

Heteronormativity in dissolution proceedings: Exploring the impact of recourse to legal advice in same sex relationship breakdown

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As more and more jurisdictions worldwide become accustomed to the practice of formally recognised same sex relationships, attention must now turn away from arguing for legal change and theorizing about the possible implications of it, towards exploring the impacts and effects that legal recognition has on lesbians and gay men. This chapter provides an analysis of in-depth semi-structured interview data with solicitors and clients about their experiences of civil partnership dissolution. The aim of the chapter is to examine the extent to which the legal culture surrounding civil partnership dissolution (and, by extension, same sex divorce)³ requires lesbians and gay men to conform to heteronormative patterns of relating. Many critical and feminist contributions to the literature on same sex marriage have suggested that same sex marriage will have these sorts of effects on lesbians and gay men (e.g., Auchmuty, 2004; Polikoff, 2000) The chapter is in four parts. We begin by exploring some of the arguments that were made before same sex marriage became a legal and political reality around the potential effects of same sex relationship recognition. These range from questions about whether it will result in assimilation into or transformation of the institution of marriage (Hunter, 1991; Polikoff, 1993), through to those which engage with questions about heteronormativity and the shaping of socially non-normative ways of living and being that can come from incorporation into formal regulatory domains (Harding, 2011). We then provide a brief methodological note about the in-depth interviews with 14 solicitors and 10 clients we explore in the remainder of the chapter. In part 3, we turn to explore these data around two intersecting themes: dissatisfaction with the adversarial nature of the legal process; and navigating heteronormative understandings of relationships. We conclude with a discussion of what these findings mean for the future potential of same sex relationship recognition to transform the nature of marriage.

Same sex marriage:⁴ transformation, assimilation and legal consciousness

The battle lines between feminist critique of marriage (Auchmuty, 2004) and lesbian and gay social movements seeking marriage equality (Kitzinger and Wilkinson, 2004) were drawn in the late 20th century, around the time that the first legal recognition frameworks for same sex relationships were

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³ We write on the basis that, given that both are types of formalised same sex relationship recognition, at least some of the observations that can be made about civil partnerships are applicable to same sex marriage. That said, there is presently a lack of research as to the whether there are differences between those lesbians and gay men that choose to enter into a marriage and those that opt for civil partnership.

⁴ Throughout this chapter, we use the term same sex marriage where it is necessary and appropriate to differentiate between same sex and different sex relationships. In many jurisdictions there are subtle legal differences between same sex marriage and different sex marriage, like the way that legal dimensions of sexual activity (e.g., consummation, adultery) are recognized and operationalized.

being introduced in Scandinavian countries (Wintemute & Andenaes, 2001). For some scholars, legal recognition of same sex relationships provided possibilities for transforming the imbalanced gender roles that characterised different sex marriage (Hunter, 1991). For others, however, the inclusion of lesbians and gay men in the privatised, state supported institution of marriage could never result in emancipation of LGBT people or of women from oppressive, patriarchal structures that perpetuate gendered inequalities (Ettelbrick, 1992; Polikoff, 1993). Since the beginning of the twenty-first century, increasing numbers of jurisdictions have created formal legal recognition frameworks for same sex relationships, often following the 'stepping stones' model experienced in jurisdictions like the Netherlands (Waldjik, 2001), introducing 'civil unions' or 'civil partnerships' as 'equality practice' before opening up access to full legal marriage for same sex couples (Eskridge, 2002).

Since civil partnerships and same sex marriage have become a legal reality in many jurisdictions,⁵ academic attention must now shift to measuring the social, legal and discursive impacts of this change. Of particular interest is the mapping of the extent to which legal recognition forces those who decide to engage in it into more heteronormative ways of living. 'Heteronormativity' combines the two ideas of heterosexuality and normativity to create, "the idea that society assumes heterosexual identity, practices and behaviour to be normative, and thus law and social structures are organised as if this were the case" (Harding, 2011: 40). Embedded in heteronormativity are assumptions about gendered normativities, particularly about the complementarity of 'masculinity' and 'femininity' in interpersonal relationships. These gendered assumptions include that the 'man' of the relationship engages in the production and circulation of commodities, and the 'woman' performs work within the home (Lloyd, 2007). Post-*White v White* [2001] 1 AC 596, the family courts have tended to base their financial relief decisions around addressing the scenario where husbands and wives carry out these distinct roles within a marriage. In so doing, they have, arguably, naturalised traits that perpetuate women's oppression, treating their difference from men as inherent. The courts have, in 'big money' matters, maintained the constructed 'breadwinner'/'homemaker' binary through a process of constant repetition, even to the point of implicitly following these norms in *Lawrence v Gallagher* [2012] 1 FCR 557, the only reported civil partnership dissolution case to date (Bendall, 2014).

Judith Butler's (1999) work on gender highlights the possibility of disrupting what she terms to be the "heterosexual matrix" by doing things differently. With that idea in mind, same sex couples seemed to present an opportunity to challenge the existing "codes of hierarchical binarisms", and to generate new domains of intelligibility (Butler, 1999: 185). Yet, Harding (2011: 40) has argued that the regulatory effects that accompany formal recognition of same sex relationships operate to, "[push] lesbians and gay men towards heteronormative lifestyles". More specifically, normalising forces, such as the extension of marriage (or quasi-marriage, in the form of civil partnership) rights to same sex couples, have been employed in order to position gay and lesbian family life so as to be

⁵ The most recent (at time of writing) jurisdiction to legalise same sex marriage was the Republic of Ireland on 16 November 2015. The pace of change in the legal arena of same sex marriage is relentless, and it can be difficult to keep up with the numbers of jurisdictions allowing civil partnership and same sex marriage, such that one of the most reliable sources of information about the status quo at any given date is (unusually) the 'wikipedia' page on the issue, see: http://en.wikipedia.org/wiki/Same-sex_marriage.

intelligible within the framework of heteronormativity. Same sex couples are now “known and knowable to the state”, resulting in greater regulation of lesbians and gay men, particularly those who are economically marginalised (Harding, 2011). Neither law nor society have yet “completely embrac[ed] non-heterosexual lifestyles” or “allow[ed] for the growth of non-heteronormative ways of living and being” (Harding, 2011: 40).

