



A 'Divorce Blueprint'? The Use of Heteronormative Strategies in Addressing Economic Inequalities on Civil Partnership Dissolution

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Abstract

This article will explore data obtained through interviews with UK family law practitioners and clients with experience of financial relief on formalised same-sex relationship breakdown. It will focus on questions around how solicitors have approached and argued their dissolution cases (and the extent to which they have drawn upon heteronormative arguments and case law), and whether both they and the clients believed that civil partnerships are, and should be, treated similarly to marriages. The discussion will examine the different understandings of 'equality' employed, and question the ways that the participants relied on ideas of sameness and difference. It will be argued that the solicitors placed particular stress on sameness, and that heteronormative constructs of gendered inequalities have been transplanted into same-sex cases, in a system where practitioners' submissions are based on 'what works.' This is despite the fact that lesbian and gay couples do not map onto the 'template' under which the parties have been subjected to different gendered expectations. Conversely, the clients were less willing to take on the full legal implications associated with (heterosexual) marital breakdown and less receptive of the solicitors 'translating' their matters to pigeonhole them into the existing framework.

Keywords: civil partnership, relationship breakdown, financial provision, equality, heteronormativity, legal practice

Résumé

Le présent article examinera les données obtenues grâce à des entrevues réalisées auprès d'avocats en droit de la famille et de leurs clients en Grande-Bretagne ayant de l'expérience avec l'aide financière consécutive à la dissolution de relations homosexuelles formalisées. L'on examinera notamment la façon par laquelle les avocats plaidants ont abordé et argumenté ces affaires judiciaires (et la mesure par laquelle ils ont employé des arguments hétéronormatifs et de jurisprudence), et si les avocats et leurs clients estimaient que les partenariats civils étaient assimilables à un mariage et devaient être traités comme tel. La discussion examinera les

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diverses façons par lesquelles la notion d'« égalité » est appréhendée et la façon par laquelle les participants ont interprété les notions de similitude et de différence. L'article avancera que les avocats ont insisté sur l'aspect de la similitude et que le concept hétéronormatif d'inégalité entre les sexes a été transplanté à des affaires concernant des couples de même sexe, dans un système où les arguments des avocats se concentraient sur « ce qui fonctionne ». Ceci s'effectue malgré le fait que les couples homosexuels (hommes ou femmes) ne précisent pas la façon par laquelle chacune des parties a été soumise à des attentes différenciées selon le sexe. Ceci dit, les clients homosexuels étaient réfractaires à l'idée d'assumer les pleines répercussions juridiques inhérentes aux dissolutions de relations maritales hétérosexuelles et peu intéressés à ce que les avocats « traduisent » leur affaire afin de l'insérer dans le cadre juridique existant.

Mots clés : partenariat civil, dissolution de relation, secours financier, égalité, hétéronormativité, pratique juridique

1 Introduction

The system of financial relief in England and Wales is framed in a way that attributes legal actors with an integral role in shaping the law. The main statutory provision governing the division of assets, section 25 of the *Matrimonial Causes Act 1973*, dictates that the courts should take a number of factors into account in deciding how redistribution should be effected (including the parties' incomes and resources, their financial needs and obligations, and their standard of living). The factors listed in the statute are not ranked, and the weight attributed to them is discretionary. The *Civil Partnership Act 2004* makes provision (at Schedule 5, Part 5) for financial relief that corresponds with the 1973 Act. Notably, at the time of writing, civil partnerships are only available to same-sex couples, although a test case has been launched challenging the ban on heterosexual civil partnerships (Bowcott 2014). Under the more recent legislation, as is the case with the former, lawyers are working to flesh out the bare bones offered by the statute. That being the position, I argue that it is important to look behind the formal principles espoused and to consider the normative frameworks working behind them. I identify an important one of these as 'heteronormativity,' by which I mean that heterosexual identity and gendered practices are "expected, demanded and always presupposed" (Chambers 2007, 662). I have in mind "those structures, institutions, relations and actions that promote heterosexuality as natural, self-evident, desirable, privileged and necessary" (Cameron and Kulick 2003, 55). Heteronormativity manifests in various practices that work to entrench gender in accordance with notions of 'maleness' and 'masculinity' (and, thus, behaviour such as engaging in the production and circulation of commodities, and a disengagement with domestic labour) and 'femaleness' and 'femininity' (involving the performance of work within the home). Legal practitioners have been tied into this 'straightjacketed' way of thinking, given that they will represent their clients on the basis of previous successes, and that they are themselves exposed to social norms. At the same time, my empirical work

suggests that legal actors are performing somewhat more of an active role, operating to repeat heteronormative relations.

I have asserted elsewhere that, in the three significant (heterosexual) decisions of *White v White* [2001] 1 AC 596, *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618, and *Radmacher v Granatino* [2011] 1 AC 534, the courts upheld heteronormative constructs of gendered inequality (Bendall 2014). In *White*, the House of Lords set out a “yardstick of equality,” centring around fifty-fifty asset division. Although the system of financial relief in England and Wales is not based on community of property, the “yardstick” aimed to implement something like this, with scope for adjustments to achieve fairness. It arguably works on a difference-blind, formal equality type approach that a person’s individual characteristics should be viewed as irrelevant in determining whether they have a right to gain. This now forms the principled basis, at least in larger money matters (where the assets are in excess of the parties’ needs), on which law demands the assessment of financial remedy. The Court introduced this approach to address the differential positions of women and men, and it may be considered a positive development, protecting women against possible harms suffered within the family. Indeed, it might be argued that little else could be done by the Court in this respect. However, the judges missed out on the opportunity presented by the facts to convey a significant message relating to the organisation of family living and ‘women’s work.’ Insufficient emphasis was placed on the point that household chores need not be something completely unrelated to the activities of ‘breadwinners’ (with Mrs. White both having brought up the children and having worked on the farm). In the later case of *Miller/McFarlane*, a new element of ‘compensation’ was introduced into the financial remedy equation. This was intended to achieve a form of substantive equality (under which the law applies differently to different groups), raising homemakers from their subordinate position. Nevertheless, the economic obligations created by care giving under this element are quantified in terms of lost market opportunities. Thereby, greater significance was placed on the traditionally ‘masculine’ role of market earning, with this working to sustain structural disadvantage. Finally, I have contended that the decision to hold the husband in *Radmacher* to an unfavourable pre-nuptial agreement evinces a further type of formal equality under which the husband and wife were treated as contracting parties. The outcome seems to have been reached on the following bases: the husband’s failure to live up to his ‘masculine’ earning potential; his lack of (‘feminine’) vulnerability; or in recognition of his autonomy (as less frequently occurs with women).

