.

[253] P. Ettlebrick, 'Since When Is Marriage a Path to Liberation' in *Lesbian and Gay Marriage: Private Commitments, Public Ceremonies*, ed. S. Sherman (Philadelphia: Temple University Press, 1992) 21.

[254] See N. Barker, 'For Better or Worse? The Civil Partnerships Bill [HL] 2004' (2004) 36 Journal of Social Welfare and Family Law 313.

[255] T. Stoddard, 'Why Gay People Should Seek the Right to Marry' in Lesbian and Gay Marriage: Private Commitments, Public Ceremonies, ed. S. Sherman (Philadelphia: Temple University Press, 1992) 14.

[256] The case for recognising a same-sex marriage validly entered into in an overseas jurisdiction as a valid marriage in England and Wales seems even stronger, particularly as increasing numbers of countries are beginning to accept and permit such marriages. It seems rather strange that Wilkinson and Kitzinger could not have their valid Canadian marriage recognised in this country whereas in *McCabe v McCabe* [1994] 1 FLR 410 a marriage in Ghana between a Ghanaian woman and an Irish man involving a bottle of gin and a sum of money, was recognised as valid by the English court even though the parties were not present at the ceremony.

prohibition on same-sex civil marriages and on opposite-sex civil partnerships.[257] This litigation is ongoing at present. Thus, in the era of emerging equality and human rights dialogue, both public and political support grew in favour of same-sex marriage.

Talking point

In a recent YouGov poll carried out for the *Sunday Times*, 54 per cent of respondents supported changing the law to allow same-sex couples to marry,[258] and it became clear that the Government was resolute in its intention to legalise same-sex marriage by 2015. David Cameron said: 'I think marriage is a great institution – I think it helps people to commit, it helps people to say that they're going to care and love for another person. It helps people to put aside their selfish interests and think of the union they they're forming. It's something I feel passionately about and I think if it's good enough for straight people like me, it's good enough for everybody and that's why we should have gay marriage and we will.'[259]

9.1 The Marriage (Same Sex Couples) Act 2013

In March 2012 the Government Equalities Office published a consultation on 'Equal Civil Marriage', which considered how to enable same-sex couples to marry.[260] The consultation closed on 14 June 2012 and received over 228,000 responses, together with 19 petitions, which is the largest response ever submitted to a Government consultation. As expected the proposals attracted much public and political controversy, with strong opposition being mounted by some religious groups. In the initial consultation the Government intended to remove the ban on civil marriage for same-sex couples but it did not intend to allow religious organisations to conduct religious same-sex marriage ceremonies. This received a mixed response with some respondents raising concerns that the continued ban on same-sex religious marriage could be legally challenged.[261] On 11 December 2012, the Government issued its response to the consultation confirming that it would proceed with its intention to legalise same-sex marriage making clear that while it would permit religious organisations to carry out same-sex marriages if they wished to do so, it would provide protections for religious organisations who did not wish to marry same-sex couples.[262] On 17 July 2013, the Marriage (Same Sex Couples) Act 2013 received its Royal Assent with the first same-sex marriages taking place on 29 March 2014.[263] Under the provisions of the Act same-sex couples can marry either in a civil ceremony or, provided that the governing body of the religious organisation concerned has opted in to that process, on religious premises with the marriage being solemnised through a religious ceremony.[264]

[257] *Ferguson & Others v United Kingdom*, a copy of the submission can be found at http://equallove.org.uk/wp-content/uploads/2011/02/equalloveapplicationtoechr.pdf.

[258] http://cdn.yougov.com/cumulus_uploads/document/lu4hu1in3u/YG-Archive-Pol-Sunday-Times-results-170513.pdf.

[259] C. Hope, 'We will legalise gay marriage by 2015, says David Cameron', *The Telegraph*, 24 July 2012.

[260] Government Equalities Office (2012), Equal civil marriage: a consultation paper, www.gov.uk/government/uploads/system/uploads/attachment_data/file/133258/consultation-document_1_.pdf.

[261] See, for example, Church of England's response to the consultation: Church of England, A Response to the Government Equalities Office Consultation—'Equal Civil Marriage'—from the Church of England, 11 June 2012.

[262] HMG (2012), Equal Marriage: the Government's response, www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1_.pdf.

[263] Large numbers of Conservative MPs were opposed to the legislation and the Government had to rely on the votes of Labour and Liberal Democrat MPs to defeat a series of amendments tabled by Conservative opponents during the passage of the Bill through Parliament. The Act permits same-sex marriage by simply deleting s 11(c) from the MCA 1973. See s 1(1) of and Sch 7, paras 26–27 to the 2013 Act.

[264] With the exception of the Church of England and the Church of Wales.

9.1.1 Religious protections

The Act seeks to balance equality between same- and opposite-sex couples with protection of religious freedom. Thus, religious organisations that wish to conduct marriages for same-sex couples can 'opt in' without their being any obligation to do so. It is unlawful for an individual church or place of worship belonging to that faith to marry same-sex couples without the agreement of its governing body. In addition, no religious organisation, or individual, can be compelled to conduct marriage ceremonies for same-sex couples. The Act sets out a 'quadruple lock' of measures to put this 'utterly beyond doubt'. The legislation:

1. states clearly that no religious organisation, or individual, can be compelled to marry same-sex couples or permit this to take place on their premises;[265]
2. provides an 'opt-in' system for religious organisations who wish to conduct marriages for same-sex couples;[266]
3. amends the Equality Act 2010 to ensure that no discrimination claims can be brought against religious organisations or individual ministers for refusing to marry a same-sex couple or allowing their premises to be used for this purpose;
4. ensures that the legislation will not affect the Canon law of the Churches of England or the Church of Wales.[267]

9.1.2 Does same-sex marriage have the same legal effect as opposite-sex marriage?

The 2013 Act gives same-sex marriages the same legal effect as opposite-sex marriages.[268] However, somewhat disappointingly, it fails to fully equalise same- and opposite-sex marriages in relation to the grounds upon which a marriage can be brought to an end through divorce or annulment.

9.1.2.1 Grounds for ending a marriage through divorce or annulment

There are currently some differences in the grounds for ending a marriage and a civil partnership. While married couples can cite adultery as evidence that the marriage has broken down irretrievably for the purposes of divorce law,[269] and non-consummation in order to petition for annulment,[270] these grounds (which are based on definitions of sexual intercourse) are not available to civil partners. Under the 2013 Act, these grounds for ending a marriage similarly do not apply in the case of same-sex marriages. The Government had originally intended that in removing the ban on same-sex marriage, all aspects of current marriage and divorce law would apply to same-sex couples. In other words, that the reasons for ending a marriage would be the same for all couples, both same- and opposite-sex, and it was expected that case law would develop in this area in order to create 'new' definitions of non-consummation and adultery for same-sex couples:[271]

> Specifically, non-consummation and adultery are currently concepts that are defined in case law and apply only to marriage law, not civil partnership law. However, with the removal of the ban

[265] Section 2. [266] Sections 4–5 and Sch 1.

