

SPEECHLY BIRCHAM

RICHARD HOGWOOD

Civil Partnerships Beyond *The Archers*: Formation, Dissolution and the Consequences for Children, Inheritances and Asset Protection

^{LT} Civil partnerships; Dissolution; Inheritance tax; Premarital agreement; Wills

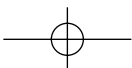
With the Civil Partnership Act 2004 having been in effect for nearly a year and a half, this article seeks to examine the issues and experiences that have arisen in practice in advising clients considering, or already having registered, a civil partnership. It particularly considers questions of asset protection which have recently generated substantial media attention.

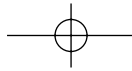
Those who are avid listeners of *The Archers* will be well aware of the furore last December in the run-up to the proposed civil partnership of Adam Macy and Ian Craig. As might be expected there were those who opposed even the principle of the occasion. But others, more connected with the couple themselves, were also raising questions about the consequences that such a union might have for claims to be made against family wealth (whether by them, as children, or by the new member of the family).

In the event the registration did indeed occur, on December 14, 2006, a year and nine days since such partnerships achieved legal recognition in the United Kingdom. Adam and Ian join a list of several thousands of others who have tied the civil partnership knot—in fact in the period from December 5, 2005 to September 30, 2006 there were 15,672 civil partnerships¹ and no doubt thousands of others since.

Even for those who have less keenly followed the goings-on in Ambridge, it is unlikely that the introduction of civil partnerships has passed by unnoticed. A certain media frenzy was inevitable when they first became law, particularly with

¹ See National Statistics Online at www.statistics.gov.uk.





PRIVATE CLIENT BUSINESS

the celebrity element provided by the likes of Sir Elton John, and ever since then they have become a more common element both of people's social lives and of their working existence.

Julian Washington in his earlier article² provided an introduction to civil partnerships, detailing how they are formed and ended and some of the legal consequences engendered by them. This article seeks to build on that, to review what has happened in practice over the past year and a half and to consider some of the issues that have arisen and been discussed, both in Ambridge and in the real world.

Who has registered a civil partnership?

While this article is not seeking to be a compendium of facts and figures, a few statistics are perhaps a useful way to see how far civil partnerships have developed from their standing start in December 2005. The actual number of civil partnerships to the end of September 2006, unfortunately the most recent date to which the Office for National Statistics (ONS) provides information, is mentioned above. But arguably more interesting is a breakdown of who these 15,672 people are. 90 per cent of them registered in England, and a disproportionately high number were in London, as might be expected. There have been more male civil partnerships than female, particularly in England where 62 per cent of the couples have been male. However, the gender gap has been reducing over time, and in some parts of the country there are more female than male civil partnerships.

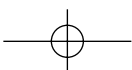
Aside from location and gender, the age makeup of civil partners is also interesting. In December 2005, 50 per cent of the couples were aged over 50 with only 12 per cent aged under 35. As at the end of September 2006, though, only 24 per cent were over 50 and 25 per cent under 35. No doubt this trend will have continued.

What have been the key issues?

Tax planning

Many private client lawyers will no doubt recognise the above trends from their own practice. Undoubtedly, and unsurprisingly, there was an initial surge in interest from older couples, many of whom had been together for a considerable time period (a record among the author's clients being 60 years!) and who could see the inheritance tax benefits that could be afforded by such a registration. Knowing that, in general, assets could pass free of inheritance tax from one civil partner to the other on the death of the first meant that the financial security of the survivor need not be compromised. Although such an advantage of a civil

² [2005] P.C.B. 177.



partnership had to be tempered by the corresponding downsides of, for example, only one property attracting capital gains tax main residence relief for the couple and the spectre of financial awards upon divorce (or, technically, dissolution), for those who had been together years if not decades this was still often something of a “no brainer”.

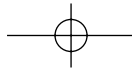
However, an unlimited “spouse” exemption for civil partners from inheritance tax is not, of course, the invariable rule. The much more limited exemption of £55,000, where assets pass from a UK domiciled civil partner to a civil partner who is not UK domiciled for inheritance tax purposes, must not be forgotten. This is increasingly the case for private client lawyers, with marriages becoming ever more international as people become more globally mobile, whether for work or education or other reasons. It is suggested that this issue is even more acute for those advising actual or potential civil partners, as a large proportion of relationships appear to be international. It is perhaps a shame that statistics on this do not seem to be available from the ONS to substantiate this hypothesis.