I contend that, in these cases, the courts expressly attempted to address a scenario where men and women adopt different roles in a (heterosexual) marriage. In affirming this disparity, they naturalised traits that perpetuate the oppression of women. Their judgments add force to the idea of women as being “biologically domestic and dependent,” treating their difference from men as inherent (Sorral 2011, 31). Particularly, they work to reinforce assumptions about a ‘woman’s place’ that women have struggled for years to escape, with “the law and legal institutions reflecting the idea of women as being ‘tied to the family’” (Fineman 1995, 16). In spite of this, judicial reliance on such notions has fed into the way that solicitors

advise their clients. It appeared that civil partnership matters might hold the potential to pose new challenges to the use of these traditional stereotypes in the financial relief context. Butler (1999) has argued that “subversive” identities, such as those of lesbians and gay men, can help to demonstrate the constructed nature of gender roles, helping to destroy their normative status. This is especially the case given Peel and Harding’s (2004) contention that, in the relative absence of pre-existing models, lesbian and gay relationships are conducted more creatively than different-sex couples. Indeed, same-sex couples do appear to do many things differently to heterosexual couples (Kurdek 2007; Patterson, Sutfin, and Fulcher 2004). Yet, *Lawrence v Gallagher* [2012] 1 FCR 557, the first reported same-sex case of this kind, suggested that the parties were still presented so as to be understandable on heteronormative terms. Although concentrating less on depicting them in accordance with a binary model of familial roles, both (male) parties appeared to be judged on the same (money-earning) basis, marking little change in the application of assumptions about ‘masculinity’. In this way, the case indicated that civil partners are being assimilated into the heterosexual norm. Of course, though, to focus on *Lawrence* alone provides an incomplete picture of how the law is operating in these new circumstances. It is for this reason that I embarked upon conducting in-depth interviews with fourteen solicitors in England and Wales who had had experience of civil partnership matters, alongside ten people who had sought legal advice on their own dissolution.

This article will explore the data obtained in those interviews. It will assert that heteronormative constructs have been transplanted into civil partnership cases, with emphasis being placed on sameness of treatment between same- and different-sex couples. This is notwithstanding both client attempts to emphasise difference and the fact that, in the context of same-sex relationships, there is less of a need to address gender-specific forms of distributive injustice. The article will argue that, rather than being treated as “other,” lesbians and gay men are being “included into the dominant system” (Boyd and Young 2003, 757). That being the case, they are being denied their radical potential in relation to social transformation, and the existing system of norms is being strengthened. The law’s assimilation discourse is resulting in a failure to expose the constructed nature of ‘masculine’ and ‘feminine’ roles in formalised relationships and to cast light on broader changes in family life.

2 Methods

The dataset in this research originates from an interviewing project undertaken between September 2013 and June 2014. This method was selected because it was felt that hearing how things are working ‘on the ground’ would best enable the gathering of information about heteronormative practices. The focus of the project was chosen because the law “is not exclusively encompassed by case law and the discourse of high-ranking judges [...] it is also what fairly low-ranking solicitors do every day” (Smart 1984, 149). The solicitors’ firms were identified through carrying out an Internet search for the term ‘civil partnership dissolution solicitor.’ The firms’ websites were subsequently examined to establish whether any of the

solicitors' 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, of which practitioners from ten different firms agreed to participate. 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, and, in addition, several solicitors were reluctant to grant access to their clients. Accordingly, 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 who had sought legal advice. Twitter was also employed, 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.

In terms of the solicitors interviewed, five were males and nine females, and eleven identified as heterosexual, two as lesbian and one as gay. They ranged from twenty-eight to fifty-nine years of age and dealt with cases concerning a range of assets, from modest amounts to multi-million pound matters. The solicitors were located in the Southwest and Southeast of England, Greater London, and the Midlands, and their exposure to civil partnership matters extended from having assisted more senior solicitors (in a junior capacity), to having advised on around fifty such cases. Of the clients, six were men and four were women, and six identified as gay, two as lesbians, one as both, and one as bisexual. They ranged from thirty-eight to fifty-four years of age and resided 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 the process. The partners' relationships varied in length: although one client had been with her partner for twenty-five years, a further one spent only a week living with her civil partner, with there having had a year of prior cohabitation. The data obtained from these participants were examined using thematic analysis to identify dominant themes, which revealed insights into the ways in which solicitors have been negotiating the issue of gender in gay and lesbian financial relief cases.

Three themes, relevant to heteronormativity, were apparent in the data, some of which relates to the earlier interactions between practitioner and client, whilst the rest concern the construction of the case itself. The first theme was that the solicitors asked their same-sex partner clients the same questions that they would ask a client in a different-sex relationship and that they appeared not to be permitting answers that did not fit the gendered 'script.' Secondly, they presented their cases so as to centre around gendered stereotypes that have been carried over from the heterosexual cases. The third (related) theme is that legal actors tended to view 'equality' as entailing sameness of treatment or, in the case of asset division, a fifty-fifty split (as per the judgment in *White*). I will now discuss each of these themes, highlighting how heteronormative constructs of gender inequalities have been applied.

