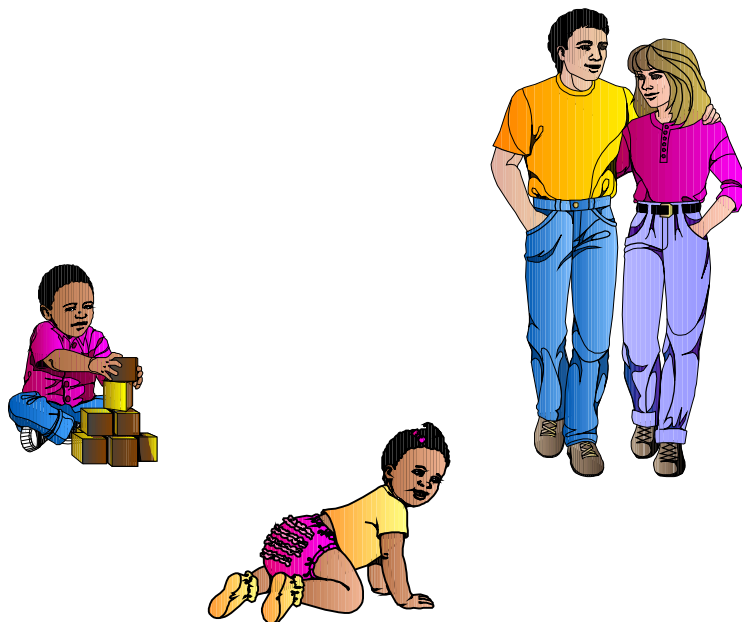


## *Assignment 1*



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# Table of Contents

Introduction. ....	1
Marriage. ....	1
Cohabiting. ....	3
Property Rights. ....	3
Children.....	5
Conclusion. ....	6
Table of Statues ....	7
Table of Cases.....	7
Bibliography .....	7

## Introduction.

‘The present law does not properly recognise, in all their forms, relationships which are deserving of marital status. This is inconsistent with a modern, tolerant society.’

In this assignment I have been asked to discuss the above statement with reference not only to unmarried cohabitants, but also to other non traditional partnerships. The areas in which I intend to look are married couples as the traditional form and the ‘so called non traditional’ relationships of cohabiting, transsexual and same sex couples and what rights they have with regards to matters like property and children on the break down of a relationship whether married or not.

## Marriage.

It may be a surprise to many people that the law is so different for people who have opted to live together as opposed to those who have decided to marry. Marriage is a legal and sometimes religious ceremony that unites a man and woman together. In marriage a man and woman become in many respects one legal entity. Each having the right to be supported by the other, to be able to marry legally under English law, you must first satisfy a number of conditions as set out in the Marriage Acts (1949-1994):

- You must be aged sixteen or over - and if you are under the age of eighteen, you will need parental consent. Under the Children Act (1989) If your parents are married, you will need the consent of both parents; if they are divorced or legally separated you will need the consent of the parent that you live with. If both your parents are dead, you will need the consent of your legal guardian or the local authority if you are in care.
- You must be of the opposite sex. Two men or two women cannot marry under English Law, see Bellinger v Bellinger & HM Attorney General (intervenor)(2000) *A marriage between a man and a woman who was born a man was not a valid marriage. The criteria for determining a person's gender in order to determine the validity of a marriage remained the three biological criteria set out in Corbett v Corbett (1970), namely chromosomal, gonadal and genital.*
- A marriage celebrated in England and Wales must involve one of the permutations of preliminary requirements and ceremonies allowed under the Marriage Acts (1949-96). Marriages abroad must comply with the *lex loci celebrationis* or, failing that, are capable of being recognised here as a valid marriage. See Jerry F Hall v Michael P Jagger (1999). *In an application for an order that a marriage ceremony was null*

*and void, it was accepted that since the ceremony was not valid in the country in which it was conducted, namely Bali, it could not be valid under s.11(a)(3) Matrimonial Causes Act (1973). Accordingly a decree of nullity was ordered.*

- You must not already be married, because if you marry another person while still legally married to someone else then you can be charged with bigamy (having more than one legal partner) and face a maximum prison sentence of seven years.
- You are not so closely related that your marriage is against the law, under the Marriage Act 1949-1986.

### **Blood Relatives.**

A man may not marry his:-

Mother  
Sister  
Daughter  
Father's Mother  
Mother's Mother  
Son's Daughter  
Daughter's Daughter  
Father's Sister  
Mother's Sister  
Brother's Daughter  
Sister's Daughter

A woman may not marry her:-

Father  
Brother  
Son  
Father's Father  
Mother's Father  
Son's Son  
Daughter's Son  
Father's Brother  
Mother's Brother  
Brother's Son  
Sister's Son

### **Step Relatives.**

A man may not marry a:-

Daughter of a former wife.  
Former wife of his father.  
Former wife of his father's father.