[267] This is to avoid conflict with the Canon law of the Church of England in relation to marriage which specifies that marriage is between one man and one woman. Section 1(3) of the 2013 Act provides that the nature of marriage in the Anglican Canon law is unaltered and that this is not contrary to the general law which enables same-sex couples to marry.

[268] Section 11 and Schs 3–4. Sch 4, Part 2, para 2 makes it clear, however, that the legislation does not extend the common law presumption that a child born to a woman during her marriage is also the child of her husband. Thus, where a child is born to a woman during her marriage to another woman, it will not be presumed that the latter is a parent of the child.

[269] Adultery requires at least partial penetration of the female by the male, see *Dennis v Dennis* [1955] 2 All ER 51.

[270] Under s 12(a) and (b) of the MCA 1973, opposite-sex couples can apply to annul their marriage where the marriage has not been consummated due to either the incapacity of either party to consummate it or to the wilful refusal of the respondent to consummate it.

[271] Equal Marriage: The Government's response (December 2012), para 9.8.

> on same-sex couples having a civil marriage, these concepts will apply equally to same-sex and opposite-sex couples and case law may need to develop, over time, a definition as to what constitutes same-sex consummation and same-sex adultery.[272]

This position, which provided the opportunity to reflect upon the sexuality of same-sex relationships, changed after the consultation. Influenced by some responses received to the consultation, such as from the Catholic Bishops' Conference of England and Wales and the Family Bar Association which raised concerns about having such uncertainty in the law, the Government decided to mirror the law on civil partnerships. As such, same-sex couples are not able to cite non-consummation as a basis for annulling their marriage. This position was taken in order to address the concerns of some that having uncertainty in the law on this issue would end up removing the concept of consummation from marriage law in its entirety.[273] One could argue, however, this is an out-of-date concept and that an opportunity was missed to reflect, through case law, upon its utility in modern matrimonial law. Its origins can be traced to historic theories of marriage as having the purpose of procreation. However, marriage can no longer be considered to be just about the possibility of procreation[274] and one could argue that consummation is an antiquated concept based upon historic notions of conjugal rights within marriage. In relation to adultery, same-sex couples can cite adultery to end a marriage provided that the behaviour complained of meets the common law definition of adultery. In other words, if a same-sex spouse had sexual intercourse with someone of the opposite sex, the other spouse could cite adultery as grounds for divorce. However, if the adulterous affair was with a member of the same sex, this could only be cited as unreasonable behaviour, as is currently the case with civil partnerships.[275] One could argue that the law's refusal to engage with the definitions of homosexual sex, evidenced by its failure to include such behaviour within the definition of adultery, is unfortunate and could be taken to suggest that heterosexual sex retains a more privileged position within legal ideology.

9.1.2.2 Pensions

Under the 2013 Act, same-sex married couples are given fewer pension inheritance rights than opposite-sex spouses. For the purposes of occupational pension rights, the Act treats same-sex spouses the same as civil partners. This means that a surviving same-sex spouse is not entitled to the full value of the deceased spouse's pension as the law only requires employers to pay same-sex survivor pensions based on contributions made since 2005.[276] The Government amended the Marriage (Same Sex Couples) Bill 2013 to require a review of the differences in survivor benefits in occupational pension schemes between opposite-sex and same-sex couples in legal relationships. It is anticipated that a report of the review will be published by July 2014.

9.2 Other aspects of the 2013 Act

9.2.1 Civil partnerships

The Act does not prohibit same-sex couples from entering into a civil partnership, and it makes provision for those in a civil partnership to convert that relationship to marriage if they choose to do so.[277] While same-sex couples now have the choice of marrying or entering into a civil partnership, opposite-sex couples who wish to formalise their relationship only have the option of

[272] Government Equalities Office (2012), Equal civil marriage: a consultation paper, para 2.16
[273] Equal Marriage: The Government's response (December 2012), para 9.9.
[274] *Baxter v Baxter* [1948] AC 274.
[275] Equal Marriage: The Government's response (December 2012), para 9.11.
[276] Under Sch 9, para 18(1) to the Equality Act 2010.
[277] Section 9.

marriage. An opposite-sex civil partnership is still not legally possible despite the fact that 61 per cent of respondents to the Government's consultation on equal marriage supported the right of opposite-sex couples to enter a civil partnership.[278] Only 24 per cent of respondents disagreed. Other countries, such as the Netherlands and South Africa, allow both opposite- and same-sex couples to enter into civil partnerships. However, the Government made it clear during the passage of the 2013 Act that it had no plans to allow opposite-sex couples to enter into a civil partnership as it was 'unclear of the need for civil partnerships for opposite-sex couples and had seen no evidence that opposite-sex couples suffered any detriment as a result of not being able to have a civil partnership'.[279] It is now the case, therefore, that same-sex couples have greater choice in terms of relationship status than opposite-sex couples as they can either enter into a civil partnership, a same-sex marriage, or convert an existing civil partnership to marriage. This is a strange and anomalous position but one that is not entirely surprising. Making civil partnerships available to opposite-sex couples could be perceived as a threat to the institution of marriage in that an alternative becomes available to these couples. In fact, if extending civil partnerships in this way had been part of government policy, it may have been even more controversial than same-sex marriage on the grounds that it could divert opposite-sex couples away from the preferred family relationship (marriage) in favour of a an alternative legal structure.

Amendments to the Marriage (Same Sex Couples) Bill which would have extended civil partnerships to opposite-sex couples were rejected by the House of Commons. While the Government originally intended to carry out a review of civil partnerships in five years' time, it seems that a review will be launched shortly, with the aim of completing it by the 2015 general election.[280] It must also be noted that an application has been made to the ECHR to challenge the prohibition on opposite-sex civil partnerships in the UK.[281] It is argued that the ban on opposite-sex civil partnerships is in violation of Article 14 of the ECHR in conjunction with Article 8.[282] While same-sex marriage has now been legalised, the ongoing litigation will challenge the ban on opposite-sex civil partnerships and any differences in treatment between same- and opposite- sex marriages. It has been reported that a new submission will be made to the Court to strike down pension inequality in marriage law.[283]

10 The legal consequences of marriage

Married persons, as a result of their marital status, have various legal rights and responsibilities which are prescribed by the state. There is no statutory list of these rights and responsibilities but they are found in a wide range of statutory provisions and cover a wide range of matters, such as taxation, inheritance, immigration, social security, financial obligations, and tenancies. On marriage breakdown, married persons also have various rights and responsibilities, for instance to provide financial provision for the other spouse in certain circumstances. However, despite their

[278] HMG (2012), Equal Marriage: The Government's response, Annex B, p 42. www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1_.pdf.