3 Asking the Same Questions (and Only Hearing the Same Answers)

In terms of the conduct of their meetings with their clients, there was a level of inconsistency as to whether there was a disparity between the questions that the practitioners asked their civil partner and married (heterosexual) clients. Mr. Henry¹, for example, considered that “the fact-finding is different” on the basis that “the things that were relevant in the relationship would have been different.” When asked how his questions might vary, he struggled to explain, ultimately considering the main difference to be the lack of children in lesbian and gay households. Mr. Arnold, moreover, set out how “you’ll want to know about how [same-sex partners have] ordered their lives, possibly a bit more than you would in a straight case,” whilst Ms Gale asserted that she sought to ensure that her questions were “as open as possible, so that they don’t feel like, actually, you’ve stereotyped them into a box.” That said, Ms Gale’s responses were contradictory, given that she proceeded to state that “civil partnership couples are no different to heterosexual couples.” Indeed, the practitioners more frequently claimed that there was no marked distinction in what they would ask lesbian and gay clients. Ms Lane, for instance, explained that she talked with them at the initial meeting about “the usual things,” and Ms Boyce stated that her preparation for such a meeting would be “the same as any family client.” She did consider that she would be “more tentative” in delivering her advice because “it’s not as if you can put your finger on something and say, ‘look, this has happened before and we’re really sure about this, because this has been to the Supreme Court.’” Yet she explained that her advice had been “generally based on all of the matrimonial work that I have done before for heterosexual... because, you know, the factors are so similar in the way that it’s been drafted, that’s what we’re basing it on.”

Such descriptions accord with the experience of client Caroline, whose solicitor had asked her questions concerning “how long I’ve been married, [...] the normal sort of questions that, you know, a solicitor would ask a married couple” (it is argued that the use of the terminology of ‘marriage’ is, in itself, significant). She had an informed perspective on this, having previously experienced a (different-sex) divorce. On a related note, Jennifer pointed out that her legal representatives did not “ask any additional questions to find out if there’s a difference” between same- and different-sex familial life “perhaps out of embarrassment, or lack of knowledge.” She explained that “if somebody doesn’t do that, you’re not going to volunteer anything that you perceive, because you don’t know whether it’s relevant, when you’re talking to somebody whose time is being charged at god knows what by the hour.” The client’s response is striking, because it suggests not only that the solicitors may be asking the (wrong) questions, but also that they are not encouraging answers that fall outside of traditional norms. Jennifer’s impression furthermore sits compatibly with Calhoun’s (2000, 34) point that lesbians and gay men feel obliged to present themselves in accordance with heterosexuality as a “condition of access to the public sphere.”

¹ Clients have been assigned first names and practitioners surnames to allow them to be distinguished.

A repercussion is that they are denied the possibility to tell their legal representatives new stories about their relationships, with the potential of their more “democratized, flexible model” of domestic life going unrealised (Weeks 2004, 161). Interestingly, both bodies of interviewees perceived that civil partner clients may feel more comfortable where the solicitor her or himself is a lesbian or a gay man; Isaac considered that this would have reduced his feeling that “I was being judged.” Nonetheless, around 97 per cent of those responding to a question in the Law Society’s (2014, 10) practising certificate holder survey identified as heterosexual, and even those who did not are subjected to the same pressures, in a precedent-based system, to accord with existing case law.

In the context of a lack of reported dissolution cases, the practitioners adopted a directed (heteronormative) approach to advising their civil partner clients. Mr. Arnold emphasised how he would say to a client, based on his experience in heterosexual cases, that “this is the stuff that courts look at, and so let’s try to focus on this, and [...] yes, I know that that’s really important to you, but it’s not going to make any difference.” In that way, the solicitor was “legitimizing some parts of human experiences and denying the relevance of others” (Sarat and Felstiner 1995, 147)). Mr. Arnold’s response here supports Harding’s (2011) observation that “legal knowledge” excludes other forms of knowledge, in addition to Smart’s (1989) argument that legal professionals will disqualify alternative accounts in favour of “legal relevances.” Ms Field likewise described how “you sit at this side of the desk and you so easily just get into the script. You just throw it at them,” whilst Ms Gale detailed how she sought to provide her clients with “an honest answer as to whether the things in their life matter” (which is noteworthy, given her above discourse about openness).

Overall, it appears that there are, in practice, understood to be few differences between conducting advisory meetings with civil partnership clients and advising heterosexual partners on divorce. A shortage of experience of civil partnership cases has led solicitors to place stress on a sameness approach between same- and different-sex relationships, as opposed to the accommodation of difference. Practitioners have sought to include same-sex matters within their knowledge base developed from heterosexual divorce proceedings (and legal precedents). In so doing, and by focusing on the things that ‘matter,’ they have been fitting their same-sex clients into the heteronormative mould. Such an approach is congruous with the overall strategies adopted by the practitioners for arguing their lesbian and gay clients’ cases, which I will now explore.

4 Arguing on the Basis of Gendered Stereotypes

Prior to considering the tactics employed to present same-sex matters, I will examine the practitioners’ reports of what has been happening in different-sex cases. This is given that the way that solicitors construct their cases will be driven by what they perceive that the courts want to hear. In this respect, Ms Boyce contended that “you’ve got to be expecting that the judge is going to be dealing with it as a divorce case, because that is what they know, that is what you know.” That assertion complies with O’Donovan’s (1993, 64) argument that lawyers present their clients so as to appear as though they are performing an “appropriate social role”

as a “normal member of society,” as well as with Sarat and Felstiner’s (1995) suggestion of lawyers’ participation in the “normalisation of identities.” Bearing out my previous submissions, the solicitors set out that divorce matters have centred around ideas of there being distinct roles for men and women in a marriage, with a patterning of status taking place. Mr. Arnold referred to there being an “open secret” that “men and women are [...] viewed differently by the courts.” Whilst stressing that the courts “do affiliate women with children,” he described how, even where childless, “women are still treated very paternalistically.” Ms Gale, repeating this sentiment, noted a desire amongst judges to “protect” wives, presumably on the basis of their ‘feminine’ vulnerability. Conversely, men remaining at home are treated less favourably. This not only bears relation to the notion of the providing ‘masculine’ man, but also a claim by Ms Field that “it’s easier for the courts to work out what is a contribution to the welfare of the family when it’s done by a woman [...] it’s just what we’re used to.”

