

A practical look at the Marriage (Same Sex Couples) Act 2013

- **Resource type:** Article
- **Status:** Law stated as at 26-Mar-2014
- **Jurisdictions:** England, Wales

This article considers the practical implications of the Marriage (Same Sex Couples) Act 2013, including its impact on existing law, the changes it brings and potential areas of future reform.

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This article considers the practical implications of the *Marriage (Same Sex Couples) Act 2013* (2013 Act), including its impact on existing law, the changes it brings and potential areas of future reform.

Most of the provisions of the 2013 Act came into force on 13 March 2014. The law requires couples to wait at least 16 days after giving notice to the local register office before a marriage ceremony can take place, so the first same sex weddings will take place from 29 March. For further information, see *Legal updates, Majority of provisions of the Marriage (Same Sex) Couples Act 2013 come into force* (www.practicallaw.com/9-560-5641) and *The Marriage (Same Sex Couples) Act 2013 (Commencement No. 2 and Transitional Provision) Order 2014* (www.practicallaw.com/7-555-0786).

The implications of the 2013 Act

The 2013 Act extends the right to marry to same sex couples in England and Wales. A couple can marry in a civil ceremony or in a religious ceremony if the particular religious body has chosen to permit same sex marriage on its premises. There are various "opt-in" provisions for religious bodies set out in the 2013 Act including, for example, applying for registration of a building. For further information, see *Legal update, The Marriage of Same Sex Couples (Registration of Buildings and Appointment of Authorised Persons) Regulations 2014* (www.practicallaw.com/6-555-7665).

No religious body will be forced to opt in. The 2013 Act respects the position of the Church of England and the Church in Wales who have indicated that they currently do not wish to permit same sex marriage according to their rites, and specific protective provisions have been included to ensure that religious freedoms are upheld.

The rights and responsibilities of couples in same sex marriages are broadly the same as those in opposite sex marriages. Breakdown of a same sex marriage will be treated very similarly to the breakdown of an opposite sex marriage. The 2013 Act is considered to be a huge step forward in achieving equality between the treatment of opposite sex and same sex couples.

Applicability to the rest of the UK

The 2013 Act's provisions do not extend to Northern Ireland or to Scotland. Same sex marriage in those jurisdictions is currently unlawful. In Northern Ireland, a same sex marriage entered into elsewhere will be treated as a civil partnership. In Scotland, the Marriage and Civil Partnership (Scotland) Act 2014 received royal assent on 12 March. The Act will introduce same sex marriage in Scotland in due course. Until then, marriages of same sex couples formed under the law of England and Wales will be treated as civil partnerships in Scotland.

Until same sex marriages are lawful in these jurisdictions, the dissolution of same sex marriages in Northern Ireland and Scotland (deemed to be civil partnerships governed by the Civil Partnership Act 2004 (CPA 2004)) will be treated as having brought the marriage to an end in England and Wales too.

Significant changes brought by the 2013 Act

Terminology

Part 1(1) of Schedule 3 provides that references to marriage, to a married couple, or to a married person in existing England and Wales legislation should be read as including a reference to same sex marriages and couples.

Although "husband" will continue to mean the male marriage partner, Part 2 of Schedule 3 states that it will be taken to include a man married to another man. Likewise, "wife" will include a woman married to another woman. This is significant as it represents an extension of traditional spousal names to same sex couples in a way which was never achieved by the CPA 2004. This changed terminology applies to the 2013 Act (and any subordinate legislation made under it), and legislation enacted after the 2013 Act comes into force, including any provision amending existing England and Wales legislation.

Conversion of civil partnerships to marriage

Civil partners can convert their civil partnership into a marriage if they wish. Although section 9 of the 2013 Act expressly permits the conversion, the regulations which govern this process have not yet been made. Section 9(4) indicates, however, that the process may involve provision of certain information or declarations in support of the application and payment of a fee.

When calculating the length of a marriage, practitioners should note that the date of the marriage is treated as the date on which the civil partnership was entered, and the civil partnership will come to an end on the day on which the conversion occurs.

The 2013 Act does not permit a civil partnership entered into outside England and Wales to be converted to a marriage. These partnerships will continue to fall within the scope of the CPA 2004.

The fact of adultery

Part 3(2) of Schedule 4 adds a new section 1(6) to the Matrimonial Causes Act 1973 (MCA 1973). The new section 1(6) maintains the legal definition of adultery and clarifies that adultery can only be committed between people of the opposite sex.

When advising a same sex petitioner who alleges adultery by the respondent, a practitioner must ensure that the respondent's conduct falls within the scope of the 2013 Act. Only conduct between the respondent and a person of the opposite sex will constitute adultery. Sexual conduct with a person of the same sex is not adultery, although the petitioner can use this as evidence of unreasonable behaviour. For further information, see *Practice note, Divorce and dissolution: unreasonable behaviour: Unfaithfulness of a civil partner or improper association* (www.practicallaw.com/9-523-5268).