[279] Equal Marriage: The Government's response (December 2012), para 7.2.

[280] Grice & Morris, 'Gay Marriage Bill: David Cameron offers civil partnership review and seeks to smooth relations with angry activists as Bill clears major hurdle', *The Independent*, 21 May 2013. Section 15 of the 2013 Act requires the Secretary of State to arrange for a review to be carried out on the operation and future of the Civil Partnership Act in England and Wales.

[281] The application also sought to challenge the ban on same-sex civil marriages prior to the enactment of the 2013 Act.

[282] *Ferguson & Others v United Kingdom*, a copy of the submission can be found at http://equallove.org.uk/wp-content/uploads/2011/02/equalloveapplicationtoechr.pdf.

[283] P. Tatchell, 'Why our new same-sex marriage is not yet equal marriage', *New Statesman*, 19 July 2013, www.newstatesman.com/uk-politics/2013/07/why-our-new-same-sex-marriage-not-yet-equal-marriage.

rights and responsibilities, which are outlined in the following text, husbands and wives have separate legal personalities. This means that they can own property in their sole name (or jointly) and can bring proceedings in tort and contract separately against each other or against third parties.[284] They can also enter into contracts with each other, make unilateral decisions about their own medical treatment,[285] and make their own decisions on how their property is to be administered on their death.

Married persons have the following rights and responsibilities.

Financial obligations: the parties to a marriage have financial obligations to each other during their marriage and, depending on the circumstances, on the termination of the marriage by divorce or annulment. They can seek orders from the court in respect of financial provision during marriage[286] and on divorce. Married couples, like all parents, have a duty to provide maintenance for any child of the family during the marriage and on and after marital breakdown. They can enter into agreements about maintenance provision for themselves and also their children, but they cannot exclude the jurisdiction of the court in respect of the terms of such agreements; and any provision in an agreement restricting the right of either spouse or any other relevant person to apply for child support maintenance for a relevant child is void.

Property rights: each spouse can own property solely or jointly with the other spouse. During the marriage the rules governing property ownership are the same as those which apply to other persons, with the exception of some special statutory provisions which apply only to spouses,[287] of particular importance being the statutory right to occupy the family home ('home rights').[288] Thus, who owns what during marriage depends on which spouse bought the property or to whom the property was given, subject in all cases to a contrary intention. On divorce, however, the position is different, as the divorce court has wide powers to adjust the property rights of spouses, irrespective of who owns what but according to the circumstances of the case.[289] In respect of property on death, each spouse is free to make a will leaving his or her property to whomsoever he or she wishes. On intestacy the surviving spouse will succeed to the estate of the deceased spouse, subject to certain restrictions and financial limits. A surviving spouse can apply to the court for reasonable financial provision from the other spouse's estate under the Inheritance (Provision for Family and Dependants) Act 1975, and is treated more favourably than other applicants.[290]

Children: parents who are married have 'automatic' parental responsibility in law for their children[291] unlike unmarried parents, where only the unmarried mother has automatic parental responsibility. In respect of any stepchild of either party, parental responsibility is not 'automatic' but can be acquired. Married parents, like all parents, have a duty to provide maintenance for any child of the family. They can adopt a child jointly, and in some circumstances solely, and they also have a right to give or refuse consent to the adoption of their child.

[284] Law Reform (Married Women and Tortfeasors) Act 1935; Law Reform (Husband and Wife) Act 1962, s 1.

[285] This includes the right of a wife to make a unilateral decision to abort a child born of the marriage (see *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276 where the husband's application for an injunction to prohibit the defendant carrying out an abortion on his wife failed).

[286] In the family proceedings court (under the Domestic Proceedings and Magistrates' Courts Act 1978) and in the county court or High Court (under the MCA 1973, s 27).

[287] Such as the Married Women's Property Act 1882.

[288] Under the Family Law Act 1996, Part IV, s 30.

[289] Under the MCA 1973, Pt II, see Chapter 4.

[290] The applicant spouse (or former spouse) can do so without having to prove dependency on the deceased or that he or she was being maintained by the deceased.

[291] On parental rights and responsibilities and children, see Chapter 7.

Other miscellaneous rights: spouses (and former spouses) can seek remedies under Part IV of the Family Law Act 1996 to protect themselves against domestic violence. Special rules apply to spouses in respect of giving evidence in criminal proceedings. The marriage of a non-British person to a British citizen may provide a way of acquiring British citizenship and/or the right to enter the UK. Married couples enjoy certain tax and pension privileges. For instance, transfers between parties to a marriage are exempt from inheritance tax, and a transfer between spouses does not give rise to a chargeable gain for the purpose of capital gains tax. A married person can also benefit from a deceased spouse's pension rights.

11 Non-formal adult relationships

The only two formal adult relationships in family law are marriage and civil partnership. These are relationships which can only be created by complying with various statutory formalities. These requirements have been considered earlier. Family law also recognises the non-formal relationship of cohabitation, but not to the same extent as marriage and civil partnership. There is also another type of non-formal adult relationship, that between home-sharers, but although these relationships have been considered by law reformers, such as by the Law Commission, and provision was made for them in the Cohabitation Bill 2008, no recognition has been given to such relationships in family law.