Such perceptions of heterosexual cases must be borne in mind when considering the accounts of same-sex matters. This is as a result of assertions, such as that made by Mr. Derrick, that “we have a framework there, and the case law should be relatively applicable across.” Ms Clarke emphasised that “I would literally apply all of the principles that I do already,” whilst Mr. Kennedy highlighted that the case of *Lawrence* had demonstrated to him that “the rules are exactly the same.” Ms Gale adopted a less confident line, providing civil partner clients with a “cautionary note.” Nevertheless, the nature of that note was that “we’re going to have to advise you on the basis of what it would look like on a heterosexual relationship, umm, until a bigger bank of case law is increased.” This occurred when client Debbie sought legal advice, and the solicitor sought to explain her position by using fictional scenarios concerning himself and his wife. Returning to the practitioner perspective, Mr. Kennedy used a similar strategy, where he described saying to a civil partner client, “I’m sure that you know somebody that’s been divorced. These are the claims that would have arisen, and these are the same claims that arise here.”

It may be unsurprising that the solicitors should adopt this approach, given that Mr. Arnold explained that “we’re told repeatedly, ‘it’s the same as marriage,’” and “to use the divorce cases.” In addition, a number of the solicitors mentioned the fact that the forms are now the same, with Ms Clarke pointing out that “it’s a divorce/dissolution/judicial separation petition [...] everything has been amalgamated.” We might question the appropriateness of this, given the lack of desire expressed to abolish civil partnership in light of the recently passed same-sex marriage legislation, signifying a continuing wish for a separate institution (Department for Culture, Media and Sport 2014). In spite of this, the indications from the data are that practitioners are reverting back to heteronormative assumptions when dealing with civil partnerships and, particularly, to traditional ideas of ‘masculinity’ and ‘femininity.’ This works against the ideas that lesbian and gay identities can challenge the fixed categories of ‘man’ and ‘woman,’ and that formalised same-sex relationships might “destabilise the gendered definition of marriage for everyone” (Hunter 1991, 12). With reference to relationship breakdown, the suggestion is that Graff’s (1997, 137) prediction that gay and

lesbian partners will be treated as “equal partners, neither having more historical authority” has not necessarily come to fruition. Moreover, the responses gathered seem to support Smart’s (1992) portrayal of law as a gendering strategy. By this, I mean that the law encourages the adoption of gendered subject positions and identities (with this tying in to O’Donovan’s (1993) argument that family law and its discourse construct a gendered “story”).

Anthony felt that, in his case, “the whole premise” was that his partner was a “woman.” Whilst Anthony had worked throughout the relationship, his partner had not, and this had been a “bone of contention.” However, he described how his ex-partner’s representatives had used this to their favour, arguing the case as if “he gave up work, he brought up the children” (he was speaking figuratively, as there were no children), and as though “I literally would walk in and I would have my slippers at the door and supper on the table.” The account of Mr. Arnold, Anthony’s solicitor, complied with this, explaining that it had been asserted that the ex-partner “did a lot, cooking and cleaning,” even though a cleaner had been employed. In setting out how the legal actors, at least on one side, were “posturing that one’s a man, one’s a woman,” Anthony detailed how his case was constructed to accord with a binary familial model. Whilst it is, of course, recognised that financial disadvantage does still need to be addressed in the context of same-sex relationships, my intention here is to highlight this problematic labelling of the parties’ behaviour (reinforcing the idea that domestic labour is ‘women’s work’). The client believed that “prejudice was very much being pushed down the throat of the judge,” on the basis of preconceived views about relationships.

Anthony highlighted that his ex-partner’s legal representatives contended that “I wouldn’t have been earning what I earn if he hadn’t ‘supported’ me.” He did not personally view the relationship in this way, although one wonders whether he would have adopted the same view had the relationship endured. Moreover, it may be that an interview with Anthony’s partner would have revealed a different story. It was not possible for practical reasons to recruit both parties of any relationship, with the result that it was unavoidable that there would be a reliance on one person’s narrative to extrapolate how the law constructs a couple. It is recognised that this might seem problematic where the narratives may have contradicted one another, and that it offers only one perspective as to how the partners organised their family living. Nonetheless, the client felt that his career had already been progressing well when he had met his partner, and that “I would probably have been in a similar situation had we not met.” In terms of further arguments that were raised, Anthony described how the other side had submitted that “we’d been accustomed to a joint lifestyle and [that] it was therefore ok for my ex to continue with that lifestyle without working.” This submission relates back to heteronormative notions of (‘feminine’) economic dependency, whilst conceptions of joint living seem incompatible with suggestions of greater financial separateness amongst same-sex partners (Burgoyne, Clarke, and Burns 2011).

The client felt that he and his ex-partner had been “pigeonholed” to fit the existing framework, when “the case law that is cited shouldn’t be heterosexual because [same-sex couples are] different.” Anthony considered that “we didn’t run it on the other side saying that I was the man, I was the ‘breadwinner.’” Alternatively, though,

he described them as having “tried to neutralise it and just say, ‘we’re two blokes [...] he needs to get a job.’” Mr. Arnold’s account is compatible with that explanation, detailing that “the way that we presented it was simply that [...] he’s got a number of language skills, you know, he’s capable of earning a decent amount of money.” This argument evinces what I have contended elsewhere to be the most persuasive interpretation of *Lawrence*, under which the parties were treated in accordance with formal equality, based on lack of gender difference (Bendall 2013). Anthony’s representatives were arguing that both parties should be judged according to pervasive notions of ‘masculinity’. Therefore, in one way or another, the practitioners seemed unable to transcend heteronormative ideas about gender. The indications were of an all-encompassing application of the heteronormative framework, with little consideration given to the ways in which the parties’ lives may be unscripted.