This chapter, focusing on relationship breakdown, considers the extent to which there is still transformative potential amongst those with experience of civil partnership. It does so by exploring empirical data and by drawing on insights from legal consciousness studies, which have examined social constructions of ‘legality’ (Ewick & Silbey, 1998; Harding, 2011; Hull, 2003). Legal consciousness studies seek to understand how everyday uses of, experiences with, and talk about law serves to construct and enact legality. In other words, how law as it is done in practice produces effects on law as it is written down in books. Legal Consciousness, as a conceptual frame, seeks to interrogate the mechanisms by which everyday experiences of law shape and change law. In the empirical analysis that follows below, we see some examples of engagement “with the law” which understands law as an “arena of competitive and tactical maneuvering where the pursuit of self-interest is expected and the skillful and resourceful can make strategic gains” (Ewick and Silbey, 1998: 48). As we will demonstrate later, clients from our interview study describe this game of ‘law’ as having been ‘played’ by solicitors, who are working to construct their clients’ cases to fit with heteronormative ideas about gendered roles in relationships. This is despite Peel and Harding’s (2004) contention that, in the relative absence of pre-existing models, lesbian and gay relationships may be conducted more creatively than different sex couples. We argue that early evidence suggests that the balance of power in legal matters relating to same sex relationship breakdown has shifted towards legal representatives, with assimilation towards the heteronorm as a consequence.

We will also highlight below some discourse that fits more coherently within the ‘against the law’ legal consciousness schema, through which, “people exploit the interstices of conventional social practices to forge moments of respite from the power of law. Foot-dragging, omissions, ploys, small deceptions, humor, and making scenes are typical forms of resistance for those up against the law” (Ewick and Silbey, 1998: 48). This was, on occasion, in juxtaposition with a more ‘with the law’ type of approach, which would seem to fit well with Ewick and Silbey’s (1998: 50) suggestion that, “legal consciousness is neither fixed nor necessarily consistent; rather it is plural and variable across contexts, and it often expresses and contains contradiction”. A perhaps surprising finding that we explore in more detail below is that whilst formal legal recognition has brought same sex partners to ‘law’ to a greater extent, practitioners have still reported a relative determination by lesbian and gay clients to settle on their own terms. This sits well with Harding’s (2011) previous finding that lesbian and gay families often work around legal presumptions and create their own rules. Although heteronormative conceptions of gender have been carried over from (different sex) marriage into civil partnership proceedings, gay and lesbian clients often appear to discursively resist the imposition of heterosexual relational norms on their relationships. In the analysis that follows, we draw on the tools of legal consciousness to interrogate clients’ and solicitors’ discursive formulations of sameness and difference, assimilation and transformation in civil partnership dissolution proceedings.

Methodology

The dataset in this research originates from an in-depth interviewing project that took place between September 2013 and June 2014 with 14 solicitors and 10 clients that had had direct involvement in civil partnership dissolution matters. Ethical approval was granted by the University of Birmingham Research Ethics Committee. Empirical methods were selected because we considered that hearing how things are working 'on the ground' (as opposed to conducting library based research) would best enable the gathering of information about how dissolution matters were playing out in practice. Solicitors (rather than barristers or judges) were selected as the most appropriate legal professional informants, because the vast majority of relationship breakdown matters settle out of court. Further, solicitors play a key role in financial relief matters, as part of which they "translate personal conflicts into legally recognisable categories of dispute" (Smart, 1984: 160). The decision to interview both solicitors and clients was motivated by a desire to hear the voices of both the "locally powerful" (Smart, 1984) and the "dispossessed" (Herman, 1994). Charlotte Bendall conducted all of the interviews.

The empirical approach used in both solicitor and client interviews was the in-depth, semi-structured, qualitative interview, as is increasingly common in socio-legal research. This semi-structured interview approach provided the best opportunity to explore the solicitors' and clients' experiences and thoughts in detail (May, 2001). During the interviews themselves, an interview schedule was used to provide a greater structure for comparability than one would tend to have if conducting a completely unstructured interview (May, 2001). There was, however, also a degree of flexibility in the conduct of the interviews, enabling the researcher to explore the meaning contexts of participants' discourse and to pursue relevant lines of investigation (Lee, 1993). This flexibility also gave participants the opportunity to develop their ideas and explain their views (Gilbert, 2008). In analysing the data from these interviews, we were cognisant of the fact that what people say in the artificial discursive environment of a research interview cannot automatically be assumed to be reflective of the 'truth' (Denscombe, 2007). Also, when exploring people's experiences of emotionally charged topics, such as relationship difficulties, Brannen (1988) suggests that respondents' accounts tend to be contradictory and filled with emotion.