11.1 Cohabitation

Cohabitation[292] is an increasingly popular relationship choice whether between heterosexual or homosexual partners, and social attitudes to cohabitation have changed over the years. Although cohabitation is on the increase, while marriage is on the decline, it is difficult to measure accurately how many people are actually living in cohabiting relationships and also how many relationships break down. This is because there is no proof by public record, as there is with marriage and civil partnership, as to the existence of a cohabitation relationship. Also, there is no proof of the termination of a cohabiting relationship as there is with divorce and dissolution of a civil partnership. The problem of estimating the number of cohabiting relationships and how many break down is particularly difficult to determine because of the difficulty of defining what the terms 'cohabitants' and 'cohabitation' mean.[293]

[292] On cohabitation, see A. Barlow, S. Duncan, G. James, and A. Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in 21st Century Britain* (Oxford: Hart, 2005); C. Burgoyne and S. Sonnenberg, 'Financial Practices in Cohabiting Heterosexual Couples: A Perspective from Economic Psychology' in J. Miles and R. Probert (eds), *Sharing Lives, Dividing Assets, An Inter-Disciplinary Study* (Oxford: Hart, 2009), pp 89–108; K. Kiernan, 'Unmarried Cohabitation and Parenthood in Britain and Europe' (2004) 26(1) Journal of Law and Policy 33–55; C. Grant Bowman, *Unmarried Couples, Law, and Public Policy* (Oxford: Oxford University Press, 2010); C. Vogler, M. Brockmann, and R. Wiggins, 'Intimate Relationships and Changing Patterns of Money Management at the Beginning of the 21st Century' (2008) 37 British Journal of Sociology 455; G. Douglas, J. Pearce, and H. Woodward, *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown* (2007) A. Barlow, C. Burgoyne, and J. Smithson, *The Living Together Campaign: An Investigation of its Impact on Legally Aware Cohabitants* (Ministry of Justice, 2007), available at www.justice.gov.uk/publications/docs/living-together-research-report(1).pdf; A. Barlow, 'Legal Rationality and Family Property: What has Love Got to Do With It?' in J. Miles and R. Probert (eds), *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Oxford: Hart, 2009); A. Dnes, 'Rational Decision-Making and Intimate Cohabitation' in J. Miles and R. Probert (eds), *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Oxford: Hart, 2009); A. Barlow, C. Burgoyne, E. Clery, and J. Smithson, *Cohabitation and the Law: Myths, Money and the Media, British Social Attitudes 24th Report* (London: Sage, 2008); S. Duncan, A. Barlow, and G. James, 'Why Don't They Marry? Cohabitation, Commitment and DIY Marriage' [2005] Child and Family Law Quarterly 383.

[293] See further Section 11.1.1.

Talking point

According to Government statistics, in 2011 there were approximately 2.9 million opposite-sex cohabiting couples living in England and Wales and this figure is projected to rise to 3.8 million by 2033.[294] The median duration of cohabiting relationships is two years, after which the parties either marry or separate. Sixty-five per cent of cohabiting relationships terminate; and about half the number of cohabiting parents split up before a child is 5 years old. Thirty-five per cent of cohabitants' children will have both parents up to the age of 16, compared to 70 per cent of children with married parents.[295] The Office for National Statistics has predicted that unmarried adults will soon outnumber married ones; and that by 2014 married couples will form fewer than half of all British families.

11.1.1 Defining cohabitants and cohabitation

One of the difficulties for the law, and for any law reform, is defining what the terms 'cohabitant' and 'cohabitation' mean. Defining these terms is important for determining whether the parties possess, or should possess, various legal rights and responsibilities. But defining them is difficult because cohabitation relationships can take many forms. In fact the parties to a relationship may themselves have divergent views about whether or not they are cohabiting, and whether or not they should be subject to mutually enforceable legal obligations.

Persons cohabit for different reasons. Some couples may cohabit as a preference choice to marriage. Some may cohabit as a precursor to marriage. In some cohabiting relationships the parties may not be in agreement—one of the parties may be committed to the relationship whereas the other party might not be, or not to the same degree. A study by Barlow and Smithson[296] found that cohabitants are of the following four psychological types: 'idealogues' (those who cohabit as they have an ideological objection to marriage); 'romantics' (those where cohabitation is a step towards marriage); 'pragmatists' (those who make decisions about whether to marry or cohabit on legal or financial grounds); and 'uneven couples' (those where one party to the relationship wishes to marry and the other does not, thereby leaving the person who wishes to marry in a vulnerable position). Barlow and Smithson concluded that these different styles of cohabiting relationship underlined the need for any legal reforms to provide a range of legal options for cohabitants.

How the terms 'cohabitation' and 'cohabitants' are defined raises certain policy issues. Some argue that a wide definition giving a wide category of cohabitants new legal rights and remedies similar, or identical, to those of married couples and civil partners would undermine the institution of marriage. Such presumptive-based recognition (ie, where rights and duties arise by virtue of the cohabiting relationship itself and not through the parties opting in to marriage or civil partnership) would, it is argued, also undermine the autonomy of cohabiting couples, some of whom may have made a conscious decision not to marry in order to avoid the rights and obligations which the state imposes on married couples or civil partners. On the other hand, one could argue that such presumptive-based legal recognition is necessary in order to protect economically vulnerable parties in cohabiting relationships.

Current statutory provisions giving cohabitants rights do not adopt a consistent definition of the term 'cohabitants'. Although they define 'cohabitants' as persons living in a quasi-marital or civil partnership relationship, there is not necessarily a minimal duration and residence requirement. Thus, to apply for financial provision from a deceased cohabiting partner's estate under

[294] According to figures from the Office for National Statistics (www.statistics.gov.uk).

[295] K. Kiernan, LSE Case Paper 65 (2003) and J. Ermisch, '*The Achievements of the British Household Panel Survey*' (2008).

[296] A. Barlow and J. Smithson, 'Legal Assumptions, Cohabitants' Talk and the Rocky Road to Reform' [2010] Child and Family Law Quarterly 328.

the Inheritance (Provision for Family and Dependants) Act 1975, a cohabitant must have lived in the same household as the deceased for at least two years as if he or she were the spouse or civil partner of the deceased; but for the purposes of obtaining protection against domestic violence under Part IV of the Family Law Act 1996 the term 'cohabitant' is defined less restrictively as there is no minimum duration requirement. The reason for this is to ensure that persons who are living together come under the umbrella of the 1996 Act and are able to gain protection against violence.

Determining the length of a cohabitation relationship for the purpose of reforming the law and giving cohabitants new rights is difficult, and there have been divergent views on this. Lord Lester's Cohabitation Bill 2008 initially recommended two years, but this was increased to five when the Bill was debated in the House of Lords. Deech, however, has suggested that ten years is a better 'gateway', if there is to be one at all, on the basis that 'only 5% of cohabiting unions in this country last for more than 10 years'.[297] There is also the question of whether short periods of separation should be ignored when calculating the duration of a cohabiting relationship and whether the nature of the parties' commitment should be taken into account, although that would be virtually impossible to assess. Difficulties about whether someone is or is not a cohabitant could result in protracted and expensive litigation being brought, which would result in the assets of cohabitants being significantly reduced and be counterproductive in an attempt to give them new rights.

