

**Civil Partnership Bill
Briefing on the Implications of
the House of Lords Decision in
Ghaidan v Godin-Mendoza
on the Inheritance (Provision for Family and
Dependants) Act 1975**

About LAGLA

The Lesbian and Gay Lawyers Association (LAGLA) membership is made up of solicitors, barristers, judges and academics. LAGLA is not a lobbying organisation, but a group of lesbian and gay lawyers who meet for seminars, conferences and social gatherings. We have members with a wide variety of legal backgrounds and feel, therefore, that we are uniquely placed to comment on the Civil Partnership Bill. We have formed a working group of lawyers with expertise in family law as well as in other areas of law that the proposals affect.

Further details on www.lagla.org.uk in the Partnership section.

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Generally

A current real case (names have been changed):

Margaret is 60 years old. She works as a teaching assistant. 15 years ago she met a teacher at her school, Janet, and they started a relationship. At the time Margaret was married with teenage children. She spent more and more time with Janet at her flat nearby and eventually moved in. She and her husband eventually divorced after 2 years of separation. Margaret continued to return to the family home to meet the children and help with their upbringing. She made no financial claim on her divorce. Recently, Janet died unexpectedly at the age of 62 of heart attack. She died intestate. Under the intestacy Janet's brother and sister will inherit. She is leaving the flat the couple has lived in and some savings. A death-in-service benefit from the Teachers Pension will be paid to the brother and sister.

Margaret is now working in two jobs, but her earnings are extremely modest. She has no pension provision other than a state pension. She has only modest savings. Unless she receives provision from Janet's estate, she will have to rely on social housing and benefits for the rest of her life.

Submissions

1. The following submissions are made on behalf of the Lesbian & Gay Lawyers Association to urge the Government to amend its current Civil Partnership Bill to make clear that same-sex partners may apply under the Inheritance (Provision for Family and Dependants) Act 1975 ("the IPFDA") as cohabitants and not merely as dependants. The recent decision of the

House of Lords in the case of *Ghaidan v Godin-Mendoza* on 21 June 2004 has reinforced this problem.

2. The IPFDA allows certain categories of person to claim a share of a deceased person's estate where they have been left out or received too little under the will or the upon intestacy. The IPFDA provides a two-stage test: First the applicant has to show that he falls into one of the categories of claimant. Only when he has done so can he make his claim and the court has a discretion to award him what is fair considering a catalogue of factors and all the circumstances. Originally there were 5 categories of claimant:
 - a. a spouse of the deceased;
 - b. a former spouse who has not remarried;
 - c. a child of the deceased;
 - d. a child of the family of the deceased;
 - e. a dependant of the deceased.

3. Cohabitants could only make a claim if they fell into the last category as a dependant. They had to show that they received more financially from the relationship than they contributed and their claim was generally restricted at best to making up the shortfall now their partner had died. This was deeply unsatisfactory because cohabitants tend to be inter-dependent, whereas the court had to focus exclusively on net financial dependency. Thus:
 - a. The court had to investigate in detail the couple's finances and relationship. It had to draw up a balance-sheet between the two partners, determining nice questions such as the value of work done by one or other party and whether it was appropriate to include it in the account.
 - b. In most cases, the deceased would have been ill for some time before his death and become temporarily dependant on his partner. Even if the survivor was generally economically weaker than the deceased, the longer the survivor had looked after him, the more difficult it was to show she was dependant on the deceased. This flies in the face of fairness.
 - c. Where the couple jointly owned a house or jointly paid the outgoings, no dependency would arise from this. This would mean that the house would have to be sold and the survivor would lose her home. Where the house was wholly provided by the deceased, the survivor would often still lose her home on the grounds that she could trade down now she no longer had to share the accommodation.
 - d. If the survivor had met the couple's joint living expenses, allowing the deceased to accumulate savings, the survivor would have no claim.
 - e. The richer partner would generally be unable to make a claim.
 - f. The survivor would not be entitled to any of the personal possessions of the deceased.

- g. In general, no account would be taken of the fact that two can live almost as cheaply as one: that living together creates a mutual dependency even where both partners contribute equally.
4. These difficulties do not tend to occur with dependants who are not cohabitants, as the dependency is generally easy to quantify – e.g. where someone provides a rent-free flat to a friend or pays for the care of an elderly relative.
 5. As a result the IPFDA was amended in 1995 to allow a cohabitant to make a claim regardless of whether she was a dependant of the deceased¹. As well as simplifying proceedings, it allowed the courts to be much more generous and humane to cohabitants. However, the new provision, s.1(1A), defined a cohabitant as follows:

“during the whole of the period of two years ending immediately before the date when the deceased died, the person was living (a) in the same household as the deceased, and (b) as the husband or wife of the deceased.”

This has enabled the courts since 1996 to make fair and just awards for cohabitants. In reality most cases under the IPFDA settle and there are few reported cases.
 6. The House of Lords decision in the case of *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 confirmed that a very similar formulation in Sch.1, para.2(2) Rent Act 1977 (“a person who was living with the original tenant as his or her husband or wife”) did not cover same-sex couples.
 7. Following the coming into force of the Human Rights Act 1998 (“the HRA”), this discrimination was overturned in a decision recently confirmed by the House of Lords in respect of the Rent Act in *Ghaidan v Godin-Mendoza*² as being contrary to Articles 8 and 14 of the European Convention on Human Rights (“the ECHR”). The definition of cohabitants in the Rent Act is now deemed to include same-sex couples.
 8. It is very likely that s.1(1A) IPFDA will now be interpreted in the same way to include same-sex cohabitants.³ The same discrimination applies, there appears to be no better justification for it and the wording of the statutory provision can be reinterpreted under s.3 HRA in the same way. However, until the courts have ruled on the point, the matter will remain in issue, making settlement more difficult in such cases, which will increase costs both for the parties and the courts, and deter meritorious claimants who are often unable to afford to lose.