Similar observations might be made regarding the legal advice received by Isaac. In accordance with the arguments made on Anthony’s partner’s behalf, the client described being informed that “I was being seen as the breadwinner, he was being seen as the [...] other party within the relationship that didn’t have the funds.” In this case, the stress was not on his ex-partner’s domestic contributions. Isaac expressed disappointment and frustration, though, that his solicitor had framed their discussion in terms of “this is how it works for heterosexual couples,” responding that “we’re not a heterosexual couple.” It is significant that he should emphasise the different nature of same-sex relationships in the face of a sameness-centred practitioner approach, and the suggestion is that a level of resistance has been maintained to legal heteronormativity. The client opined that “almost the divorce blueprint that they had been working with for, you know, decades, she was trying to fit that into, umm, a gay couple’s lifestyle, and it doesn’t work,” highlighting this especially to be the case in the absence of children.

Isaac proceeded to contend that “the divorce process [...] hasn’t grown as society has changed [...] it hasn’t, umm, evolved at all [...] Divorce really is ‘one size fits all.’” It is noteworthy that that terminology should be selected, given that identical phrasing was employed by George in stating that his solicitor had been “sort of, ‘one size fits all’ with everything and, ‘well, there’s two of you, the same as if there were a man and a woman.’” That description is consistent with a point raised by solicitor Ms Boyce about “the risk that things will just be very much done as rote in terms of that, ‘well, I’ve dealt with 3,000 divorce cases and now I’m starting to deal with civil partnerships, and this seems to fit the mould of what I’ve dealt with before.” She felt that “there’s going to be a lot of match-up with the way that divorce cases have been dealt with as to the way that civil partnerships will be dealt with,” even where the facts were not directly comparable. Ms Clarke implied the same, explaining that she “slipped” between the language of ‘divorce’ and ‘dissolution’ because the former is “what I do every day.”

Returning to Isaac, the client explained that it had been submitted on his partner’s behalf (as will often be the case in relation to wives in heterosexual matters) that, because he had become accustomed to a “luxury lifestyle” during the relationship, he should still be able to “expect to go and have nice food, [...] have holidays.” Isaac found such arguments “difficult,” given that the scenario

“came down to two men in a relationship [...] we could both go out and earn a fairly decent wage.” The client’s response here, once more, harks back to ideas about ‘masculinity’ and it is possible that these could be attributed to his legal advisors (at least, to a degree), given that his account suggests that they behaved inflammatorily. This was hinted at where Isaac reported having talked through with his solicitor “why [his partner] wasn’t prepared to bring money into the family unit.” However, it was most evident where he explained that they had said to him that, within his relationship, “I’m really sorry, but you have just been used.”

Drawing this discussion together, within Anthony and Isaac’s matters, the financially weaker side placed greater weight on a binary construction of roles. Conversely, the more moneyed side, particularly in Anthony’s case, put emphasis on the point that both partners were, as men, able to provide for themselves. The former line of argument links in with solicitor assertions, such as that made by Ms Field (albeit with reference to a younger man with an older ex-partner), that there is a temptation to present a same-sex matter in a ‘breadwinner’/‘homemaker’ fashion. In this way, the solicitor was explaining that she would draw on heteronormative constructs of gendered inequalities to obtain a favourable result for her client. She proceeded to set out that she would argue on her client’s behalf that “I’ve supported you, I’ve ironed your shirts.” Despite this, Ms Field felt it more difficult to argue on behalf of a gay client that “I’ve stayed [within the] home and looked after it,” expressing the view that “you’ve got to prove that more.” She emphasised that, under such circumstances “I would question them quite carefully about what they did.” This comment is of note on two bases: firstly, because it suggests that a man performing the role of the ‘typical’ housewife has not done enough to obtain an equivalent award; secondly, because an additional implication is that wives tend not to be asked “carefully about what they did” (presumably, because assumptions are made about the tasks that a housewife performs).

Turning to the lesbian clients interviewed, traditional gender roles featured most heavily in Debbie’s account. She mentioned her ex-partner’s argument that “she was the main ‘breadwinner,’” even though Debbie had also worked part-time. Although the client acknowledged that she had performed the majority of the domestic chores, she felt that there had been an over-emphasis by the legal actors on “whether you’re the wife or the husband.” In fact, Debbie’s view of the court proceedings in her matter was striking, with her perceiving that legal representatives “speak on your behalf, and that’s it.” She pointed out that she had not understood the submissions made, consequently feeling “completely out of my depth,” and expressing the opinion that, as a client, you lose control of your case to lawyers (see Harding 2011). To take this idea further, whilst Smart (1984, 160) argues that lawyers “translate” matters into “legally recognisable categories,” that occurred to such an extent that the client’s conflict became unrecognisable to her. This point was hinted at further by Jennifer, who considered that her solicitors “see that they have a job to do, and they will take instructions from me [regardless of] whether I’m fully understanding of what to tell them.”