11.1.2 The vulnerability of cohabitants and their children

Cohabitants are given some recognition in family law but not to the same extent as married couples and civil partners. Thus, for instance, they can seek orders from the court to protect themselves against domestic violence[298] and make a claim for financial provision from the estate of their deceased partner.[299] In respect of property and financial matters, however, there are no special family law provisions and cohabitants must turn instead to the general principles of the law of property and contract. This makes them particularly vulnerable on relationship breakdown as cohabiting partners have no duty to provide each other with financial provision (maintenance); and any dispute about the family home must be determined by property law principles and in the ordinary courts where the outcome may be uncertain and the cost of litigation prohibitive. This is quite different from marriage and civil partnerships where the family court has a wide discretion to make property and finance orders according to the needs and resources of the parties and by applying principles of fairness and non-discrimination.[300] In a property dispute involving cohabitants, on the other hand, the court will exercise its jurisdiction by looking at the express or inferred intentions of the parties,[301] and not base its decision on what is fair in the circumstances. The only remedy cohabitants have in family law is that, if they have a child, they can apply for a property order for the benefit of the child under Schedule 1 to the Children Act 1989.[302]

There is also the problem that there is a widespread but erroneous belief that there exists something in English law called a 'common law marriage' which gives cohabiting couples after a period of time the same rights and remedies as married couples.[303] This is a myth about which

[297] R. Deech, 'Cohabitation' [2010] Family Law 39.

[298] Under the Family Law Act 1996, Part IV, see Chapter 3.

[299] Under the Inheritance (Provision for Family and Dependants) Act 1975.

[300] See, in particular, *White v White* [2001] 1 AC 596, [2000] 2 FLR 981; *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186; and *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246. See Chapter 4.

[301] See, in particular, Baroness Hale in *Stack v Dowden* [2007] UKHL 17, [2007] 1 FLR 1858 at [61]. See further at Chapter 5.

[302] See Chapter 5.

[303] In fact some 53 per cent of the 2006 British Social Attitudes survey's nationally representative sample believed there was something called a 'common law marriage' (see A. Barlow, C. Burgoyne, E. Clery, and J. Smithson, 'Cohabitation and the Law: Myths, Money and the Media' in A. Park, J. Curtice, K. Thompson, M. Phillips, and E. Clery (eds), *British Social Attitudes—The 24th Report* (London: Sage, 2008), pp 29–51).

cohabiting couples need to be informed and made aware. Probert[304] argues that the origin of the 'common-law marriage myth' can be traced back to no earlier than the 1970s, basing her hypothesis on the fact that the media used this term during the 1970s when Parliament and the courts began to confer rights on such couples. A two-year study by Barlow, Burgoyne, Clery, and Smithson (2008)[305] found that cohabitation is a popular choice of relationship in Britain but that, despite the Living Together Campaign,[306] few cohabitants had taken steps to safeguard their legal position. Thus, only 15 per cent of those who owned their accommodation had a written agreement about their share of the ownership; and only 19 per cent had sought advice about their legal position.

Children of cohabiting couples are also likely to be in a more vulnerable position than children whose parents are married, not only because cohabiting relationships are more prone to breakdown, but because the court has no power to oversee the residence and contact arrangements for children of cohabiting parents on family breakdown, whereas it has if parents are divorcing.[307] Children may also be vulnerable if one of their cohabiting parents loses a right to remain in the family home on relationship breakdown, and also because there is no maintenance obligation between unmarried partners.

11.1.3 The rights and obligations of cohabitants

Cohabitants have some legal rights and obligations but these are much more limited than those of married couples and civil partners.

Financial obligations: unlike married couples and civil partners, cohabitants have no duty during their relationship or on its breakdown to provide each other with financial support, and therefore have no right to apply for court orders in respect of financial provision during their relationship or on its breakdown. They do, however, have a right to seek financial provision in certain circumstances from the estate of their deceased partner on his or her intestacy.[308] In respect of their children, cohabiting parents, whether or not they have parental responsibility, have a duty to provide financial provision for their children and, if a parent fails to do so, an application can be made to the Child Maintenance and Enforcement Commission[309] and, in certain circumstances, to the court, where they can apply not just for maintenance but also lump sum orders for the benefit of a child.[310]

Property rights: cohabitants, unlike married couples and civil partners, have no special property rights in family law either during the relationship or on relationship breakdown. To establish an interest in property, such as the family home, cohabitants must rely on equitable doctrines, such as trusts and proprietary estoppel.[311] This is quite different from divorce or dissolution of a civil partnership.[312] This may mean that, on relationship breakdown, cohabitants may find themselves without any entitlement to the former family home and with no right to any pension provision from their former cohabiting partner. Also, cohabitants, unlike married couples and civil partners, have no statutory rights of occupation of the family home ('home rights'), which means that they will only have a right to occupy the home if they have a right of ownership in the property, a licence to live there, a right under a tenancy, or they have been granted an occupation order

[304] See R. Probert, 'Common-Law Marriage: Myths and Misunderstandings' [2008] Child and Family Law Quarterly 1.
[305] See n 303.
[306] Its website provides cohabitants with information about their legal rights and remedies.
[307] A petitioner to a divorce must present a Statement of Arrangements for the Children to the divorce court and the district judge has an obligation under the MCA 1973, s 41, to consider those arrangements. See further Chapter 9.
[308] Under the Inheritance (Provision for Dependants) Act 1975.
[309] Under the Child Support Act 1991, as amended, see Chapter 6.
[310] Under the Children Act 1989, s 15 and Sch 1. [311] See Chapter 5. [312] See Chapter 4.

permitting them to reside in the home where there is domestic violence.[313] However, if cohabitants have children they are in a slightly better position as they can seek property orders for the benefit of a child under section 15 of and Schedule 1 to the Children Act 1989, which give the court power to transfer, for instance, the family home to the non-owning cohabitant during a child's dependency which may enable the child and the residential parent to continue living in the home after the age of majority.[314]

Property rights on the death of a cohabiting partner: on the death of a cohabiting partner who dies intestate, the surviving cohabitant is in a vulnerable position compared with a married person or civil partner, as the survivor has no right to inherit from the deceased partner's estate. Instead, any property goes to the deceased's children or parents. There has, however, been discussion about whether the rules of intestacy should be reformed to give cohabitants a right to succeed to their deceased partner's estate.[315] In 2007 the Law Commission in its report on cohabitation law reform was not in favour of this, as it considered it would be difficult to reflect appropriately the diverse range of cohabiting relationships.[316] It proposed instead making better provision for cohabitants by amending the Inheritance (Provision for Family and Dependants) Act 1975. However, in 2008 the Law Commission announced that it would carry out a general review of the law of intestacy and the 1975 Act, and in 2009 published a Consultation Paper in which it reviewed the law and discussed options for reform including a proposal that unmarried couples who had lived together for at least two years should be automatically entitled to half their deceased partner's estate on intestacy, which would put them in the same position as surviving spouses and civil partners.[317]

Because of the danger that a surviving cohabitant may be left with nothing on his or her partner's death, it is particularly important for cohabiting partners to make a will even though the surviving cohabitant can apply to the court for financial provision from the deceased partner's estate under the Inheritance (Provision for Family and Dependants) Act 1975. Under this Act, however, cohabitants are not treated as favourably as spouses and civil partners. It is also possible to bring a claim against a deceased partner's estate by applying to the court to establish a beneficial interest in the deceased cohabitant's property under a trust or proprietary estoppel. A surviving partner can succeed to a tenancy belonging to a deceased cohabitant.