¹ Law Reform (Succession) Act 1995, s.2

² [2004] UKHL 30, on appeal from [2001] EWCA Civ 1553 (reported as *Mendoza v Ghaidan* [2002] All ER 1162). See also the comparable decision on the same facts of the ECHR in *Karner v Austria* (2003) 2 FLR 623.

³ In support, see the article of Prof. Bailey-Harris, *Mendoza v Ghaidan and De Facto Spouses* Fam Law [2003] 575.

9. Margaret hopes that Janet's brother and sister will accept the HRA argument, but they may make the point and fight the case in the courts rather than reaching a negotiated settlement as in most IPFDA cases. This would in all likelihood be to great expense to both parties as well as the Community Legal Service budget, especially if the matter is taken as far as the House of Lords as in *Ghaidan*.
10. There is also a serious danger that the enactment of the Civil Partnership Bill will unintentionally make it much more difficult to apply the general principle in *Ghaidan* to other statutes such as the IPFDA and thereby revive discrimination.
- a. The philosophy of the Bill, which has been explicitly set out by ministers, is that civil partnership is a quite different status to marriage.
 - b. The Bill makes numerous amendments to existing statutory provisions (principally in the field of social security) re-defining cohabitation in each particular case so that a heterosexual couple will count as cohabiting if their relationship is akin to marriage and a same-sex couple if their relationship is akin to civil partnership.
 - c. This is even explicitly done in relation to the provision with which *Ghaidan* was concerned, namely Sch.1, para.2(2) Rent Act 1977⁴. This may either inadvertently suggest that Parliament disagrees with the reasoning in *Ghaidan* and believes same-sex couples cannot be compared to married couples or to heterosexual unmarried couples; or rather it has been included in order to clarify that the Civil Partnership Act does not change the ruling in *Ghaidan*.
 - d. However, if this clarification is inserted for one of two pieces of legislation, it should be inserted for both. Otherwise, the same problem will arise for claims under the IPFDA.
 - e. The Bill even amends the IPFDA, but only to make provision for civil partners and not for same-sex cohabitants.
11. There are two dangers here:
- a. that Parliament may be mistakenly taken to intend that in general cohabitation provisions only apply to same-sex couples where express amendment has been made to include them;
 - b. that Parliament may be taken to have clarified the meaning of marriage so that henceforth the reasoning in *Ghaidan* cannot be applied to other statutes such as the IPFDA (and the dissenting judgment of Lord Millett in *Ghaidan* will apply).
- Both may lead to the conclusion that after the enactment of the Bill, one will no longer be able to read s1(1A) IPFDA in a non-discriminatory way.
12. The obvious remedy is expressly to further amend the IPFDA in the Bill. This requires only the inclusion of the words "or civil partner" after "husband or wife" in s.1(1A) IPFDA. Not to do so would:

⁴ Sch.8, para.13 (3) and (4) Civil Partnership Bill (both original and reprinted versions): Para.13(4) shows what pains are taken to maintain a clear distinction between marriage and civil partnership and between heterosexual cohabitation and same-sex cohabitation.

- a. leave the law in a state of unnecessary uncertainty, increasing cost to those affected and to the public purse;
- b. risk re-instating the unjustifiable discrimination that the decision in *Ghaidan* appeared to have cured;
- c. risk the Bill being incompatible with the ECHR, requiring a declaration of incompatibility and further legislation.

13. The Government has stated that extending cohabitation rights to same-sex couples is outside the ambit of the Bill. However, it has clearly ignored this in using the Bill to amend so much social security legislation to change the position of same-sex cohabitants. Even if the Bill does not deal with cohabitation generally, it implicitly affects the operation of the IPFDA with regard to same-sex cohabitants. There is therefore every justification for the Bill to make expressly clear what the position under the IPFDA is and should be, to ensure the result conforms to its intentions, to policy and to the ECHR.

14. As this amendment would be a clarifying amendment, there would be no question of retrospectivity. The problem is not acute under IPFDA in any event as all claims have to be brought within 6 months from the date that the grant of probate or letter of administration have been obtained.

www.lagla.org.uk

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Inheritance (Provision for Family and Dependants) Act 1975

1 Application for financial provision from deceased's estate

(1) Where after the commencement of this Act a person dies domiciled in England and Wales and is survived by any of the following persons –

- (a) the wife or husband of the deceased;
- (b) a former wife or former husband of the deceased who has not remarried;
- (ba) any person (not being a person included in paragraph (a) or (b) above) to whom subsection (1A) below applies;
- (c) a child of the deceased;
- (d) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
- (e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased;

that person may apply to the court for an order under section 2 of this Act on the ground that the disposition of the deceased's estate affected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant.

(1A) This subsection applies to a person if the deceased died on or after 1 January 1996 and, during the whole of the period of two years ending immediately before the date when the deceased died, the person was living –

- (a) in the same household as the deceased, and
- (b) as the husband or wife of the deceased.

(2) In this Act “reasonable financial provision” –

- (a) in the case of an application made by virtue of subsection (1)(a) above by the husband or wife of the deceased (except where the marriage with the deceased was the subject of a decree of judicial separation and at the date of death the decree was in force and the separation was continuing), means such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance;
 - (b) in the case of any other application made by virtue of subsection (1) above, means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.
- (3) For the purposes of subsection (1)(e) above, a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money’s worth towards the reasonable needs of that person.