Such challenges of interviews are not restricted to those with clients in this study. Professional interviews also have limitations in terms of the representativeness of the data gathered. Firstly, as Macauley (2009) argues, within the interview scenario, "people like to entertain you." As a result, they often choose to tell you, "the best story that they've got", as opposed to what they consider to be an accurate account of events and experiences (Macauley, 2009: 22). Secondly, interview respondents may feel under pressure to supply answers so as to "fit in" with what they believe the interviewer "expects" of them (Denscombe, 2007). Likewise, they might tailor their answers so as to comply with what they believe the researcher's point of view to be. Thirdly, it is possible that interview respondents might be made to feel "under the microscope" whilst being interviewed, as though they are being somehow scrutinised or tested (Denscombe, 2007), a problem that came up in some of the solicitor interviews in this study. Accordingly, interviewees may purposely attempt to answer the questions posed in such a way as to reflect favourably on themselves (Denscombe, 2007). Notwithstanding these limitations of empirical qualitative interview research, the recruitment and sampling processes followed in this project were aimed at gaining as broad a range of perspectives as possible, such that the data from the project can be understood, at the very least, to

be a reliable snapshot of contemporary discourse around civil partnership dissolution from both clients and solicitors.

Recruitment and Sampling

As is common in research involving lesbian and gay issues, sampling and recruitment can be challenging because of the difficulties of locating a relatively unknown population (Harding & Peel 2007). Solicitors' firms were selected by conducting an Internet search for the term 'civil partnership dissolution solicitor'. The firms' websites were subsequently examined to establish whether any of the solicitors' individual profiles specified that they had experience of advising on civil partnership and, where this information could not be located, the heads of the firms' family departments were e-mailed. In total, 291 firms were contacted, from which 14 practitioners from 10 different firms agreed to participate in the research. It had been hoped that the solicitors would provide introductions to their clients, with further interview participants being attained in this way, and this did occur twice. However, it soon became clear that many of the firms contacted had not advised on a high number of civil partnership cases to date, which is understandable considering the very small number of dissolution proceedings that have happened to date. Civil Partnerships have only been available in England and Wales since December 2005, and the first dissolutions of recognised Civil Partnerships happened in quarter 2 of 2007. From January 2007 to December 2013, there were a total of 3466 dissolutions of Civil Partnerships recorded (ONS, 2015). This figure represents a very small proportion of the overall family law relationship breakdown matters over that period: by way of contrast, there were 719,075 divorces recorded from 1 January 2007 to 31 December 2012 (ONS, 2014). In addition to this, several of the solicitors displayed a reluctance to grant access to their clients. Accordingly, we deployed our (previously approved) 'backup' recruitment plan to access clients, drawing on direct strategic opportunistic and snowball sampling approaches. An advertisement was sent to 217 lesbian and gay organisations, mailing lists and publications with a potential interest in the subject in an attempt to recruit people that had sought legal advice. Twitter was also used, with direct 'tweets' being sent to 87 individuals and organisations and relevant 'hash tags' being utilised (such as '#LGBT', '#LGBTQ' and '#LGBTfamilies'), and details of the project featured on the notice boards of two online forums.

Of the solicitors interviewed, five were males and nine females, and 11 identified as heterosexual, two as lesbian and one as gay. They ranged from 28 to 59 years of age and dealt with cases concerning a range of assets, from modest amounts to multi-million pound 'big money' matters. The solicitors were located in the Southwest and Southeast of England, Greater London and the Midlands. In terms of the clients, six of these respondents were men and four were women, and six identified as gay, two as lesbians, one as both, and one as bisexual. They ranged from 38 to 54 years of age (mean age = 45), and they resided in locations across Greater London and the Midlands. Their assets ranged from very little to significant and, whilst three were in the process of dissolution and asset division, seven had completed this process. The partners' relationships varied in length: although one client had been with her partner for 25 years, a further one spent only a week living with their civil partner, with a prior year of cohabitation before the civil partnership ceremony.

Approaches to, and perceptions of, the law of civil partnership dissolution

We now turn to discuss these data in depth. Interviews were digitally recorded and transcribed verbatim by the first author. Data from both components of the interview study were analysed using thematic analysis (Braun & Clarke 2006). NVivo software was utilised to assist with the coding

process. Two key themes were identified that relate to this chapter. Firstly, many of the client participants blamed the legal practitioners involved for encouraging and fostering an adversarial and inflammatory approach in the matter. Some clients perceived this approach to be for the gain of the solicitors, rather than as a means of resolving the dispute. Others, however, felt that their own legal representatives did not represent their views and positions strongly enough in the process. The second theme coheres around the ways that clients and solicitors both used discourse that we have coded as drawing on heteronormative understandings of relationships, but in different ways. Whereas some solicitors sought to include same sex matters in their previously developed knowledge base from heterosexual divorce proceedings and legal precedents, clients found this frustrating, and often wished to emphasise the different nature of same sex relationships. Other solicitors highlighted the differences in approach that their lesbian and gay clients had to matters, particularly to issues around money and maintenance. Running through both of these themes was an overall view that adversarial dispute processes in same sex relationship dissolution sat in opposition to common understandings that ex-partners remain important to lesbians and gay men, and that the breakup of an intimate relationship need not mark the end of a friendship. We discuss each of these themes in turn.