Cohabitants and their children: cohabiting parents have virtually the same rights and responsibilities with regard to their children as married couples, but with the important exception that the unmarried father has no 'automatic' parental responsibility in law for his children, although he can acquire it in various ways.[318] Cohabitants have the same maintenance obligations to their children as married couples, and all other parents, irrespective of whether the father has parental responsibility, and cohabiting parents (including fathers without parental responsibility) can apply for child arrangements orders and other orders under section 8 of the Children Act 1989.[319] Eligibility to apply for section 8 orders is based on parenthood, not on whether a parent has parental responsibility. Only the unmarried mother, not the father, has a duty to register the child's birth, but both parties can choose to do so jointly whereupon the father acquires parental responsibility. Under the law of adoption[320]

[313] Married couples and civil partners have 'home rights' under the Family Law Act 1996, Pt IV, s 30 in certain circumstances, see Chapter 3.

[314] See Chapter 5.

[315] See C. Williams, G. Potter, and G. Douglas, 'Cohabitation and Intestacy: Public Opinion and Law Reform' [2008] Child and Family Law Quarterly 499 which considers the position of cohabitants whose partners die, and also the approach of the courts to claims under the Inheritance (Provision for Family and Dependants) Act 1975.

[316] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007), Part 6.

[317] *Intestacy and Family Provision Claims on Death* (Law Com CP No 191, 2009).

[318] Eg by registering his child's birth with the mother, by entering into parental responsibility agreement with the mother, or obtaining a parental responsibility order from the court (see Children Act 1989, s 4), or by subsequently marrying the child's mother (see further Chapter 7).

[319] Such as for residence and contact, see Chapter 9.

[320] See Chapter 11.

a cohabiting couple can make a joint application to adopt a child, but an unmarried father without parental responsibility has no statutory right to consent to the adoption of his child.

Other rights: cohabitants and former cohabitants, opposite-sex and same-sex, can apply for non-molestation orders and occupation orders under Part IV of the Family Law Act 1996 to protect themselves and their children against domestic violence. Cohabitants have a right to enter into a contract to regulate their affairs, for example to make arrangements about the allocation of property and other matters should their relationship break down, but in practice few do so.[321]

11.1.4 Reforming the law

For many years there has been discussion about reforming the law to give cohabitants rights in respect of property and finance on relationship breakdown, and on the death of their partner. Proposals for reform have come not only from the Law Commission[322] but from the Law Society[323] and from Resolution, the body of family lawyers.[324] At the end of 2008, Lord Lester of Herne Hill[325] introduced the Cohabitation Bill into the House of Lords,[326] a Bill which was supported by Resolution. The Bill had its second reading in the House of Lords in March 2009, but met with resistance from some members of the House and went no further. Thus, the discussions and proposals for reform have gone no further and there are currently no proposals to reform the law.

There are several arguments for and against reforming the law to give cohabitants new rights on relationship breakdown and on the death of a partner. One of the main arguments given in favour of reform is that under the current law cohabitants and their children are vulnerable and suffer unfairness and injustice particularly on relationship breakdown.[327] Thus, for instance, Lord Lester of Herne Hill, when presenting the Cohabitation Bill to Parliament at the end of 2008, said that legislation was 'urgently needed to tackle the vulnerability not only of unmarried cohabiting couples and their children but also co-dependent carers and siblings who live together.'[328] He said that it is 'a scandal in modern Britain that existing law does almost nothing to prevent such

[321] See *Sutton v Mishcon de Reya and Gawor & Co* [2003] EWHC 3166 (Ch), [2004] 1 FLR 837 where a cohabitation agreement was held not to be valid in the circumstances of the case, as it was an agreement about sexual relations not one about the parties' property, and see commentary by R. Probert, 'Sutton v Mishcon de Reya and Gawor & Co: Cohabitation Contracts and "Welsh Sex Slaves" [2004] Child and Family Law Quarterly 453.

[322] In 2002 it published *Sharing Homes: A Discussion Paper* (Law Com No 278), in which it discussed reforming the law not just for cohabitants but home-sharers generally. It did so by discussing a 'contribution-based' model for reform, but it found it to be unworkable in practice. In 2006 the Law Commission published a Consultation Paper, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com CP No 179) making proposals for reform of the law relating to the property and financial consequences of cohabitation breakdown. This was followed in 2007 by the publication of its Report, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307).

[323] See *Cohabitation: The Case for Clear Law; Proposals for Reform*.

[324] In 2000 the Solicitors' Family Law Association (now called Resolution) published *Fairness for Families*, in which it recommended reforms similar to those recommended by the Law Society.

[325] A human rights lawyer, and the person who was responsible for driving the reforms giving victims of forced marriages greater protection under the Family Law Act 1996, Pt 4A.

[326] The Bill was drawn up after a consultation paper, *Reforming the Law for People Who Live Together,* had been published in 2008 setting out two main options for reform: one similar to that proposed by the Law Commission in 2007 being based on economic disadvantage; and the other a more discretionary scheme similar to that on divorce under the MCA 1973. It was the latter option which was chosen and incorporated into the Bill. For details of the Bill, see R. Probert, 'The Cohabitation Bill' [2009] Family Law 150.

[327] The 'classic' case of unfairness which is often cited is that of *Burns v Burns* [1984] Ch 317 where the female cohabitant (she had taken her partner's name) failed on relationship breakdown to gain an interest under a trust in the home owned by her male partner, even though they had cohabited for nearly 20 years and she had looked after the house and brought up the children. Cf *Hammond v Mitchell* [1991] 1 WLR 1127 where the female cohabitant obtained an interest in the home under a trust on facts similar to those in *Burns*, except that a conversation she had had with her partner (even though brief and many years earlier) was held to be sufficient evidence of an inferred intention that she was to have a half-share.

