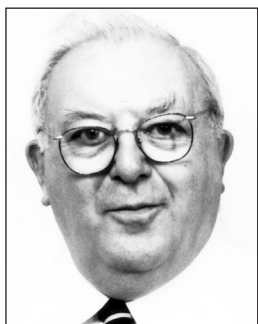


Surviving partners

Sidney Ross explains the extension of the Inheritance (Provision for Family and Dependants) Act 1975 to claims by civil partners and considers the case law



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'It is in relation to applications by surviving civil partners that the development of the case law may well be least predictable. Given that the purpose of Civil Partnership Act 2004 is to assimilate, in relation to inheritance rights, the positions of parties to marriages and to civil partnerships, this might seem surprising.'

The purpose of this article is to examine the impact of the Civil Partnership Act 2004 (CPA) on family provision claims. It traces the major legislative changes to the Inheritance (Provision for Family and Dependants) Act 1975 (the 1975 Act). It explains how its scope has been extended by the CPA and draws attention to the provisions of CPA that are likely to be particularly important in practice. Further, it offers the author's view on how the case law may develop in relation to claims by surviving civil partners and parties to what are called in this article 'secondary relationships', that is to say, former and quasi-civil partners, and persons who are, in civil partnership terms, the equivalent of step-children.

Recognition of opposite-sex relationships

The survivors of two classes of relationship outside marriage have now been brought within the scope of the 1975 Act. The Law Reform (Succession) Act 1995 (the 1995 Act) made the survivor of an opposite-sex relationship eligible to apply for financial provision out of the estate of their deceased partner, provided that the applicant had, for the whole of the period of two years before the death of the deceased, been living in the same household as, and as the husband or wife of, the deceased.

This extension of the 1975 Act was viewed as being preferable to changing the law of intestacy so as to provide automatically for cohabitants. It also mitigated the anomaly that an applicant who had contributed full valuable consideration for their maintenance by providing care and support for the deceased might thereby be placed in a worse position than one who had made no such contribution.

Recognition of same-sex relationships

The CPA came into force on 5 December 2005. It is the second statute to have increased substantially the number of potential claimants under the 1975 Act. However, it is a much more wide-ranging piece of legislation than the 1975 Act both because of its aim and because of the variety of relationships to which it applies. The CPA's aim is to put parties to civil partnerships (as defined by s1) in the same position as parties to a marriage. In doing so, it extends the range of eligible claimants not only to parties to civil partnerships, but also (as discussed below) to secondary relationships. This contrasts with the 1995 Act, which made opposite-sex cohabitants eligible, but not parties to any kind of secondary relationship. Thus the 1995 Act did not assist, for example, a mistress discarded by the deceased before his death, nor children of the applicant who had been treated by the deceased as if they were children of the cohabitation relationship (though such children might have been able to claim as dependants under s1(1)(e)).

Section 71 of the CPA 2004 provides that Schedule 4 amends enactments relating to wills, administration of estates and family provision so that they apply in relation to civil partnerships as they apply in relation to marriage. It is vital to appreciate that mere cohabitation by same-sex partners does not create a civil partnership, though same-sex cohabitants who fulfil the statutory conditions are eligible to make a 1975 Act claim.

Sections 1(a)(i–iii) of the CPA define a civil partnership as a relationship between two people of the same sex ('civil partners'), which is formed when they register as civil partners of each

other in England and Wales, Scotland or Northern Ireland under the appropriate Part of the CPA. There are special provisions for parties registering outside the United Kingdom.

Who may be civil partners?

Section 3 of the CPA provides that two people are not eligible to register as civil partners of each other if (a) they are not of the same sex; (b) either of them is a civil partner or lawfully married; (c) either of them is under 16; or (d) they are within the prohibited degrees of relationship. Schedule 1, Part 1 sets out two classes of prohibited degrees of relationship, viz, absolute and qualified. The absolute prohibition applies where one person is the grandparent, parent, child (including adoptive or former adoptive child) or grandchild of the other, or a sibling, a sibling of the parent, or the child of a sibling of the other. 'Sibling' includes half-blood relationships. The qualified prohibition applies where one party is the former civil partner or spouse of the other's parent or grandparent, or is the child or grandchild of a former spouse or civil partner of the other. It operates unless both parties have reached the age of 21 at the time when they register as civil partners of each other and the younger has not at any time before reaching the age of 18 been a child of the family in relation to the older.

To whom is the 1975 Act extended?

The amendments to the 1975 Act take up the major part (paragraphs 15–27) of Part 2 of Schedule 4. The enlargement of the eligible classes is effected by paragraph 15. It amends ss1(1)(a) and (b) of the 1975 Act (relating, respectively, to surviving spouses and to former spouses who have not remarried) so as to include (a) a spouse or civil partner of the deceased and (b) a former spouse or civil partner of the deceased, but not one who has formed a subsequent marriage or civil partnership.

Same-sex cohabitants are brought within the scope of the 1975 Act by the amendment to s1(1)(ba), which extended it to opposite-sex cohabitants, and the insertion of a new s1(1B). This mirrors the existing s1(1A) by applying s1(1)(ba) to persons who had lived for the whole of the period of two years immediately before the death of the deceased in the same household as, and as the civil partner of, the deceased.

Section 1(1)(d) has been amended by insertion of the words 'or civil partnership' after 'marriage' in the two places where the latter occurs. The effect of this is that a person whose parent (B) has formed a civil partnership with A, and whom A has treated as a child of the

(6), so as to make corresponding provisions in relation to civil partners.