Popular opinion historically seemed to be that same-sex couples were unconcerned with tax planning, and in particular inheritance tax planning, because they did not have children. It is unlikely that this was ever strictly true, and certainly today with the advent of civil partnerships it is frequently incorrect. Many couples will have children, whether they be from during or prior to the current relationship, biological or adopted. Even for those couples who do not have children, where ultimately it is desired to leave assets to friends or relations rather than simply charities there will often be a desire to mitigate tax. Will-based inheritance tax planning, including nil-rate band discretionary trust loan and charge methods, remains popular, and advice is frequently sought on lifetime action that can be taken to enhance these savings.

As Gordon Brown’s statutory amendments in recent years have rendered various Will-based inheritance tax planning techniques redundant, civil partners and married couples alike are also increasingly focusing on planning using assets qualifying for business property relief and agricultural property relief. Wills offering the opportunity to, in effect, “double up” the tax savings available are proving especially popular.

Immigration

As mentioned above, civil partnerships often appear even more international than marriages have now become. In conjunction with seeking advice on the consequences (good and bad) of registering a civil partnership and obtaining tax planning advice, many clients are asking how, from an immigration perspective, they can actually go about the registration. Immigration law is no easy matter and, for a client or a lawyer who does not specialise in this field, obtaining even basic information is often not simple, as attempting to navigate the Immigration



PRIVATE CLIENT BUSINESS

and Nationality Directorate and Home Office websites will demonstrate. Ian and Adam back in Ambridge were not concerned about it, and this article does not propose to go into any detail on the topic, but suffice it to say this is an area upon which practitioners are increasingly being asked to advise.

Wills

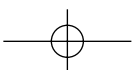
While having in place a tax-efficient Will is, of course, advisable for every client, be they single, cohabiting, married or in a civil partnership, a good start is at least to ensure that, if nothing else, clients have any Will in place. In this way the often undesirable outcome of the intestacy rules can be avoided.

In the author's experience, far more same-sex couples appear to have put in place Wills than heterosexual couples, albeit this can prove to be something of a mixed blessing. Perhaps because, prior to December 5, 2005, same-sex couples had few rights upon intestacy and, unlike many heterosexual couples, did not harbour under the misapprehension of having a mythical "common law spouse" status, many took measures to put in place Wills to protect their partner's interests. What many same- and opposite-sex couples are ignorant of, though, is the revocation of a Will upon marriage or registration of a civil partnership (unless a contrary intention is expressed in the Will). Accordingly many civil partner clients are surprised to learn that, since the date of their registration, their previous Will is now null and void. It is the job of advisers to alert clients to this, ideally in advance of their registration.

Asset protection

For many private client specialists the issue of asset protection has become one of the key concerns of clients in recent years. This encompasses not only protecting wealth and business interests from the ravages of tax, but also controlling who can benefit therefrom, how they can benefit, and what might happen upon a breakdown of a relationship. The issue of asset protection was especially prominent in Ambridge as Brian Aldridge, Adam's step-father, was deeply concerned about the possibility of Ian benefiting from Adam's wealth. To be able to advise on this fully requires often a knowledge of tax and trust law together with experience in the world of family law, an uncommon mix among private client advisers.

One of the first things that Brian Aldridge could do is to utilise trusts to provide a measure of control. Rather than bequeathing assets outright to Adam, leaving Adam then free to give them or bequeath them to Ian, Brian could pass him the business, for example, in trust. This could be during Brian's lifetime or on death (albeit, of course, that lifetime gifts into trust will trigger inheritance tax at 20 per cent to the extent that they exceed Brian's available nil-rate band and are not otherwise relieved). An ongoing trust after his death would enable Brian to



provide for Adam to benefit (subject again to inheritance tax, this time at 40 per cent on chargeable value in excess of the nil-rate band) but without Adam having the ability to pass assets to Ian. Needless to say, Brian would want to choose the identity of his trustees carefully, mindful of their power to distribute capital to Adam. He would also have to consider the tax consequences of this—the periodic and exit charges that might apply to such a trust within the relevant property regime but, on the other hand, the avoidance of a 40 per cent charge as assets cascade through the generations.

