

# Chapter 2: The Formation of Adult Partnerships

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## Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the CILEx 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 and more diverse forms of adult relationship can now be recognised. In 2005 civil partnerships were introduced, making legal recognition available to same-sex couples. More recently, the **Marriage (Same Sex Couples) Act 2013 (M(SSC)A 2013)** has opened up marriage itself to same-sex couples. Civil partners are able to convert their civil partnership into a marriage, if they wish to do so and civil partnership has now been opened up to all.

There are now three major types of adult partnership:

- marriage – a formally recognised relationship available to same-sex and different sex couples;
- civil partnership – a formally recognised relationship available to same-sex and different sex couples; and
- cohabitation, which is much less regulated.

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:

- the circumstances in which 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 came from ***Hyde v Hyde and Woodmansee [1866]***:

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

This definition is still quoted but since it no longer reflects the reality of modern marriage following the introduction of same-sex marriage, it can no longer be treated as an adequate definition of marriage.

A better, more modern definition was provided by Thorpe LJ in ***Bellinger v Bellinger [2003]***: *“a contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations”.*

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 discussing capacity to marry, 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 they have their 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 they will always have a domicile and they 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 their 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 they depend (**s3 Domicile and Matrimonial Proceedings Act 1973 (DMPA 1973)**). If the parents separate and the child continues to live with their mother, they 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 Ahmed 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.

***Cyganik v Agulian [2006]*** 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:

- 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**.

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