Provisions relating to civil partners

The provisions that will, in practice, be most relevant are those introduced by

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family in relation to the civil partnership, can now claim for financial provision out of A's estate.

Under s25(4) of the 1975 Act, as originally enacted, any reference to a wife or husband was treated (subject to conditions) as including a reference to a person who has in good faith entered into a void marriage with the deceased. This sub-section has been amended, and s25(5) replaced by ss25(4A), (5) and

paragraphs 15(6), 17 and 21 of Schedule 4. Paragraph 15(6) inserts a new s1(2)(aa) that defines the same standard of reasonable financial provision for a surviving civil partner as for a surviving spouse. Paragraph 17 amends s3(2) by directing the court, in the case of an application by a surviving civil partner, to have regard to the provision that the applicant might reasonably have expected to receive if, on the day when

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the deceased died, the civil partnership had instead been terminated by a dissolution order.

Section 2(1)(f) of the 1975 Act gave the court power to vary ante-nuptial or post-nuptial settlements. Paragraph 16 of Schedule 4 adds s2(1)(g), which, correspondingly, enables the court to make orders varying any settlement made during the subsistence of a civil partnership formed by the deceased, or in

As to same-sex cohabitants, the approach of Neuberger J in *Re Watson* [1999] to the question of whether the parties were living together as husband and wife (ie, that it should be determined by asking whether, in the opinion of a reasonable person with normal perceptions, the parties were living together as husband and wife) will presumably be followed as far as possible, though one may wonder what the reasonable person

Act, a deceased spouse who leaves a widow is entitled to bequeath his estate to whomsoever he pleases. His only statutory obligation is to make reasonable financial provision for her and that, depending on the value of the estate, the concept of equality may bear little relation to such provision. Further, where a marriage is dissolved by death, a widow is entitled to say that she entered into it on the basis that it would be of indefinite duration, and in the expectation that she would devote the remainder of the parties' joint lives to being his wife and caring for him.

This approach, in which the roles of the parties to the relationship are gender-determined, may be apposite in a claim by a surviving spouse. But in a civil partnership, where gender plays no part, a different approach must surely be developed. It may be, on the facts of any particular case, that one party has assumed the role of breadwinner, the other the home-maker. There, if the home-maker is the survivor, they might, on that approach, be treated as the *de facto* widow. But this course cannot be taken where the breadwinner is the survivor, or when the parties have shared the roles between them. Discrimination, in this gender-free setting, is irrelevant. Equality may well, on the facts, be inappropriate. Courts will have to do their best to achieve fairness between the parties, but, as *Fielden v Cunliffe* has made plain, judges will have to articulate the reasons underlying their determination of what is fair. Deprived of recourse to concepts of discrimination and equality, they may find it no easy task. ■

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anticipation of the formation of a civil partnership by the deceased.

Of the amendments to the part of the 1975 Act which makes special provisions in cases of divorce, separation, etc, the most important in practice is likely to be the new s15ZA (inserted by paragraph 21), which gives the court power to order, on the termination of a civil partnership, that neither party, on the death of the other, shall be entitled to apply for an order under s2 of the 1975 Act. Other new provisions in that part are ss14A, 15B and 18A (inserted, respectively, by paragraphs 20, 22 and 25), which correspond, in relation to civil partnerships, to the existing ss14, 15A and 18. The definition of 'maintenance agreement' in s17(4) is amended by paragraph 24 so as to include agreements made by a party to a civil partnership.

How might the law develop?

In some areas we can reasonably expect the case law to develop as it has done in the thirty years since the 1975 Act came into force. The normal practice of including section 15 provisions in orders made in ancillary relief proceedings (as to which, see *Cameron v Treasury Solicitor* [1996]) should be followed in the civil partnership context, under the power contained in s15ZA, with the result that claims by former civil partners who have not remarried or formed another civil partnership should be rare. In relation to such claims *Re Fullard* [1982] and *Barrass v Harding* [2001] will no doubt continue to apply.

with normal perceptions would perceive (or be seen by the court as perceiving) to be the indicia of living together as civil partners. Applications under s1(1)(d) have been rare so far but we may anticipate that the only two reported cases (*Re Callaghan* [1985] and *Re Leach* [1986]) will be followed in applications under the amended provision.

It is in relation to applications by surviving civil partners that the development of the case law may be least predictable. Given that the purpose of the CPA is to assimilate, in relation to inheritance rights, the positions of parties to marriages and to civil partnerships, this might seem a surprising prediction. However, the matrimonial statute and case law (by which the 1975 Act and the case law in relation to s3(2) is strongly influenced) owes much of its recent development to the efforts of parliament and the judiciary to redress the balance between the (usually male) breadwinner and the (usually female) homemaker. Judgments in both those spheres of law have emphasised the need to approach questions of financial provision in a fair and non-discriminatory manner (see *White v White* [2001] and the 1975 Act surviving spouse case of *Fielden v Cunliffe* [2006]).

The Court of Appeal made it clear in *Fielden v Cunliffe* that there is no presumption of equality of division of assets. Wall LJ referred, in his judgment in that case, to 'the statutory cross-check' imposed by s3(2). However, he went on to observe that, in cases under the 1975

Barrass v Harding
[2001] 1 FLR 138
Re Callaghan
[1985] Fam 1
Cameron v Treasury Solicitor
[1996] 2 FLR 716
Fielden v Cunliffe
[2006] WTLR 29
Re Fullard
[1982] Fam 42
Re Leach
[1986] Ch 226
Re Watson
[1999] 1 FLR 878
White v White
[2001] 1 AC 596