

Civil Partnership Raises Complicated Pension Issues

If passed, the Civil Partnership Bill will transform pension provision for the surviving partner, writes pensions lawyer, Fiona Thornton.

The Civil Partnership Bill 2009 was introduced in June 2009 as part of the programme for Government in consequence of the Colley options paper on domestic partnership (November 2006) and the Law Reform Commission report on the rights and duties of cohabitants (December 2006).

The Bill contains complex and detailed provisions which introduce wide ranging rights and it is anticipated that tax changes which dovetail with the proposed new laws will be brought in by changes to the relevant Finance Bill which is published around the time that the Civil Partnership Bill becomes law.

Who Qualifies?

The Bill introduces the concepts of civil partners, cohabitants and qualified cohabitants. A civil partner is either of two persons of the same sex who are parties to a civil partnership which has been registered in Ireland or is recognised as a foreign civil partnership. Cohabitants are adults who live together as a couple in an intimate and committed relationship, who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.

Qualified cohabitants are generally cohabitants who live together for at least three years or two years if there is a child of the relationship. If one of the parties is married to someone else the relationship will not qualify as a qualified cohabitant relationship where the married party at the time the relationship ends had not been living apart from their spouse for four of the previous five years.

Where property rights are proposed to be varied, under the new legislation, the court must have regard to the rights of any other person with an interest in the matter including a spouse, former spouse, civil partner or former civil partner.

Limited Tax Changes

Judging from the Law Reform Commission report, the scope of tax changes for cohabiting couples is likely to be limited. When enacted the new laws will establish the status of civil partners, enable same sex couples to register their civil partnership, confer on them a range of rights and duties consequent on registration including maintenance, shared home, succession and pensions rights.

A civil partnership only ends on the death of a partner or on dissolution by the court and a cohabitants' redress scheme will be established for same-sex and opposite-sex couples giving protection to an economically dependent party at the end of a long-term cohabiting relationship where the couple have chosen not to marry or to register in a civil partnership.

Legal recognition will also be given to cohabitant agreements enabling cohabitants to regulate their joint financial affairs. The introduction of civil partnership status and consequent rights and protections has been anticipated for some time now. For some the new regime for cohabitants may appear more groundbreaking because cohabitants have not elected to marry or register as a civil partnership. Rights conferred on qualified cohabitants are not as extensive as those applicable to civil partners or spouses but the legislation affords protections for an economically weaker party in a cohabitation relationship that ends through breakdown or death.

There are a surprising amount of provisions that deal with pensions.

Issues Affecting Civil Partners

A benefit under a pension scheme that is provided for a spouse of a person shall be deemed, when the legislation

is passed, to be provided equally for a civil partner. Thus, if a pension scheme provides for spouses' pensions henceforth a civil partner will be entitled to the same benefit. As drafted, the Bill does not treat civil partners as spouses where discretionary pension benefits arise. This exclusion may, in practice, create issues for pension schemes.

For example, the Bill confers certain maintenance rights on civil partners and a civil partner may be required to maintain the other partner by court order. In that context, where under the rules of a pension scheme, entitlement to a pension benefit is dependent on the parties living together, the court can be asked to require the trustees to disregard such a provision. Where this occurs the trustees are given a statutory exoneration and may seek to have any related expense incurred by them discharged.

There is no general rule of construction presumed whereby references in documents to a "spouse" are deemed to apply to a "civil partner". Instead, the Bill does this on a case by case basis by inserting such references in specific statutes.

In the pensions context these include legislation under which the state public sector pensions arise. Thus public service pensions, as specified under the Bill, shall henceforth fully apply to civil partners. Pensions equality laws permit special treatment for married persons and this is to be extended to civil partners.

Partnership Dissolved

Where a civil partnership is dissolved the court may make various orders dealing with the property rights of the former partners. These include pension adjustment orders which will only be made if proper provision cannot be made from other assets of the affected civil partner.