The adversarial nature of legal process

Several clients in this study suggested that the solicitors involved in their matter (and particularly those on the other side) had adopted an aggressive strategy, encouraging their disputes to become more adversarial than they would have expected, wanted or needed them to be. Consider this excerpt from Anthony's⁶ interview:

I think my ex thought that I was, in the background, working with legal. So, all of a sudden, he got representation. I didn't have any, I hadn't consulted. I'd thought about it and done a little bit of research, but I hadn't actually engaged. I thought we'd do that together. So, I had to find somebody and I've got a friend who's a barrister and he recommended a website and that's how I found [firm]. But I was left, after that meeting, thinking that this was going to be trickier and perhaps more expensive than I had realised, and longer, and that was a bit of a 'come to Jesus' moment, thinking, "oh my goodness, this is really going to be difficult". We had our first collaborative meeting and the word 'collaboration' had escaped my ex's representation because he went on attack mode. He just started really attacking. [...] I believe that his solicitor gave him an outcome that wasn't realistic and between the two of them... ultimately, you appoint a solicitor and they act on your behalf so I can't blame the solicitor per se, but he set unrealistic expectations and then it became a, "let's screw this guy", me being the guy, and luckily the judge saw through that. (Anthony)

Here, he suggests that whereas he had hoped to engage in a collaborative process, his partner's legal representative had forced them into a protracted dispute. Indeed, Anthony's case was the only one of the concluded cases in this interview sample that had proceeded through to final hearing.

⁶ All names are pseudonyms. Clients have been given first names and solicitors have been allocated surnames in order to easily differentiate between the two groups of interviewees.

Similarly, Isaac described his partner's solicitors as being "very aggressive" in contrast to his own, more open solicitors:

They were very aggressive, there's a term for it. Yeah, umm, so they were... so, whereas my, umm, solicitors were very open and wanted to have a resolution, they were from the outset very aggressive in saying what they wanted, and saying how their client had been hurt.
(Isaac)

Bill contrasted his knowledge of his ex-partner's approach to money with the way the dispute between them seemed to be playing out, attributing this to the solicitors on the other side:

And he never, really, seemed to give any importance to money. And, I'm still, you know, I still think that. Which is why I've still got a problem that his solicitor is putting him up to it... is trying to almost drag this thing out... trying to say, "actually, you could... you know, you may be entitled to more by law". You know, if the law allows this. And, I still don't feel that that's him. And, I could be wrong, but I've known him since 1994, err, and I don't think that I'm wrong. (Bill)

These constructions of the 'other side' as being the catalyst for an aggressive or adversarial approach are interesting, because they seem to chime with Day Sclater's (1998) contention that it helps psychologically to 'paint' the other side in a negative light (and oneself in a positive one) in relationship disputes. Yet this seems to sit awkwardly with research that highlights the importance of ex-partners in lesbian and gay 'families of choice' kinship networks (Weeks et al, 2001).

In fact, some clients were explicitly resistant to the possibility that their dissolution should become adversarial, or that they should push the other side for a better settlement. Consider this excerpt from Edward's interview, which gives an indication of this issue:

[my solicitor] thought that I was being very generous and that I should go for more. But, that's the nature of solicitors, isn't it? They certainly wanted me to go away and think about the money quite a bit, and discuss it with other people. But, I was... I went into that very eyes-open, I knew that there'd be a pressure on me to try to change my mind, and I was happy with what I had decided. (Edward)

Similarly, several practitioners indicated that their civil partner clients had preferred to keep their disputes out of law, and out of court especially, by comparison to different sex partners. In this respect, it was detailed how:

I think that, in comparison, we did settle the money issue very fast. If this was an opposite sex couple, no we wouldn't have [...] What I did find is that the finances, every time you got the letter, "okay". (Ms Ennis)

I deal with some very acrimonious divorces and, at the moment, I haven't dealt with a terribly [...] acrimonious civil partnership. (Ms Clarke)

In contrast, both Debbie and Bill felt that they had been disadvantaged by the lack of 'fight' on their side of the dispute, and would have preferred their legal representatives to have been more adversarial on their behalf:

Basically, I just had to abide by her rules, and felt that I'd been bullied again, by the court, and herself, and the solicitor. And, a little bit by mine. I didn't feel like my solicitor was very supportive at all. Like, everything that would come from them, the other side, she'd then sort of say, "oh well, they're right". There was never any- no fight, nothing (Debbie).

I felt that it was going to give me more rights than was indicated. [...] Given the wrong that has been done to me, I would have thought, you know, we should absolutely take him to the cleaners. And then, for the first solicitor to say, "well, no, actually... no, we don't actually take him to the cleaners", it almost seemed a bit too well-mannered and watered down [...]. I think that this whole thing looks a bit- there's no- there doesn't seem, to me, to be any substance or, you know, anything- you know, a punch. And, I think that that was what I was expecting. I was expecting a bit more punch. And, it was all a little bit mumsy, to be honest with you. And, "oh, you know, we can't, you know, oh no" and "they will have these rights and, you know, we mustn't upset anybody". So yeah, it was... definitely, I think, a lot more- it doesn't seem a lot like the Nigella Lawson case - obviously, I know that that's a different - but, you know, where it's all insults, and all of the rest of it, being thrown. I expected something a little bit more like that (Bill)

Importantly, Anthony blamed the conduct of their dissolution matter for the lack of ongoing relationship between him and his ex-partner:

But the only person that won was the legal representation. I didn't win, I just didn't lose. My ex certainly didn't win; mentally it was stressful, as you can appreciate, frustrating, and it burnt every bridge between us two. Because we were okay. When I bought him a property... as part of the agreement, we bought a flat in [city] for a new place for him to go to live without a mortgage, and during the purchase process I was ready to go to put the curtains up, wire the wifi up and set everything up, because it was, you know, helping. By the time it actually got to that point, I wouldn't have, you know, got the hose out if he was on fire. And it shouldn't have been that way because we weren't a fight-y couple. And now it's beyond any sort of reconciliation in terms of friendship. But it was purely because of the legal process. (Anthony)