[328] The Burden sisters supported the Bill, see p 53 (later in this section).

people from losing their home or sliding into poverty if their relationship breaks down or their partner dies'.

Other arguments are posited as reasons for reforming the law. One is that the law should keep up to date with changing social conditions and provide new rights for cohabitants, as cohabitation is increasingly popular and is predicted to increase even further in the future. Another argument is that the law of property, which cohabitants must use to determine property disputes, is unsatisfactory and their property rights should be determined by a family law, not a property law, regime. The drawbacks of the law of property were referred to by the Law Commission in its 2006 Consultation Paper[329] where it stated that in cohabitation cases the rules 'have proved to be relatively rigid and extremely difficult to apply, and their application can lead to what many would regard as unfairness between the parties.' The Law Commission said that any claim based on these rules was time-consuming and expensive and resulted in protracted hearings. It also said that the inherent uncertainty of the underlying principles made effective bargaining difficult to achieve as parties found it difficult to predict the outcome of contested litigation.

There are, however, arguments against reforming the law, such as that cohabitants can, if they wish, enter into a marriage or civil partnership and thereby acquire the rights which attach to that status. One of the major arguments against reform is that it would undermine the autonomy of cohabitants, some of whom may have consciously chosen to cohabit in order to avoid the state imposing on them legal obligations which they do not wish to have. Deech,[330] for instance, is of the view that the autonomy and privacy of those who live together should be respected and that, rather than reforming the law, any disputes should be 'dealt with by the ordinary law of the land, of agreements, wills, property and so on'. She argues that any reform of the law degrades the emancipation of women and that any legal reform 'should build on cohabitants' autonomy rather than take it away'. She is in favour of recognising cohabitation contracts and encouraging cohabitants to make wills leaving their property to each other if that is what they wish.[331] In other words, Deech is in favour of maintaining the autonomy and contractual freedom of cohabitants, but ensuring that they know what their rights and remedies are. Herring, on the other hand, is of the view that individual conceptions of autonomy 'are inconsistent with the realities of family life; are dissonant with how people understand their intimate lives; and work against the interests of women.'[332] Instead, he argues that a vision of autonomy is needed which recognises the interdependency and vulnerability of both children and adults within family relationships.[333] However, despite the arguments against reform based on autonomy, a compromise is possible, as any legal reform giving cohabitants new rights could include provisions allowing cohabitants to contract out of any new regime should they wish to do so.[334]

If it is decided that the law must be changed, then one of the most difficult policy issues is defining the terms 'cohabitants' or 'cohabitation' for the purpose of giving those who live together new rights and obligations. Should there be a minimum duration requirement and, if so, how long should the relationship have lasted; and should the fact the couple have children automatically bring them within the definition of cohabitants?[335] A definition of cohabitation which gives a wide

[329] *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 179, 2006).

[330] R. Deech, 'Cohabitation' [2010] Family Law 39.

[331] Deech is also not in favour of the proposals providing for automatic inheritance on intestacy for cohabitants (see Law Commission Consultation Paper, *Intestacy and Family Provision* (Law Com CP No 191, 2009), Part 4).

[332] J. Herring, 'Relational Autonomy in Family Law' in J. Wallbank, J. Herring, and S. Choudhry (eds), *Rights, Gender and Family Law* (Abingdon: Routledge, 2009), p 275.

[333] See also L. Glennon, 'The Limitations of Equality Discourses on the Contours of Intimate Obligations' in J. Wallbank, J. Herring, and S. Choudhry (eds), *Rights, Gender and Family Law* (Abingdon: Routledge, 2009), pp 169–198.

[334] Provision was made for this in both the Law Commission's proposals for reform in 2007 and in the Cohabitation Bill 2008.

[335] The Cohabitation Bill 2008 originally defined cohabitants as persons who live together as a couple (opposite-sex or same-sex) for a continuous period of at least two years; or live together as a couple and are the parents of a minor

category of persons living together new legal rights might undermine the autonomy of cohabitants; and may also be seen to undermine the institution of marriage if those who come within the definition are given quasi-marital rights. How cohabitation is defined for the purposes of eligibility for new legal rights has been, and will be, an important part of any discussions of reform of the law.

Another difficult and important policy issue is whether cohabitants who are eligible should have the same rights and remedies as married couples and civil partners on relationship breakdown. In other words, what should be the scope of any new rights? Should, for instance, cohabitants be entitled to maintenance, property orders, and a share of their partner's pension on relationship breakdown in the same way as spouses and civil partners? The Law Commission in its 2007 Report and the Cohabitation Bill 2008 took different approaches in respect of what entitlements cohabitants should have.

The Law Commission was against cohabitants having the same rights as divorcing couples as it would 'impose an equivalence with marriage which many people would find inappropriate' and which would be 'politically unattainable'.[336] The Law Commission therefore recommended a statutory discretionary regime for adjusting the property of cohabitants, although limited to addressing the need to adjust for any disadvantage or retained benefit arising from the relationship. There would be no power to order periodical payments as cohabitants do not necessarily give each other a commitment of future support.[337]

The Cohabitation Bill 2008, on the other hand, would have given cohabitants rights which were similar, although not identical, to those of married couples on divorce. Reforms in Australia and New Zealand have also given cohabitants virtually the same rights as married couples on relationship breakdown. Thus, in Australia[338] cohabiting couples (those who are able to prove according to various statutory criteria that they living in a '*de facto*' relationship) have rights equivalent to those of married couples on relationship breakdown and which are similar to those which married couples have on divorce in England and Wales.[339] In New Zealand, 'relationship property' (home, chattels, post-relationship acquisitions) are shared equally after three years' cohabitation, subject to the parties contracting out.[340]

There are other important and difficult issues to address. One is whether cohabitants should be entitled to opt out of any new scheme, and, if so, how this should be achieved. Any discussion of reform would have to consider whether, when, and in what circumstances the court would have the power to vary or revoke such agreements.[341] Another issue is whether heterosexual cohabiting partners should be given the opportunity to enter into a civil partnership, which is currently only available to same-sex couples.[342] In some countries heterosexual couples can register such a partnership.[343] Any reform will also have to address the issue of whether those who cohabit should be

child or have a joint residence order in respect of a child. However, the two-year requirement was later amended to five after debate in the House of Lords.

[336] See the Law Commission Report, paras 4.5–4.10.