As to the solicitors themselves, Mr. Derrick recounted that the opposing party in a lesbian matter he had worked on had submitted that “my client has been the homemaker, [so] sharing, compensation, needs, it’s all got to be in.” In this way,

they were arguing for an award that included the element of substantive equality that was introduced by *Miller/McFarlane*. This is despite the fact that, in same-sex relationships, the parties are subjected to the same gendered expectations. Of course, I am not arguing here that there necessarily cannot be a more vulnerable party in a same-sex relationship. Nevertheless, the roles performed by each partner will tend to be based more on autonomy and choice, and to be less constrained by external rules (and, in any event, what I am intending to critique is the unthinking application of a framework that is mismatched with the parties' realities) (Weeks 2007). Mr. Derrick stated that, in that particular case, the other side had portrayed their client as "being supportive of her partner, who was the higher earner." He did, however, express uncertainty about where this 'homemaker' portrayal had originated from; he set out that the ex-partner had seemed "quite happy to paint herself as the little woman. Whether that was her or whether that was the advice that she was given, I don't know, but I thought that it was quite a good approach." In a similar vein, Ms Boyce explained that, when acting for that side of the partnership that has stayed at home "one would want to emphasise those features that are on the 'feminine' side, if you like. So, for example, 'oh, she cared for the elderly grandmother' [...] or, 'she was nurturing something.'"

As regards this association of women with caring, we find additional evidence in Ms James's description of a case with shared childcare subsequent to dissolution. She stated that there had been a disparity in salary between the women concerned, although the court had permitted a clean break. The solicitor felt that "that would not be allowed to happen if they were straight [...] the judge would say, 'no, we want nominal maintenance.'" She believed that the outcome was reached because the court was confident that both parties, being women, would ensure that the children were looked after. This was as opposed to the position where the man is more closely associated with 'masculine' providing, and the woman with 'feminine' caring. In this way, assumptions still seem to have been made about the women on the basis of 'femininity,' with neither partner being treated as the money earner. That observation works somewhat against Calhoun's (2000) suggestion of lesbians being viewed as "ungendered." That said, the lesser earning party within Ms James's matter was apparently not conceived of as vulnerable, as tends to occur in relation to female partners in heterosexual relationships. There are hints that lesbians are almost being treated as 'not-women,' in the sense of notions of traditional dependent 'femininity.' This ties in with a point raised by Ms Irvine, albeit in relation to a dispute under the *Trusts of Land and Appointment of Trustees Act 1996*, on the death of her client's lesbian partner, that she had "never been asked to do the amount of work that we had to do to prove dependency."

More broadly, though, the solicitors appeared to have been working to construct their clients' cases to fit with heteronormative ideas about gender roles in relationships, missing the complexities of real life. This is in spite of contentions that non-heterosexual people are "in the vanguard," having the capacity to become the "arch inventors" in society's "life experiments" (Weeks 2004, 159). It has been asserted that 'queerness' entails "dyadic innovation and support for gender nonconformity" (Green 2010, 429). However, lesbians and gay men have, to a large extent, been assimilated into the mainstream, with the radical potential

of their formalised relationships diminishing. It may be little wonder that this is occurring, given both that the formal legal framework largely mirrors that of marriage, and that the suggestions in the parliamentary debates concerning the 2004 Act were that it was intended to bring about “inclusion, rather than social change” (Stychin 2006, 81). Indeed, as Hunter (1991, 29) has acknowledged “the impact of law often lies as much in the body of discourse created in the process of its adoption as in the final legal rule itself.” Nevertheless, I argue that civil partnerships, having *prima facie* facilitated greater social and legal ‘equality’, have at the same time stood to “impose a ‘marriage model’ based on traditional gendered power relations (Rolfe and Peel 2001, 324). I will now question the way that this idea of ‘equality’ featured in my interviewees’ narratives, focusing on the interlinked understandings of ‘equality’ between same and opposite sex couples and between the partners themselves.

5 ‘Equality’ as Sameness of Treatment?

As regards their discourses around ‘equality’ between same- and different-sex partners, the solicitors’ emphasis was again on formal equality, or sameness of treatment. Mr. Arnold explained that the Law Society’s equality and diversity training led solicitors to understand that “we must treat this exactly the same.” The solicitor reported a barrister having stressed to him that “judges are just so keen to show that there’s equality that it’s going to be no different from a married case.” Ms Ennis employed identical terminology whilst setting out her view of equal treatment, explaining this as being because lesbians and gay men have “the same expectations, lifestyle [...] they’re no different.” Ms Irvine highlighted that “you should not distinguish at all,” whilst Ms Boyce even went so far as to say that “if you are doing anything different to heterosexual couples, there is a danger that you’re going to be accused of being prejudiced.” What we see here is little evidence of Fraser’s (2012) equality of ‘recognition.’ Whereas that ascribes value to diversity, what is occurring is a misrecognition of the ways in which same-sex relationships can be different. Not only this, but the practitioners’ approach is incompatible with Ettelbrick’s (1997) understanding of “justice,” under which lesbian and gay couples are supported in spite of their differences from the “dominant culture.”

Turning to the clients, however, this notion of formal equality likewise featured strongly, with respondents failing to recognise the heteronormativity of the frameworks into which inclusion was sought (Harding 2011). My findings in this respect are consistent with Denike’s (2010, 148) assertion of the abandonment of queer critiques of the family in favour of access to “privileges of the state.” Caroline considered that “it doesn’t matter whether you’re gay or straight, you should be treated exactly the same,” and Heather contended that, were she a legal advisor, she would treat a civil partnership “in the same way as I probably would, umm, a normal marriage.” George similarly felt that the fact that the forms were the same for dissolution “did feel more equal to divorce,” and Isaac considered it “a milestone for lesbian and gay couples to be treated the same [as opposite sex couples] in the eyes of the law.”