Overall, it appears from these data that lesbian and gay clients are somewhat resistant to the adversarial nature of legal representation in dissolution matters, preferring to engage in private ordering of their affairs. This is perhaps a somewhat surprising finding, given that those that have chosen to enter into a civil partnership may be expected to be committed to a legalised approach. One reason for this resistance to the adversarial nature of legal involvement might be the relative recency of same sex couples' inclusion in formally recognised relationships (see further, Harding, 2011), and the consequent lack of understanding of the implications of entering into a civil partnership. Given that aside from the name, civil partnership in England was legally identical to marriage (Stychin, 2006), a further reason might be as a result of a general lack of understanding of the very great similarities between civil partnership and marriage. Solicitor Ms Field commented, in

this respect, that there had initially been a “surprising” level of “ignorance” amongst civil partners, and she expressed uncertainty as to the level of comprehension, even to date, of the monetary obligations that arise. It is possible that the discourse will shift over time, as same sex couples become more used to the legal and financial implications of the dissolution of formal relationships. Equally, however, lesbians and gay men do not exist in a social vacuum. As Bill mentioned, understandings of legal process are shaped, in significant ways, by media representations. Most of the cultural and/or media representations of the financial consequences of relationship breakdown are from heterosexual contexts, so it would be naïve to consider that lesbians and gay men only prefer to settle things themselves because of subcultural ‘outside the law’ influences from the era before formal legal equality.

Heteronormative understandings of relationships

Our second theme, that of heteronormative understandings of relationships, builds on the final point above. Same sex couples appear to do many things, both during relationships and when they break up, differently from heterosexual couples (Carrington, 1999; Kurdek, 2007; Patterson et al, 2004). Yet this sits in tension with the formal legal frameworks surrounding civil partnership dissolution, and same sex divorce, both of which are very similar to the legal approach to divorce for different sex couples.⁷

Many of the solicitors in this study had only acted in a very small number of dissolution proceedings, and one, in fact, had no direct experience of a CP dissolution matter. Their constructions of the legal differences between dissolution and divorce are very interesting:

I see them as being the same and I very naughtily often refer to “divorce” when it should be “dissolution”, umm, and refer to “decree nisi” when it should be “conditional orders”. Umm, I perceive them as the same because the law currently does. Umm, whether I would change my view in the future, umm, it very much all depends on case law. (Ms Gale)

I don’t see the issues being necessarily different, I don’t see the dynamics being particularly different. The law is the law, and we kind of have it, and that’s it. And it’s an area that I wish that there was a way that we could, perhaps, do more of it but we’re not, unfortunately. On the flip side, we do get a lot of other work, so we’re quite busy. But, it is something that I would like to see more of, because I think that there would be nuances and legal arguments to be had which would actually be quite exciting and quite good. New law and new stuff is always great. It tests you and it takes you out of your comfort zone. (Mr Derrick)

I think that that’s probably one of the most important facts, really, to home in on quite early, is to make it clear that, in the majority, the law has sought to almost mirror what has been

⁷ The only substantive difference in English Law between civil partnership dissolution and heterosexual divorce is the lack of “adultery” as a factor in evidencing the irretrievable breakdown of the relationships (s. 168 of the Civil Partnership Act 2004). In terms of same sex divorce, whilst adultery is included as a factor in section 1 of the Matrimonial Causes Act 1973, the common law definition of adultery has been applied to this factor, which only relates to heterosexual penetrative vaginal intercourse *R v R* [1952] 1 All ER 1194. See further: Brook (2001).

the position for marriages for some time, and well before civil partnerships were available to be entered into [...] you explain it to them and say, “well, there is no difference, and the law sees there as being no difference” (Mr Kennedy)

I would just literally apply all of the principles that I do already. I really don’t think that I would do anything differently at all. I wouldn’t, because the law is being applied across the board, so I wouldn’t look to do anything different at all. (Ms Clarke)

The lack of authority on civil partnership has not stopped me arguing the issues. Because, I will get a divorce case out and say, “the facts are similar in terms of length of relationship, disparity of wealth, why don’t you apply them?” (Ms Irvine)

As is clear across these solicitors’ interviews, in practice advising civil partners on dissolution and advising straight married couples about divorce are constructed as identical. That the practitioners should adopt such a view may be understandable, given that the formal legal frameworks surrounding civil partnership dissolution are very similar to the legal approach to (different sex) divorce, and that the common law is founded on the doctrine of precedent. Yet, we argue that, for all practical purposes, same sex relationships are being assimilated into the marriage model in the realm of legal recognition. In doing so, the potential for opening up new critical dialogues and new ways of implementing equality and fairness on relationship breakdown may be lost. This is not only in relation to same sex partners, but also in the context of different sex matters (given that many opposite sex relationships are also lived in a way that differs from the law’s fixed, homogenous understandings of gendered role division).

The solicitors constructed the issues and the legal frameworks in dissolution matters as being identical to different sex divorce, except for the lack of adultery grounds in civil partnership dissolution.⁸ The lack of adultery as a reason for irretrievable breakdown in civil partners was noticeably constructed as problematic both by clients and by solicitors: “I think that it does, you know, probably annoy all of us” (Ms James). Consider this story from Heather:

The only ... aspect that I got frustrated about was the fact that I couldn’t apply for it on the grounds of, adultery. [...] Because, I had to apply on the grounds of unreasonable behaviour, and I made that application, but obviously stated the adultery as the unreasonable behaviour, and initially my application got declined. Because, the judge that it obviously went in front of didn’t read the form, and it basically got sent back to me just saying that I should have applied on the grounds of adultery. So, I then had to fill in... I had to photocopy all of the original paperwork and send it all back with a cover letter basically saying, “I can’t, it’s a civil partnership”. And, I did get a bit frustrated at that as well because, you know, not only was I not allowed to apply on the grounds of adultery, but they were then saying, “well, that’s what you should have done”. And, I know that that was a mistake, he obviously didn’t look and see that it was a civil partnership, and he probably had loads in front of him every

⁸ A difference between same and difference sex divorce which is retained following the insertion of s. 1(6) of the Matrimonial Causes Act 1973 by schedule 4 of the Marriage (Same Sex Couples) Act 2013.

day. But, if you're going to refuse it then you should make sure that you're refusing it correctly, because they put it all back probably a couple of months, by the time that the paperwork came back to me and I had to send it all off again and things (Heather).

