

Chapter 2: The Formation of Adult Partnerships

Outline	2.1	Introduction	2.5	Marriage, civil partnership and cohabitation compared
	2.2	Marriage		
	2.3	Civil partnerships	2.6	Summary
	2.4	Cohabitation		



Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the ILEX syllabus:

- 1 Understand the underlying legal principles of marriage
- 2 Understand the underlying legal principles of adult partnerships

2.1 Introduction

Traditionally, marriage between a man and a woman was the only adult relationship that could be given legal recognition. Social attitudes have changed dramatically over the last 30 years or so. Our society now seems more willing to recognise a more diverse approach to adult partnerships. This is shown by the introduction of civil partnerships in 2005, making legal recognition available to same-sex couples. There is an ongoing debate about whether some legal recognition should be provided to couples who choose to live together outside marriage or civil partnership.

There are now three major types of adult partnership:

- marriage;
- civil partnership; and
- cohabitation.

The effects of marriage and civil partnership are very similar but the effects of cohabitation differ dramatically.

This chapter will deal with the requirements for the formation of a valid marriage and a valid civil partnership and, in particular:

- when a couple has capacity to formalise their relationship as a marriage or civil partnership; and
- the formalities that must be complied with.

This chapter will go on to deal with the option for cohabiting couples to choose to regulate their relationship with a cohabitation contract and the pressure for reform of the law in relation to cohabiting couples. It will also compare the effects of these three major types of adult partnership.

2.2 Marriage

2.2.1 Definition of marriage

The classic definition of marriage in English law comes from *Hyde v Hyde [1866]*:

“the voluntary union for life of one man and one woman to the exclusion of all others”.

This definition is often quoted and does cover some of the essentials of marriage: it must be voluntary, monogamous and heterosexual. This definition is getting rather old, though, and does not provide the whole of the modern definition.

The word “marriage” may mean one of two things:

- the act of marrying, which must comply with certain formalities; or
- the status of marriage, which follows from the act of marriage, and affects the rights and duties of the parties and their legal relationship with third parties, especially any children that they have.

This chapter will deal with the act of marriage. The consequences that flow from the status of marriage will be covered in later chapters.

For the act of marriage to lead to the status of marriage, it must comply with certain legal requirements:

- (1) each party must have the **capacity** to marry in accordance with the law of his **country of domicile**. Domicile is a legal concept that links a person with a particular legal system and it will be explained in the next section;
- (2) the marriage must comply with the legal **formalities** that are in place in the **country where the marriage is celebrated**.

This chapter will now go on to explain these requirements in more detail.

2.2.2 Domicile

Before we discuss these requirements, it is important to understand the concept of domicile, since this will govern a person’s capacity to marry and may determine the validity of the marriage itself.

Domicile is a legal concept that links a person with a particular legal system. A person’s domicile is the place where he has his permanent home. It must be a place which has its own legal system, for example, England and Wales or Scotland, but not Britain or the United Kingdom. Domicile is not the same as nationality, although the two often coincide. Although a person may have more than one nationality or be stateless, English law ensures that he will always have a domicile, although he cannot have more than one at any particular time.

There are three ways in which a domicile may be acquired.

- (1) **Domicile of origin**: every child acquires a domicile of origin at birth. For a child of married parents, this will be the father’s domicile at the date of birth. A child of unmarried parents will take the domicile of his mother. A

domicile of origin will be kept until another domicile is acquired. If a person loses one domicile without acquiring another, the domicile of origin will revive to fill the gap.

(2) **Domicile of dependence:** until the age of 16 (or marriage under that age which is permitted in some jurisdictions but not under English law), a person's domicile will change with that of the parent on whom he depends (**s3 Domicile and Matrimonial Proceedings Act 1973 (DMPA 1973)**). If the parents separate and the child continues to live with his mother, he will take her domicile.

(3) **Domicile of choice:** a person aged 16 or over may acquire a domicile of choice by moving to another country with a settled intention of living there permanently (**s1 DMPA 1973**).



Case Study

Ahmed is born in England to married parents who have English domiciles. His parents are married so Ahmed will take his father's domicile (England) as his domicile of origin. When Ahmed is four, his parents split up and his mother moves to Denmark with the intention of settling there permanently. She acquires a domicile of choice in Denmark and, as a consequence, Ahmed will acquire a domicile of dependence there. When Ahmed is 18, he moves to Spain permanently and acquires a domicile of choice there. If he later decides that Spain is no longer his permanent home and moves to Japan to take up a new job on a three-year term, he will lose his domicile of choice in Spain. He will not acquire a domicile of choice in Japan because he has no intention to live there permanently. No one can ever be without a domicile so Ahmed's domicile of origin will revive itself. Even though he lives in Japan and has not lived in England since he was four, he will be domiciled in England. Although many people are domiciled in the country they live in, Ahmed demonstrates that this is certainly not always the case!