Conversely, Ms Field felt that “you can’t compare the non-earning, or the lower earning, lesbian or gay partner to the wife and the mother [...] because you can’t

discriminate, can you, between men and men and women and women.” As well as this, some practitioners placed emphasis on it only being appropriate to adopt a sameness approach where the facts are directly analogous. Ms Gale, for example, only considered it possible to treat lesbian and gay couples the same as heterosexual couples without children (although arguments centring around sameness were, of course, adopted in relation to the childless clients discussed above). One wonders, given the previous assertions about the routine application of the heteronormative framework, to what extent practitioners would recognise the circumstances of the cases before them as non-identical. Yet Mr. Derrick, taking the idea further, recognised that “there are cases where there are differences, there are cases where there are niche issues, there are ones that do require different thought processes.” The practitioner was unspecific as to what these issues might be, although perhaps he was referring to the “demarcation of financial arrangements” that he raised in terms of his civil partner clients. He was contradictory on this point, though, also suggesting that “there’s got to be a uniform way” of treating financial relief. This sameness-centred approach, which featured more commonly, might be criticised for “fail[ing] to envision a [...] transformative model of family life” (Polikoff 2000, 167). By attaining inclusion based on rationalising of this nature, lesbians and gay men may seem to become the champions of heterosexual marital values, thus reducing their potential to challenge the way that gender works in every relationship.

Moving on to consider what ‘equality’ means in addressing potential economic inequalities of relationship breakdown, Ms Boyce asserted that it “isn’t that [the partners] each keep what they’ve got. It’s joining everything that they both own, whether it’s in [...] their sole name [or not], and putting it in a pot and then dividing it.” Again, the solicitor is arguably neglecting to notice the financial separateness that may be a more common feature amongst same-sex couples and, consequently, the lesser degree to which it may be appropriate to transfer property between partners on relationship breakdown. In a similar vein, Mr. Henry viewed that “I can’t see that the concept of sharing would be any different [in the civil partnership context] after a long relationship.” A number of the solicitors suggested relationship length to be a determining factor, with shorter relationships being approached more on the basis that “you come in with what you go out with” (as expressed by Ms James). As to the longer-term relationships, though, Mr. Arnold considered that “the door’s shut, for the time being at least, for doing anything but fifty-fifty.” He further contended that “most of our cases are not many tens of millions and the reality is that, in the courts on a day-to-day basis, most judges are not interested in arguments about an unequal division.” Despite the solicitor’s claims about his caseload, Mr. Arnold deals with relatively large money matters, and his comments should be considered as against those of solicitors working on more ‘everyday’ cases. Ms Lane, for example, viewed it to be “rare” to come across a case where the assets are divided fifty-fifty, as a result of ‘needs.’ Even so, she stated that “cases we negotiate, you try to get as near to fifty-fifty as you can” (and this seems consistent with Hitchings’s (2010) point that the ‘big money’ principles have been given weight in larger value everyday cases). A more formal (*White*-based), difference-blind approach to equality

still seems, at least to an extent, to have influence, and this might be difficult to justify in relationships where there is no particularly vulnerable party.

Returning to Mr. Arnold, the practitioner contended that his approach was based on the notion that “if you’re signing up to a contract of marriage or civil partnership, you should expect to share what you bring in.” My data have suggested that this is not necessarily what many civil partners have been expecting (although, notably, the partners’ surprise was more in terms of ongoing responsibilities). For instance, Ms Field indicated that her lesbian and gay clients would often provide “a mathematical calculation of what they’ve paid, and I don’t usually get that” in heterosexual cases. Notwithstanding this, Ms James reported a number of “relatively half/half” outcomes, whilst client Isaac was advised that his ex-partner may be entitled to 50 per cent of the assets (“under the terms of marriage”) had he not agreed to pay a sum in settlement. Mr. Derrick furthermore described a lesbian matter that he had advised on in which “we divided things up pretty much equally... there was a division of capital that worked about 55-45 per cent.” Here, the solicitor rationalised a near-fifty-fifty division using a substantive conception of equality, explaining that it put the financially weaker party in a stronger position (which he considered “fair,” given the substantial length of the relationship).

That said, it was recognised that ‘equality’ can require something more complicated than splitting the assets in half. Ms Lane, for example, explained that, whilst “you start at fifty-fifty [...] you have to then, you know, measure against all of these other factors.” Even so, the use of this ratio of apportionment at all might be considered problematic (as it was by Ms Field) given that “you’re imposing this heterosexual model on [people’s relationships] and saying [...] ‘we’re going to assume that you started as a sharing relationship, and then give us reasons why we shouldn’t think that.’” Indeed, Anthony, whilst not disagreeing with the ratio *per se*, viewed that the approach in civil partnership matters “has actually become unequal, because they [...] try to impose a heterosexual stereotype over you and then try to work out what to do.” In fact, as against the discussion above, a few practitioners reported encountering clients who were not seeking sameness of treatment in relation to financial relief. Ms Ennis described how “some do have high expectations that they’re going to get different treatment,” whilst Mr. Kennedy observed the presence of “a pre-conception that things are going to be different.” As to what this difference may be, Ms James said that her civil partner clients had tended to agree that “we won’t give each other any compensation and we won’t pay maintenance [...] you’ve had more money than me, and you always will.” The suggestion was of an alternative approach to finance on relationship breakdown to that which has developed through the heterosexual case law, and one which stands in contrast to Ms Boyce’s statement that “I don’t see why, in a civil partnership, you should be any less entitled to be maintained by your partner than you are in a marriage.” Ms James elaborated that same-sex partners’ views of equality do not match those of solicitors, in that “equality of ‘outcome,’ they don’t get that. That’s not something that civil partners think about, whereas it’s very much in the mind of, I think, straight married couples.”

The solicitor’s point was supported by client Debbie, who regarded as central the idea that “if you’ve put this in, then you’re entitled to that percentage out.”