Not all clients were so clear that same sex relationships were just the same as different sex relationships, and several thought that there should have been a different approach in the law as a result. The perspectives on what the differences are between lesbian and gay relationships and straight relationships are worthy of further exploration.

One difference that was articulated by these participants was that gay men may be more likely to have multiple sexual partners, even within a committed and formally recognised relationship. Consider this story, from Isaac:

Isaac: I think that it was just difficult for her to understand, because she was married herself and she had- it would have been better if I had gone to a gay solicitor who knew about these things, and knew what gay men did, actually. That would have been better. But, she had no idea of lifestyles that happen and go on.

Interviewer: Can you think of any examples of that?

Isaac: Umm, yeah, she was shocked that, you know, he wanted an open relationship, and that he wanted continual sex with other people and, you know, she found that quite shocking. She told me, "this is fairly shocking stuff". But, you know, if that had been a gay solicitor- a gay man especially, or a gay man working in a solicitors dealing with dissolution- he'd have said, "I totally understand what's going on here". And, there would have been a lot more tea and sympathy, rather than a, "oh, shock horror, this is happening" type thing.

Here, Isaac attributes a lack of understanding from his solicitor (a straight woman) to her gender and sexuality, and suggests that a gay male solicitor would have been more likely to have understood gay male non-monogamies (Klesse 2007). More interestingly, perhaps, the issue of diversity in the legal profession ran through a significant portion of these participants' accounts. It appeared to be significant both that there is still such widespread heterosexuality across the legal profession, and that members of the judiciary will tend to be of an advanced age. Around 97% of those responding to a question in the Law Society's (2014: 10) practising certificate holder survey identified as heterosexual, whilst this figure was closer to 98% amongst recommendations for judicial appointment from October 2013 to March 2014 (Judicial Appointments Commission, 2014). Indeed, Rackley (2007) emphasises that, while the judiciary of England and Wales is the most diverse that it has ever been, there is certainly more to be done.

The two lesbian solicitors interviewed (Ms James and Ms Field) opined that same sex partners will be more comfortable when consulting a lesbian or gay practitioner, and this assertion was repeated in the client accounts. Anthony explained having instructed Mr. Arnold because he did not want any "awkwardness" or, "the barrier of difference in sexuality" in the context of a process that is "still quite invasive". Anthony felt that, "there's just an empathy... you have the same, let's say, foundational mentality... If the solicitor had been straight, I would probably have been being prejudiced against the solicitor thinking that the solicitor would be prejudiced to me" (and, likewise, Isaac described the difficulty of relaying personal information to "a straight woman, actually, err, who didn't understand"). In terms of the latter point concerning judicial demographics, even

solicitor Ms Irvine voiced that the legal profession is, “run by people who have very old-fashioned concepts”. Client Debbie perceived, regarding generational attitudes, that, “I should imagine that my granddad, yeah, had he still been alive today, would probably not be as accepting of gay people as probably, like, my mum would be”. In fact, she suggested that, in her matter, “I think that the age of the judge probably went against me”, and she attributed her perception of the homophobia of the judge who heard her case with him ultimately having been cited in a note that she wrote prior to a later suicide attempt. This perception of homophobia from the judiciary was also related by solicitors in this study:

And, my experience of the courts making orders about civil partnership finances is that they pretty much throw the case law out. That’s been my experience. So, for example, I had two women, one was a well-paid [healthcare professional] and the other was quite a well-paid [financial services professional]. They had two children, umm, and they were sharing the care of the children. There was a big difference in their salary, [my client wanted] half of the equity in the house and wanted a clean break on spousal maintenance. That would not happen... that would not be allowed to happen if they were straight. Two young children- the judge would say, “no, we want nominal maintenance”, at least. Especially at our local court, nominal maintenance for children. But not for lesbians, apparently. So, I think there’s a bit of- I feel that there’s some homophobia. (Ms James)

Perhaps related to this perception of the possibility of homophobic responses from formal law, some of the solicitors reported a lack of faith in the legal system from lesbian and gay clients, and a disjuncture between the perceptions and the realities of legal representation in the dissolution process.