There is much case law examining the question of whether individuals have acquired or lost domiciles of choice. We will consider a couple of examples:

Irvin v Irvin [2001] explored whether the husband had abandoned his English domicile of choice by living in the Netherlands since 1979. The judge considered all the facts and concluded that the husband's links with his friends in England, his British nationality and his limited assimilation into Dutch society showed that he had not abandoned his domicile of choice and was still domiciled in England. An important factor in the court's decision was evidence that the husband had always intended to return to England when he retired.

Agulian v Cyganik [2006] has provided further helpful guidance about what is necessary for a domicile of choice to be acquired. Although it concerned an application under **s2 Inheritance (Provision for Family and Dependants) Act 1975**, the principles are applicable to marriage and divorce. The deceased was a Cypriot who had lived in England for 43 years, while retaining close links with Cyprus. The Court of Appeal made it clear that the relevant question was whether the deceased had formed the necessary intention to remain permanently or indefinitely in England so as to acquire a domicile of choice

rather than whether he intended ever to return permanently to Cyprus. His Cypriot domicile of origin remained in place unless and until there was clear, cogent and compelling evidence of sufficient intention to acquire a new domicile of choice. In this case, the deceased retained his domicile of origin.

2.2.3 Capacity to marry

Anyone who is domiciled in England and Wales must have capacity to marry under English law, even if the marriage takes place in a different country. The requirements for capacity to marry are contained in the **Matrimonial Causes Act 1973 (MCA 1973)** and a series of Acts that are usually described together as the **Marriage Acts 1949–1994**. These requirements are that:

- one party must be male and the other female (**s11(c) MCA 1973**);
- neither party must be lawfully married or a civil partner already (**s11(b) MCA 1973**);
- both parties must be aged 16 or over (**s2 Marriage Act 1949 (MA 1949)**);
- the parties must not be too closely related to each other – this is often expressed in the language of **MA 1949** by saying that the parties must not be within the *prohibited degrees of relationship*.

If either or both of the parties to the marriage do not have capacity to marry, the marriage will be void. Void marriages will be considered more in **Chapter 3**.

2.2.3.1 Gender Recognition Act 2004

One of the requirements for capacity to marry is that one party is male and the other female, but the concept of who is male and who is female has become much more flexible in recent times. Gender dysphoria is now recognised as a medical condition in which a person feels that he is trapped in a body of the wrong gender. This can cause considerable psychological distress.

After many years of injustice, the **Gender Recognition Act 2004 (GRA 2004)** finally allows transsexuals to gain formal recognition of their new gender. There is quite a long history of case law that led to the introduction of **GRA 2004**. This section will explain the development of the case law and then the major provisions of **GRA 2004**. The section under consideration in the case law is **s11(c) MCA 1973**, mentioned above, which provides that one party must be male and the other female.

The issue was first brought into the public eye by ***Corbett v Corbett [1970]***. The bride was a male to female transsexual who had undergone successful gender reassignment surgery. The groom was a man. The judge decided that a person's gender is determined at birth and cannot be altered by surgical intervention. The marriage was between two men and was void because the parties did not have capacity to marry.

The decision in ***Corbett*** remained good law for over 30 years. During this time, several decisions based on ***Corbett*** were challenged in the European Court of Human Rights (ECtHR) on the ground that the UK law contravened **Art 12 ECHR**, which guarantees the right to marry. In ***Rees v United Kingdom [1987]***, ***Cossey v United Kingdom [1991]*** and ***Sheffield and Horsham v***

© 2011 Copyright ILEX Tutorial College Limited

All materials included in this ITC publication are copyright protected.

All rights reserved.

Any unauthorised reproduction or transmission of any part of this publication, whether electronically or otherwise, will constitute an infringement of copyright. No part of this publication may be lent, resold or hired out for any purpose without the prior written permission of ILEX Tutorial College Ltd.

WARNING: Any person carrying out an unauthorised act in relation to this copyright work may be liable to both criminal prosecution and a civil claim for damages.

This publication is intended only for the purpose of private study. Its contents were believed to be correct at the time of publication or any date stated in any preface, whichever is the earlier.

This publication does not constitute any form of legal advice to any person or organisation.

ILEX Tutorial College Ltd will not be liable for any loss or damage of any description caused by the reliance of any person on any part of the contents of this publication.

Published in 2011 by:
ILEX Tutorial College Ltd
College House
Manor Drive
Kempston
Bedford
United Kingdom
MK42 7AB

British Library Cataloguing in Publication Data

A catalogue record for this manual is available from the British Library.
ISBN 978-1-84256-558-2