While leaving assets in trust might prevent Adam having sufficient control to choose to pass them to Ian, trusts are not impregnable on a divorce or dissolution. In this circumstance Adam's views may be aligned with those of Brian—a desire for Ian not to benefit—but matrimonial law might come to Ian's assistance.

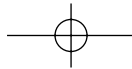
The approach of the family courts

Matrimonial law and judges tend to adopt a rather more broad-brush approach than their tax and trust counterparts. Statute, and in particular the Matrimonial Causes Act 1973 (MCA) which is the foundation of modern day divorce law, ascribes an overriding discretion to judges as to how to deal with the matrimonial finances upon a divorce. From an historic position of providing for the recipient spouse's (often wife's) "reasonable needs", thanks to the case of *White v White*³ in 2000 in the House of Lords, the landscape is now one of the "benchmark of equality". This establishes a starting point of an equal division of the capital of the parties from which, only exceptionally, will deviation occur.

This 50/50 division applies not simply to assets such as cash, property, listed shareholdings and the like, but equally to interests in private companies and businesses, inherited wealth and trusts. Section 24(1)(c) of the MCA explicitly enables judges to amend "ante-nuptial" or "post-nuptial" settlements (both undefined, somewhat imprecise but nevertheless rather wide terms). Even where a trust interest lies outside this category, judges are minded to consider the reality of the position—the benefits derived from that interest and how it contributes to the standard of living of the parties. Increasingly they will then make what is known as an "encouragement order"; in effect, an order greater than the assets owned outright by the paying party, relying on the fact that the trustees will make a distribution from the trust sufficient to enable this obligation to be fulfilled.

Matrimonial judges will not shy away, for example, from forcing controlling shareholdings in companies to be sold (as happened to Stephen Marks, the founder of French Connection) or farming businesses to be split (as was the situation with Mr and Mrs White, the case referred to above). A deviation from an equal division will also be the exception rather than the norm. Entrepreneurs

³ *White v White* [2001] 1 A.C. 596.



PRIVATE CLIENT BUSINESS

who demonstrate a “spark” or “seed” of genius can sometimes retain more than half of the capital—for example Sir Martin Sorrell (of WPP fame) and, both recently and publicly, John Charman (who founded Axis Capital and was previously CEO of Ace International Group, both insurance and reinsurance businesses). Judicial comment makes clear, though, that being a business “genius” is far removed from merely being a successful businessperson.

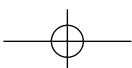
Where a significant proportion of the marital assets are inherited by one party this can also sometimes be the case. However, particularly where assets are accumulated through business activities or inherited after the date of the wedding or civil partnership, and where the relationship starts to be considered “long” (which is now, taking into account cohabitation that leads seamlessly into the marriage or civil partnership, anything from about 13 years and upwards), the argument for such a deviation weakens.

Brian Aldridge and Adam Macy would thus do well to be mindful of the consequences were Adam and Ian’s civil partnership to encounter difficulties. As an unregistered couple the threat of asset loss through dissolution would rarely arise, the exceptions being where one party can demonstrate a resulting or constructive trust over some of the assets of the other or if there are children that need to be cared for. The risks in this respect increase markedly when the civil partnership schedule is signed.

Pre-nuptial agreements

This is not to suggest that nothing can be done to protect Brian’s and Adam’s wealth. Perhaps the foremost weapon in the armoury in this regard is the pre-nuptial agreement (or pre-registration agreement, strictly, for civil partners). The common misconception is that such documents are not worth the paper upon which they are written. While to some extent this is true—they are not legally enforceable as contracts in the United Kingdom (unlike in many countries, including various US states and several continental European countries)—they can prove persuasive to the courts and have in practice done so.