Expectations of the law were a lot lower than maybe a heterosexual client, that the law wasn’t going to do anything to help them.... I think, actually, that both of the clients that I dealt with individually were fairly skeptical about the law in general. They weren’t big fans of it. (Mr Derrick)

What interests me most about the civil partnership work that I do is that they’re generally not litigated. Umm, and my view is that is because until recently there hasn’t been a forum for lesbian and gay people to litigate. And it’s quite an interesting hangover from that time.[...] There’s a study that says that something like 80% of people who... straight people who break up, the first people that they go and see is a solicitor. It’s really high, and I would say that it’s much lower for homosexual breakups. I think that the first person that they go to is not a solicitor. Umm, possible the last.[...] The law hasn’t been seen as particularly friendly, umm, and, on that basis, [they] definitely avoid [law]... possibly to their detriment... my view would be that they don’t come to law. I think that civil partners generally do now... they do because they- they know that they have to do something legal. Something legal happened, and they know that something legal has to happen. [...] it’s not because they want to argue about everything, they just want a bit of help. But, no, they don’t want the bloody help when you give it to them. “No, we’re fine, we’ve sorted it out”. “You’ve got it wrong”. “It’s fine”. (Ms James)

This finding that lesbians and gay men prefer to avoid solicitors, have low expectations of what solicitors can do for them, or prefer to work things out for themselves reflects findings from our previous research into legal consciousness in lesbian and gay family relationships (Harding, 2011). It is clear that the historical exclusion of lesbian and gay relationships from family law has significantly contributed to this approach, but there appear to be additional factors at play that suggest same sex couples may have a different approach to finance and relationship break down to that which has developed through the 'big money' heterosexual case law. Consider these reflections from solicitors and clients on this issue:

In my three experiences both parties have been working, there hasn't really been an expectation that one was going to maintain the other or anything like that, you know. There's definitely been more of an air of, "we're going our own way, we need to divide our assets and get on with our own lives". Whereas, when you see a wife who has, perhaps, been working part-time and is very dependent on her husband's income, you get a very different feel from that wife. (Ms Clarke)

When they're in a relationship they contribute as much as they can [...], and then when they break up they say that, "our main asset we'll divide equally, but we won't give each other any compensation and we won't pay any maintenance, because we've done everything separately and independently. So, we'll carry on doing that. You've had more money than me, and you always will. I've always had less money than you, and I always will. I've got enough to start again, and that's fine". (Ms James)

When you've got a same sex couple, and especially two men- men still earn more money than women these days- and so... but there's no... everybody's treated the same. And, I found that really disappointing, actually. And, obviously that's the law, I couldn't change it, and that's how I was going to be judged. I earned more money than he did, so I was the breadwinner, so basically I could have come out a bit- the worst, basically. (Isaac)

Taken together, this discourse from solicitors, and clients, would seem suggest that clients either try to or would prefer to 'opt out' of the substantive remedies introduced to address (heteronormative) assumptions about necessary dependency and vulnerability within relationships, in part because of a higher degree of financial independence within their relationships. It may, of course, be the case that the same can be said of heterosexual couples that organise their finances independently (and many different sex partners do favour the private ordering of their assets). However, the indication within our data is that these opinions may be more common in same sex matters. Solicitor Ms Field rationalised this by asking, "do you think that it's so part of the culture that marriage means sharing, whereas civil partnership...? I don't know" (indicating that it may have alternative connotations).

Heteronormativity, legal consciousness and dissolution

These data suggest that there is a level of divergence between solicitors' and their lesbian and gay clients' perceptions of civil partnership dissolution. As the dissolution framework for civil partnership is identical to that in same sex divorce, there is no reason to consider that these tensions will not be carried over into same sex divorce. These pressures appear to cohere around three points of difference between same and different sex relationships: first, that same sex couples are resistant to

the negative interpersonal effects of legalised familial dispute resolution; second, that same sex couples still do not trust the law to sort out their disputes, in spite of increasing formal legal equality; and third, that there is significant resistance to the redistributive models of financial division that have developed through different sex divorce cases.

A key reason why same sex couples prefer to sort out their relationship disputes on their own terms, and settle, rather than leaving it to legal professionals to do so, is likely to be related to the longstanding subcultural importance of former partners within lesbian and gay kinship networks (Weston, 1997; Weeks et al 2001). Previous research suggests that lesbians are even more likely than gay men to report ongoing close friendships with former lovers (Nardi and Sherrod, 1994). Jacqueline Weinstock (2004) suggested that drivers for the ongoing relationships come from both positive and negative forces. Negative forces she identified included suggestions that lesbian relationships were too closely enmeshed, that lesbians struggle with moving on after separation, and the small and close networks that have been necessary in lesbian communities (Weinstock, 2004). In contrast, she also identified several positive drivers for this behaviour in same sex couples and friendships, including the ways that the dividing lines between friends and family are blurred in same sex relationship contexts, the need for lesbian friendships in order to develop and maintain non-heterosexual identities, and the shared experience of marginalisation, which supports the relationships between lesbians and their ex-partners (Weinstock, 2004). It is not clear, yet, to what extent the rise in the use of online dating websites and the changes that these have sparked in the ways that same sex couples meet may affect this longstanding tradition of friends as families in lesbian and gay communities. It is also not clear from this small study whether the differences between lesbians and gay men noted in previous research are reflected in approaches to legal representation during relationship dissolution.

A second reason for these lesbian and gay men's resistance to the formalised legal approach to relationship dispute resolution is that even following the legal recognition of same sex relationships, lesbians and gay men still do not appear to trust formal law to resolve their disputes. In certain respects this is understandable, because if 'law' does not have the discursive or conceptual tools to understand the different kinship practices that characterise same and different sex relationships, then engagement with formal law may require lesbians and gay men to fit their relationships into (hetero)normative ways of doing relationships. Harding (2011) in her legal consciousness study of lesbian and gay lives argued that understandings of law by lesbians and gay men appeared to be characterised as including a form of resistance to law. This resistance to law included elements of the 'against the law' category of legal consciousness outlined by Ewick and Silbey (1998), but also included more active forms of resistance, which sought to shape and change law, rather than purely avoiding it. Similar tensions are evident in these data, which suggests that formal legal recognition of same sex relationships has not had entirely assimilatory effects so far. This is evidenced by the reports from both clients and solicitors in this study that same sex couples are more likely to settle out of court, and that same sex couples prefer to take their own approach to financial division, that does not reflect the 'yardstick of equality' approach developed by the courts in previous heterosexual cases (now a starting point principle in light of *Charman v Charman* [2007] 1 FLR 1237).