The general regime of pension adjustment orders, which derives from the Family Law Acts, is adapted into a civil partnership context. The court may, at the time a dissolution decree is made or at anytime afterwards, make a pension adjustment order in favour of the other civil partner of a benefit which consists of part of the member's pension benefit which has accrued up to the time of the order. The member's scheme benefit is reduced by the amount of benefit awarded to the applicant.

The non member civil partner is then entitled to seek a transfer amount from the pension scheme at any time up to when the benefit would otherwise become payable from the scheme. The transfer amount is determined by the scheme trustees under applicable guidelines and is payable to usual approved arrangements.

In some circumstances, the scheme trustees may, on their own initiative, transfer out the applicant partner's benefit to another approved arrangement. Like in the case of divorce, orders awarding pension benefits payable on the death of the member spouse may only be issued when the dissolution decree is granted or within a year of that time. Pension adjustment orders cease to have effect on the entry into a new civil partnership, marriage or death of the applicant.

Where a pension adjustment order is made, the pension trustees are given statutory exoneration where its implementation would otherwise breach the terms of the pension scheme or the Pensions Acts 1990 to 2009 (the Pensions Act) and scheme trustees must be given prior notice that a pension adjustment order is being applied for. The court may decide who bears the trustees costs in administering a pension adjustment order and in default of a determination the civil partners will bear these equally.

Issues Affecting Qualified Cohabitants

Where one qualified cohabitant can prove that financial dependence on the other party arises from the relationship or its termination, the court may order financial redress if it considers this is just and equitable in all the circumstances.

The redress may comprise any or all of maintenance, a property adjustment order or a pension adjustment order. As in the case of judicial separation, divorce and dissolution of a civil partnership pensions are the last port of call when financial orders are made.



The pension adjustment order regime is substantially similar to that applicable to spouses and civil partners described above. There is no time limit by which a pension adjustment order dealing with contingent benefits (i.e. those payable on the death of the member) may be applied for.

Where a pension adjustment order is made in favour of a qualified cohabitant the pension trustees are given statutory exoneration where its implementation would otherwise breach the terms of the pension scheme or the Pensions Act. However, the court cannot require the trustees to pay contingent benefits (e.g. death in service and death in retirement benefits) to a cohabitant unless the scheme expressly provides for such payments. Meanwhile, a pension adjustment order shall cease to have effect if the person in whose favour the order is made dies, marries or enters into a civil partnership.

Cohabitants are generally permitted to contract out of these protections provided they sign an agreement to that effect and take independent legal advice. Where this occurs they may waive their rights to the legal protections conferred by the legislation.

Tips for Employers and Pension Schemes

The proposed new regime suggests that a review and update of the detailed terms of a pension scheme may be timely in order to ward off unfortunate and expensive consequences. For example, since the new regime does not automatically confer the same rights on civil partners as those enjoyed by spouses, private sector pension schemes which enable discretionary

benefits for spouses may need to be updated to apply to civil partners. (Possibly this issue may be overcome by an edit to the Bill prior to enactment.)

Scheme design may also need to be updated to cater for civil partners and scheme rules changed to require evidence of civil partnership status to be provided as a qualification for benefit (as sometimes happens for spouses benefits). Failure to address this could result in a civil partner becoming entitled to a benefit which neither the scheme trustees nor employer has provided for.

Sometimes scheme rules are not broadly enough drafted to permit trustees to withhold full payment of benefit where tax arises for which the trustees may be accountable. This issue may become more relevant should a qualified cohabitant become entitled to a pension benefit where Capital Acquisitions Tax then arises.

There are a substantial number of procedural rules that apply to pension scheme trustees who are served with a pension adjustment order. Experience to date has shown us that when trustees receive a pension adjustment order they should check it out to see if it makes sense and is capable of implementation. If not, it should be sent back to the parties so that they can ask the court to issue an order that is properly drafted.

Finally, pension adjustment orders arising under the new regime should be viewed with the same degree of caution. Once enacted the effects of the new laws will take a while to work through the system but trustees and employers should take the time now to consider their likely impact on their pension arrangements. 📧

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