Jurisdictional issues

The 2013 Act has prompted a number of jurisdictional issues of which family practitioners must be aware, namely:

- Parties to a same sex marriage entered into outside England and Wales are treated as being married in England and Wales, regardless of whether the particular country provided for same sex marriage at the time the 2013 Act came into force, or at some later date (*section 10*). This means that parties who married overseas can petition for divorce rather than dissolution in England and Wales from 13 March 2014, provided all legal requirements are met, such as the one-year rule.

- There is currently no jurisdiction under EC Regulation 2201/2003 (Brussels II Revised) to dissolve same sex marriages or civil partnerships, since there is no cross-border recognition of these relationships. The Regulation deals only with divorce of opposite sex couples. The creation of a procedure for divorce of same sex couples is left to the individual country. Not all EC countries provide a mechanism for obtaining a divorce, so same sex couples may face difficulty divorcing in the country in which they are resident. Practitioners should be aware that an attempt to secure jurisdiction first in time for a same sex divorce under the provisions of Brussels II Revised would be hampered as a result.
- In respect of England and Wales, Part 4(5) of Schedule 4 inserts a new Schedule A1 to the Domicile and Matrimonial Proceedings Act 1973 (DMPA 1973) confirming the jurisdiction of courts to entertain proceedings for divorce of same sex couples. Paragraph 5 of that Schedule gives the Lord Chancellor power to make regulations corresponding to those set out in Brussels II Revised regarding the jurisdiction of courts in England and Wales in same sex divorce proceedings where one party:
 - is or has been habitually resident in a member state;
 - is a national of a member state; or
 - is domiciled in a part of the United Kingdom or the Republic of Ireland.

The Marriage (Same Sex Couples) (Jurisdiction and Recognition of Judgments) Regulations 2014 came into force on 13 March 2014. The regulations apply to all marriages of same sex couples entitled to be treated as marriages under the provisions of the 2013 Act, including those registered outside England and Wales. Regulation 2 sets out the criteria a couple must meet for the courts in England and Wales to have jurisdiction in same sex divorce proceedings. See *Legal Update, The Marriage of Same Sex Couples (Jurisdiction and Recognition of Judgments) Regulations come into force* (www.practicallaw.com/3-560-5682)

If none of those jurisdictional criteria applies, the courts of England and Wales may still have jurisdiction under Schedule A1 to the DMPA 1973 if:

- No court has, or is recognised as having, jurisdiction under regulations under paragraph 5 and either party is domiciled in England and Wales on the date the proceedings are begun; or
- The couple married each other under the law of England and Wales, no court has, or is recognised as having, jurisdiction under regulations under paragraph 5 and it appears to the court to be in the interests of justice to assume jurisdiction in the case.

(Paragraphs 2(1)(b) and (c), Schedule A1, DMPA 1973).

This last ground of jurisdiction is the ground of "last resort" and can be used by same sex couples who may be habitually resident in a member state that does not recognise their relationship meaning that they cannot divorce there.

Annulment

Part 3(4) of Schedule 4 amends section 12 of the MCA 1973 to provide that non-consummation (by reason of incapacity or wilful refusal) cannot be a ground on which a same sex marriage is voidable. Unlike in opposite sex marriages, a party in a same sex marriage cannot therefore obtain annulment of the marriage on the ground of non-consummation. Instead, after one year of marriage, a party to a same sex marriage could apply for a divorce based on the fact of unreasonable behaviour.

Transgender couples

Before the 2013 Act, a marriage would be deemed voidable upon one party obtaining an interim gender recognition certificate (and thereby being legally considered to have changed gender). The marriage had to be annulled before a full gender recognition certificate could be obtained. Many couples were concerned that they would be forced to terminate their marriage to enable one of them to be recognised as having changed gender. The 2013 Act allows for a marriage to continue after issue of a full gender recognition certificate, provided both parties consent. In the case of civil partners, the partnership must have first been converted into a marriage.

Pension survivor benefits

Part 6 of Schedule 4 deals with occupational pensions and survivor benefits. When advising either party to a same sex marriage on financial benefits that would be lost on divorce, the question of spousal death benefits often arises. There is one key difference in this regard between the treatment of opposite sex and same sex couples. The provision of occupational pension scheme survivor benefits under the 2013 Act is akin to the provision for civil partners in that, when exercising their discretion, pension trustees are only obliged to consider benefits accruing since 1 December 2005, which was the date the CPA 2004 came into force. This means that where one party to a same sex marriage dies before decree absolute, the surviving party will only receive a fraction of the pension benefits that a surviving spouse of an opposite sex marriage would receive. This has been permitted by amendment to the Equality Act 2010.