She asserted that the fifty-fifty division of the proceeds of the sale of their property, reached at the Financial Dispute Resolution hearing, had been drawn “without seeing any of the real evidence.” The client provided the analogy that “if two people came in and they said, you know, we’ve got a biscuit here and we’ve got to share it, [the law would say] ‘well, cut it in half, have half each,’” feeling that “the fact that one person [...] contributed towards, you know, the majority of that biscuit” is not taken into account. By this, she was referring to the contribution of her inheritance towards the purchase of the home, which she considered was not adequately reflected in the asset apportionment. Debbie held perceptions of ‘fairness’ which she viewed as being more important than ‘equality,’ in the sense that the latter was conceived of in *White*. It may, of course, be the case that such perceptions are also held by heterosexual people who bring the greater quantity of money into their relationship. This is given that the fifty-fifty approach to division is a legal construct that replaced a less generous approach to the economically weaker party. However, the indication within my data is that these opinions may be more common in same-sex matters given, for example, Ms Field’s statement that “it’s so part of the culture that marriage means sharing, whereas civil partnership...? I don’t know” (hinting that the term carries alternative connotations).

Anthony further contended that more stress should be placed on the parties’ “contribution or detraction, in financial terms.” This works contrary to the idea, described by Burgoyne (1990), that all assets should be shared, regardless of who contributed what. In fact, his attitude goes against the notion in the heterosexual case law that the parties’ different contributions should each be regarded as no less valuable than the other (unless one of their contributions was “stellar” (*Cowan v Cowan* [2001] 2 FLR 192)). Anthony’s understanding lacks any recognition of the non-financial ways people can contribute to relationships. Conversely, Heather stressed that “if you’re not contributing as much financially but you’re contributing more in other ways, then that does have a value” (although pointing out that “how you put a value on that, I’m not really sure”). All the same, in her relationship, Heather described having settled the finances by presenting her ex-partner with “a piece of A4 paper with, umm, what we both put into the property.” One can only imagine that Anthony’s views were shaped by his beliefs of his partner’s lack of economic and domestic activity, as well as the substantial earnings that he personally brought into the relationship. He considered that “whichever way you shape equality, the measuring stick needs to change. Maybe it needs to change [so] that you’re two individuals and you look at the circumstances of the individuals,” as opposed to viewing the parties as “men and women.”

The emphasis placed by the clients on financial contributions, as against contributions of a less quantifiable nature, is likely to be at least partially reflective of their lack of children. In any case, the purpose of this article is not to argue that those who have remained at home to care should not receive financial support on relationship breakdown. However, what was apparent from the client accounts was that the ways they conceived of ‘equality’ were often incongruous with those of the solicitors (and that heteronormative assumptions and constructs seemed to have been applied even where children were not present). Several clients spoke in favour of a concept of ‘equality’ that is more sophisticated than a straightforward

fifty-fifty division, and more reflective of the circumstances of individual relationships. It is recognised (and was highlighted by Professor Robert Leckey in discussion with the author, September 23, 2014) that the greater the need to investigate into individual circumstances, the more it becomes necessary to instruct lawyers. This may be problematic, given the absence of legal aid in relationship breakdown matters in England and Wales. Still, I argue that moving beyond the unthinking and universal application of a heteronormative framework is instructive not only in the same-sex context, but also in relation to divorce matters, given that many different-sex relationships are also lived non-normatively.

In sum, in relation to equality, the clients and solicitors alike commonly relied on a wider discourse of formal equality between same- and different-sex couples. This may reflect the fact that legal struggles have centred around claims that “lesbian and gay relationships mirror those of heterosexual couples” (Young and Boyd 2006, 228). Nevertheless, such discourse is unlikely to offer the kind of role transformations that we might have wished to have been instigated by formalised same-sex relationships. As against this, whilst the practitioners adopted a similar approach to financial remedies between civil partners as has occurred in the (heterosexual) divorce context, the gay and lesbian clients appeared to offer some resistance to the imposition of heterosexual relational norms. Moreover, it seemed that they would prefer to ‘opt out’ of the remedies introduced to address (heteronormative) assumptions about necessary dependency, which may in part be because of a higher degree of financial independence within their relationships. In this way, the legal frameworks surrounding civil partnership dissolution and the attitudes and behaviour of same-sex partners might sit uncomfortably with one another.

6 Conclusion

As a result of their lack of familiarity with civil partnership and of a shortage of case law, legal actors, when addressing financial relief, appear to be placing a stress on sameness of treatment and formal equality between same- and different-sex couples. The solicitors in my study widely constructed the issues in their same-sex matters as being identical to those in married cases. This may be unsurprising, given the legislative history of the 2004 Act, and the fact that the frameworks surrounding civil partnership dissolution are similar to the legal approach to (different-sex) divorce. Nonetheless, it is in tension with the fact that lesbian and gay couples, given their lack of gender disparity, hold “unique possibilities for the construction of egalitarian relationships” (Weeks 2004, 159).

In a system focused on precedent, practitioners are adhering to notions of equal division as they feature in the key (heterosexual) cases. Consequently, they appear to be reverting back to heteronormative constructs of gender inequalities that are incompatible with the conduct of many households’ lived realities. My data suggest that the strategy of encouraging the adoption of traditionally gendered subject positions is being extended into civil partnership proceedings. That being the case, the law of financial relief is working to reproduce heterosexual behaviour as the norm. Practitioners are not attributing lesbians and gay men with equality of ‘recognition’ and are not responding to the ways in which lesbian and gay clients are different. This is despite hints of client efforts to highlight such difference,

which signal a continuing level of resistance to legal heteronormativity (although the potential transformative effects of this are being blunted).

The intention of this article is to offer critique, rather than to set out what an alternative, queerer law of financial relief should look like. It is argued, though, that understandings of legal equality need to shift. Present indications are that same-sex relationships are being assimilated into the marriage model in the realm of legal recognition. This risks leaving essentialist assumptions about male and female roles intact and enables underlying criticism of the way that gender works in marriage to become “marginalized, even silenced” (Polikoff 1993, 1549). Indeed, it reduces the capacity of same-sex relationships to denaturalise and dismantle the historical constructions of gender that marriage has centred around, so as to alter contemporary understandings of gender in all formalised relationships.

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