[337] S. Bridge, 'Financial Relief for Cohabitants: How the Law Commission's Scheme would Work' [2007] Family Law 998 and S. Bridge, 'Financial Relief for Cohabitants: Eligibility, Opt-Out and Provision on Death' [2007] Family Law 1076. For criticism, see G. Douglas, J. Pearce, and H. Woodward, 'The Law Commission's Cohabitation Proposals: Applying them in Practice' [2008] Family Law 1076.

[338] Under the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008, which amends the Family Law Act 1975, and which came into force in March 2008. See H. Baker, 'Family Law Down Under: Can the Old World Learn from the New?' [2009] International Family Law 165 (for an edited version of this article, see [2009] Family Law 1201).

[339] Under the MCA 1973, Pt II, see Chapter 4.

[340] See the Property (Relationships) Act 1976.

[341] The Law Commission's proposals for reform (see its 2007 Report) and the Cohabitation Bill 2008 made provision for such agreements to be set aside by the court where they would cause manifest unfairness.

[342] See Section 8.

[343] In the Netherlands heterosexual and homosexual cohabitants can enter into a civil partnership, and in France they can enter into a *pacte civile de solidarité* (a state-endorsed contract).

able to continue to bring claims under the general law, such as for a beneficial interest in the home under a trust.

Despite differing views about whether the law should be reformed to give cohabitants new rights, and the advantages and disadvantages of reforming the law, it is not disputed that cohabitants should have access to easily understandable information about their rights and remedies and about their lack of them compared with married couples, including the fact that there is no such thing as a 'common law marriage'. The Government's 'Living Together Campaign', launched in 2004, aimed to provide information and guidance for cohabitants,[344] and a survey conducted for the Ministry of Justice by Barlow, Burgoyne, and Smithson[345] found that those who used the Living Together Campaign's website were of the view that they had become better informed about their rights and obligations as cohabitants as a result of visiting the website.

11.2 Home-sharers

Some people live together in informal relationships but are not cohabitants. Thus, some people live together as companions, or as friends, or because they have a family relationship.[346] Such 'home-sharers' may live together for different reasons. Some may live together because this is the only way they can afford to buy a house. Some may do so for companionate reasons, and others may live together to care for another person or a family member. Persons living in informal home-sharing relationships do not have those family law rights which are available to married couples and civil partners except in respect of protection from domestic violence when they can apply for remedies under Part IV of the Family Law Act 1996 in certain circumstances.[347] 'Home-sharers' can be vulnerable in the same was as cohabitants can be in respect of ownership of the home when the home-sharing arrangement comes to an end and also when the other home-sharer dies. They can also suffer tax disadvantages as the case of *Burden and Burden v UK*,[348] which follows, has shown. The Law Commission has considered whether the law should be changed to give home-sharers certain property rights, and in 2002 published a discussion paper[349] in which it discussed a 'contribution-based' model of reform, but in which it came to the conclusion that this was unworkable in practice and the discussion was taken no further.

Key case

In the *Burden* case two unmarried sisters (aged 90 and 82) considered that they were discriminated against in respect of inheritance tax under UK law as they did not have the same inheritance rights as same-sex couples even though they had lived together for the whole of their adult lives in the same home which they owned in their joint names. On the death of one of them, the survivor would be forced to sell the house to pay the 40 per cent inheritance tax owed on its value. After their claim failed before the English courts they took their case to the ECtHR, arguing that UK inheritance tax laws discriminated against them under Article 14 of the ECHR taken in conjunction with Article 1 of Protocol 1 to the Convention which provides that '[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions'.

[344] Its website (www.advicenow.org.uk/living-together) provides advice and guidance for cohabitants which explains what rights cohabitants have and how they differ from those of married couples.

[345] See para 5, p 7, in A. Barlow, C. Burgoyne, and J. Smithson, *The Living Together Campaign: An Investigation of its Impact on Legally Aware Cohabitants* (Ministry of Justice, 2007).

[346] See L. Glennon, 'Displacing the "Conjugal" Family in Legal Policy—A Progressive Move?' (2005) Child and Family Law Quarterly 17.

[347] As associated persons, which includes persons who 'live or have lived in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger or boarder' and persons who are relatives (s 62(3)).

[348] (App no 13378/05), [2008] 2 FLR 787.

[349] *Sharing Homes: A Discussion Paper* (Law Com No 278).

They also argued that the Civil Partnership Act 2004 breached their human rights under the ECHR as it was discriminatory in that it gave rights to same-sex, but not opposite-sex, couples. Their claim failed. The Grand Chamber of the ECtHR held by 15 votes to 2 that there had been no violation of the Convention, as the UK had not exceeded the wide margin of appreciation afforded to it; and the difference of treatment for the purposes of the grant of inheritance tax exceptions was reasonably and objectively justified for the purpose of Article 14. It was of the view that any workable tax system was bound to create marginal situations and individual cases of apparent hardship or injustice; and it was up to national authorities to decide how to strike the right balance between raising revenue and pursuing social policy objectives.

The outcome of the decision in *Burden* was that the UK was justified in not treating siblings in the same way as married couples and civil partners for the purpose of inheritance tax, even though they had lived together for all their adult lives.[350] The UK was entitled to differentiate between marriage and other relationships in respect of tax. However, some commentators have been critical of the decision. Deech, for instance, considered it 'inequitable' that the Burden sisters, who had lived 'at least as companionably and interdependently as any two same sex partners' were denied any sort of benefits.[351] She referred to other carer situations, such as the child who looks after a parent and does not inherit, or if he or she inherits has to pay inheritance tax. Deech proposes that a 'sensible reform' would be 'to grant deferral of IHT to any two family members who are co-dependent and are within the prohibited degrees so that the option of civil partnership or marriage is not open to them.' Lord Lester's Cohabitation Bill[352] put before Parliament at the end of 2008 made provision for sibling home-sharers but the Bill went nowhere and there are currently no proposals for reform.

Discussion Questions

1. Is the 'legal' family becoming more fragmented in the face of greater cohabitation between adults?
2. Compile the arguments for and against same-sex marriage.
3. Do you agree with the view that legalising same-sex marriage reinforces the use of 'marriage' to confer rights and responsibilities within family law and that other ways of recognising relationships need to be found?
4. Should civil partnerships be made available to opposite-sex couples?
5. Is nullity a relevant remedy in the twenty-first century?

Further Reading

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[350] See R. Auchmuty, 'Beyond Couples' (2009) 17 Feminist Legal Studies 205.

[351] See R. Deech. 'Sisters Sisters—And Other Family Members' [2010] Family Law 375.

[352] Lord Lester of Herne Hill introduced a Private Member's Bill in the House of Lords on 11 December 2008. See Chapter 5.

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