The vastly restricted provision of survivor benefits that results from these provisions, and which is in effect a continuation of the provisions under the CPA 2004, is considered by many to constitute unjustifiable discrimination in the treatment of opposite sex and same sex couples. For further discussion, see *Legal Update, Same sex marriage regulations make consequential amendments* (www.practicallaw.com/2-559-5768) and *Practice note, Pensions and discrimination claims: Marriage (Same Sex Couples) Act 2013* (www.practicallaw.com/3-208-8985).

Unchanged areas of the law

Operation of the CPA 2004

Although subject to future review (see *Potential reform*), the operation of the CPA 2004 is currently unchanged. Civil partnerships can only be formed between same sex couples. Those who have entered into a civil partnership in accordance with the CPA 2004 remain civil partners rather than spouses under that Act and there is no mechanism for an automatic conversion into a marriage, although there is now an option to convert under the 2013 Act. Practitioners should be aware that civil partnerships entered into outside England and Wales are not treated as same sex marriages in this jurisdiction and will continue to fall within the scope of the CPA 2004.

Presumption of parentage

The existing common law presumption that, where an opposite sex couple marry the husband is presumed to be the legal father of a child born during the marriage, does not extend to parties of a same sex marriage. There is no presumption made regarding the identity of a child's parents in a same sex marriage and the existing presumption is expressly stated in Part 2 of Schedule 4 as being irrelevant.

Private legal instruments

The provisions in Part 1 of Schedule 4 regarding private legal instruments will be of particular note to Private Client practitioners. Instruments such as wills and trusts which were made before the 2013 Act and contain reference to "marriage" or "spouse" will not be affected by the coming into force of the Act. These terms will not be deemed to include a same sex marriage or same sex spouse and the relevant instrument would require updating. This does not apply to those instruments made after the 2013 Act is in effect.

There is also a more general need for Private Client practitioners to advise on the changes brought by the 2013 Act in terms of inheritance tax and estate planning, especially regarding international clients. For further consideration of these issues, see *Practice note, Marriage (Same Sex Couples) Act 2013 changes to wills and trust documents* (www.practicallaw.com/2-559-9907)

Potential reform

Sections 14 to 16 of the 2013 Act confirm that there will be review of the following areas:

- Operation of the CPA 2004 with a report due as soon as practicable.
- Survivor benefits under occupational pension schemes with a report due by 1 July 2014.
- Whether or not marriages can be conducted by non-religious belief organisations (such as humanists) with a report due by 1 January 2015.

Reform of the operation of the presumption of parentage is also anticipated, in order to bring the 2013 Act in line with current provisions for female civil partners. The Human Fertilisation and Embryology Act 2008 dictates that where a woman gives birth to a child during her civil partnership with another woman and the child was conceived via assisted conception, the mother's civil partner will be the legal parent of the child.

Wider practical implications

Aside from the specific changes outlined above, the introduction of the 2013 Act may lead to:

- An increased number of same sex couples choosing to formalise their relationship and consequently a potentially increased number of couples wishing to divorce.
- New challenges where children are involved, concerning perceived unequal legal or biological parentage.

- Developing case law on the financial division of resources on the breakdown of same sex marriages. This will be particularly interesting given the perception of some that same sex relationships less frequently involve traditional roles of "breadwinner" and "homemaker" than opposite sex marriages.
- The potential for discrimination against opposite sex couples to be raised as an issue now that same sex couples have an option to marry or to form a civil partnership whereas both these options are not available to opposite sex couples.
- Given the increasingly regulated nature of relationships, added focus to the debate on cohabitation and the current lack of legal protection and substantive regulation for cohabitants, who form a significant sector of the population.
- The need for other jurisdictions to now determine how same sex marriages entered into in England and Wales are to be treated in their particular jurisdiction. There is the potential for distinction to be drawn between civil partnerships and same sex marriages or recognition of them both.

Resource information

Resource ID: 0-562-2065

Law stated date: 26-Mar-2014

Products: Family, PLC UK Private Client, PLC UK Public Sector

Resource history

Changes made to this resource

We will record here any changes to this resource as a result of developments in the law or practice.

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Legal update: archive

Majority of provisions of the Marriage (Same Sex Couples) Act 2013 in force on 13 March 2014 (<http://uk.practicallaw.com/topic9-560-5641>)

Marriage (Same Sex Couples) Act 2013: private client aspects (<http://uk.practicallaw.com/topic3-540-5065>)

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The Marriage of Same Sex Couples (Registration of Buildings and Appointment of Authorised Persons) Regulations 2014 (<http://uk.practicallaw.com/topic6-555-7665>)

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