This latter issue requires more careful consideration, particularly as the ways that parties in these same sex relationship disputes appear to be approaching financial division run contrary to approaches developed in the courts to redress economic power imbalances within relationships. It

may be that because none of the clients interviewed for this study had children or other significant caring responsibilities, and similarly the solicitors interviewed had little experience of same sex dissolution proceedings involving children, the differences in the approach to relationship finances were a function of the lack of children, rather than because these were same sex couples. Though, importantly, the one dispute involving children that was discussed by Ms James suggests that the courts are also not following previous heterosexual case law when addressing same sex dissolution matters, even where these do involve children and an income disparity. This is, perhaps, the most challenging part of the findings from this project, and one which raises the largest number of questions for future research.

It is recognised that, in reality, 'equal division' is often not the outcome of different sex partners' financial matters, with wives still often getting less. However, the case law stemming from *White* adopts a more generous approach to the economically weaker party than had previously existed, and our data suggest that this approach is being eschewed by lesbians and gay men. Instead, the indications were that they favoured financial settlements reflecting the pre-relationship financial status of each of the parties to the relationship. This raises troublesome questions about how the different economic status of parties to a relationship is reflected by and through formally recognized same sex relationships, and why and whether individual economic circumstances prior to, during and after the relationship should be prioritised over redistributive practices that recognise and compensate for financial inter-dependency. It may simply be the case that same sex couples are, overall, less financially interdependent than heterosexual couples and continue to rely more on strategies of partial pooling and independent money management than their straight counterparts (Burns, Burgoyne & Clarke, 2008). Alternatively, it might be the case that the previously 'outside' the law status of same sex relationships has meant that lesbians and gay men have not had the same opportunity to develop more interdependent financial arrangements. Whereas evidence suggests that different sex cohabitantes engage in financial interdependency in the absence of protection, this was attributed to a lack of awareness of legal vulnerability due to a widespread belief that there is a form of 'common law' marriage (Barlow *et al* 2008). In contrast, the historical lack of legal and financial protection on the breakdown of same sex relationships has likely mediated against higher levels of financial interdependence in same sex couples.

The potentially transformatory effects of same sex relationship recognition figured strongly in feminist arguments for same sex marriage (Hunter, 1991). Yet transformations of money management practices within relationships that lead to economically weaker parties being less well compensated in financial division on relationship breakdown are unlikely to offer the kinds of gender role transformations that we might have preferred to have seen catalyzed by same sex marriage. Money management research has consistently found that women perceive that they have less entitlement to shared relationship funds, have less control over household finances, and less access to personal spending money than their husbands (Burgoyne, 1990; Nyman, 1999; Pahl, 1990). Interestingly, Sonnenberg *et al*'s (2011) experimental study on attitudes to intra household financial organisation found that the pooling of all income with both parties having equal access (despite any differences in income level) was perceived as the most desirable money management approach. They did, however, also find that "people's norms regarding the organisation of household money may be subtly shaped by who contributes what to household income" (Sonnenberg *et al*, 2011: 579), with the concept of 'perceived ownership' suggesting that higher earners have a stronger entitlement to relationship funds and personal spending money, and that this was more strongly

associated when the higher earner was male. These differences in constructions of ownership and entitlement to shared relationship funds appear to be somewhat amplified in same sex relationships, with less pooling of resources and greater levels of financial independence in same sex couples. It is possible that as more same sex cases are litigated (and there is no doubt that they will be over time, notwithstanding the preference for settlement in these matters), normative constructions of financial interdependence in relationships may be shifted in directions away from equality and towards lower levels of compensation for economically weaker parties.

Concluding Remarks

Same sex relationship dissolution appears to be taking place in ways that pose novel challenges for family law. Some of the differences highlighted here between same and different sex relationships, such as retaining friendly interpersonal relationships with ex partners, may well provide a positive example for straight couples. Similarly, lesbian and gay couples' apparent preferences for settling their family law disputes, rather than litigating, would appear to be in keeping with wider governmental 'nudges' in the direction of mediation, arbitration, private ordering and avoiding (lengthy, costly) family law disputes. Nevertheless, same sex couples' different approaches to relationship finance, that tend to emphasise financial independence rather than interdependence, could have the potential to encourage a retreat from redistributive models of resource allocation on relationship breakdown.

It is tempting to see the preference for financial independence in same sex relationships as a function of greater levels of equality within same sex relationships, or as a result of relatively similar income or earnings potential between the parties. But the participants in this project suggest that this is not actually the case. Instead, we would argue, the preference for settling dissolution matters, and the relative resistance to both compensation and maintenance found here, reflects pre-civil partnership approaches to relationship breakdown and the previous lack of legal support on the breakdown of longstanding same sex relationships. As those in same sex relationships find that they are no longer positioned outside of or "against" the law, approaches to money management in legally recognised same sex relationships may shift towards greater levels of financial interdependence. Given the assumptions around financial interdependency that are inherent in the legal recognition of same sex partnerships, and the consequent reduction in welfare to support to those in same sex relationships (including those who do not choose to marry or enter into a civil partnership), it seems likely that higher levels of financial interdependence within same sex couples will result. Fundamentally, however, further research is now needed to explore the extent to which legal recognition of same sex relationships changes the ways that same sex couples experience law in their everyday lives.

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