Public policy objections have always been raised against pre-nuptial agreements being enforceable. It was felt to be against the spirit of marriage, being “until death us do part”, for the parties to document at the outset the asset division were divorce to arise. Interestingly civil partnerships are framed in the legislation itself—in s.1 of the Civil Partnership Act 2004—to subsist until death, dissolution or annulment. Arguably, then, it does not go against the spirit of civil partnerships to make provision for their dissolution. While the matrimonial courts, which will apply the same considerations to the ending of civil partnerships as to the termination of marriages, will invariably not treat pre-registration agreements differently from pre-nuptial agreements, one wonders whether pre-registration



agreements might in some way therefore drive the pace of change in the enforceability of such documents.

For the present, though, pre-nuptial agreements are often introduced to divorce cases as “conduct of the parties that it would be inequitable to disregard” or one of the “circumstances of the case”, both of which judges must consider under the MCA when exercising their discretion. Where they are “properly” drawn up, pre-nuptial agreements have influenced the awards made by judges, and the seminal case of *K v K*⁴ sets out in the judgment of Rodger Hayward Smith Q.C. some key elements for a “proper” pre-nuptial agreement. These include full financial disclosure by each party, separate legal advice to each party, fair and reasonable terms and no pressure on either party to enter into the agreement. The terms should be fair and reasonable at the time of any dissolution or divorce, as opposed to merely at the time the document was signed, and consequently good practice suggests a regular reviewing of the agreement (perhaps every five years and on the birth or adoption of a child) so that it can keep pace with the couple’s circumstances. Pressure can be pressure from the other party or their family and can also include pressure of time. Accordingly it is generally preferred to complete the document at least 21 days before the wedding or civil partnership.

Pre-nuptial agreements are particularly suited to attempting to ring-fence assets held by either party prior to the wedding or civil partnership and those acquired during the marriage or civil partnership by way of gift or inheritance. For this reason, increasingly, parents are encouraging (or even demanding) children to enter into a pre-nuptial agreement before their marriage or civil partnership should they still later wish to participate in family wealth. Some families, particularly those with substantial wealth, take this even further and ask family members to sign up to a contract—a family protocol—when they come of age. Such a protocol might insist, for example, that family members enter into living together agreements when cohabiting, pre-nuptial agreements when they marry or register a civil partnership, and declarations of trust when purchasing properties with their partners.

Even when the wedding day has passed without a pre-nuptial agreement in place, it is not necessarily too late. Several clients who, perhaps rather precipitately, entered into a civil partnership in the first rush of excitement, are now considering such a mid-nuptial agreement (sometimes in rather a belated attempt to placate the parents or in-laws!). Perhaps this is something for Brian and Ian to consider? While pre-nuptial agreements are little tested, “mid-nups” are even more uncommon, both within and without the courtroom. There is also a not inconsiderable risk that even suggesting one could result in a divorce or dissolution rather than an agreement!

⁴ *K v K (ancillary relief: pre-nuptial agreement)* [2003] 1 F.L.R. 120.

Conclusion

No doubt many of the earlier couples to register their civil partnership, being (as discussed) often older, more longstanding couples, will not have considered a pre-registration agreement to be relevant to them. Planning was required for where the relationship ended through death rather than dissolution and the key considerations in practice have been Wills and tax planning. However, as those registering become younger, and as the first dissolutions become more publicised (it being necessary to wait a year from the date of registration before dissolution can occur), asset protection moves up the agenda and, no doubt, pre-registration agreements will become vastly more prevalent.

The international nature of many of these relationships, besides raising questions of immigration law and international tax planning, may also encourage the adoption of such agreements, particularly where parties come from jurisdictions where they are considered more *de rigueur* (and more enforceable) than in the United Kingdom.

Ultimately, the issues for civil partners, as demonstrated by Adam and Ian and the many thousands of couples in practice, will be very similar to those for couples in, or considering, marriage. Some questions may arise more frequently (perhaps immigration issues and adoption rules and procedures?) and some less so (perhaps inheritance tax planning for children?), but overall it is clear that today's private client adviser needs to have a very broad knowledge, particularly as regards wealth protection. We wait to see whether this will become an issue for Adam and Ian in due course . . .