A woman may not marry a:-

Son of a former husband.  
Former husband of her mother.  
Former husband of her father's

mother. Former wife of his mother's father. Former husband of her mother's mother. Daughter of a son of a former wife. Son of a son of a former husband. Daughter of a daughter of a former wife. Son of a daughter of a former husband.

### **Relatives in Law.**

A man may not marry:-

The mother of a former wife.  
The former wife of a son.

A woman may not marry:-

The father of a former husband  
The former husband of a daughter.

Under the Marriage Act 1986, some relatives are allowed to marry, but there are strict requirements and these marriages may usually only take place during a civil ceremony, under license.

Provided they are aged twenty-one or older, step-relatives may marry. However, the younger member of the couple must, at no time before the age of eighteen, have lived under the same roof as the older person. Neither must

they have been treated as a child of the older person's family.

Relatives-in-law may marry, provided that they are twenty-one years or older.

If any of these factors is present in a marriage, the effect on the marriage would be to make the said marriage void. The marriage would not have to be annulled and the parties to the said marriage would not have to divorce, because in the eyes of the law there is/ was no valid marriage in the first place.

## **Cohabiting.**

Under English Law transsexuals and same sex couples are included amongst those who are denied the rights of marriage, such as those applied by the prohibited degrees of consanguinity and affinity as defined above, all of whom are limited to the extra marital option. The popular misconception is that unmarried couples (and by this I mean not only a man and woman partnership but also transsexuals and same sex couples unless otherwise stated) who live together as partners, for a certain length of time, may wrongly assume that, their relationship develops some additional legal status, that they have become 'common law man and wife', and that if they then separate their belongings would be split between them in much the same way as those who are married, but in reality this is not entirely true. The law regarding cohabitants is entirely different from the law relating to married couples, so far as the property rights are concerned although issues involving children are dealt with in similar ways. It is important to remember, that cohabitants mean any couple who live together and that may include same sex or transsexual relationships. The law is the same whether the parties are the same sex or not. The difference is between the status of marriage and that of cohabiting. When cohabitants break up there is no duty on either party to support the other, this is true regardless of how long the relationship lasted and no matter how great the difference between the earnings of the parties.

## **Property Rights.**

The law as it affects property rights is the same whether the cohabitants are of the same sex or not. It is only the centre of any disputes which is likely to be different. If the relationship between two unmarried people breaks down then their property rights are unaffected. The distinction between "his, hers and theirs" (or indeed, between "his, his and theirs" or even "hers, hers and theirs") is very real in this situation and each party to the relationship is entitled to claim their own property. This is in noticeable distinction to the position between married couples where the courts can divide all property ("his, hers and theirs") in whatever way they consider best, regardless of who actually owns them. In the case of divorce following marriage breakdown the courts have a very wide jurisdiction over all the marital property and, such property is usually divided between the parties according to their perceived needs.

It is important to appreciate this distinction.

For example: *It is quite common following a divorce for the former matrimonial home to be transferred into the sole name of the ex-wife who continues to live there with the children of the marriage. The ex-husband may also be obliged to pay maintenance for his children and/or his ex-wife.*

The reason this often happens is that the “needs” of the children to have a stable home environment and a roof over their heads quite often dictates that the house is transferred into the sole name of the ex-wife. This may be despite the fact that all mortgage payments, for example, may have been made by the ex-husband. Such a situation often causes tension for understandable reasons.

The case of a cohabiting couple is quite different. Their property rights remain exactly the same after they split, as they were before. Any property continues to belong to its owner and that is normally the person who paid for it, although there is room for dispute over this but that is the overriding principle and the courts have no jurisdiction to ignore it. See Grant v Edwards (1986). *The couple were unmarried. The man told the woman that the house had to be purchased in his sole name because otherwise her husband could claim a share of it in their divorce proceedings. This is untrue. The woman did not contribute to the purchase price but she did share the household expenses, do the housekeeping and bring up the children. The court awarded her a half share of the property because she had relied on what the man had told her and acted to her detriment.*

It is in this area where people often refer to the “common law wife” assuming that the “so called common law wife” has the same rights as an actual wife. This is not the case. There can be complications in that there may be a dispute over who owns what and who contributed how much to a given purchase but, the answer is always the same: each is entitled to keep their own property. See Burns v Burns (1984). *A couple had lived together in a property for seventeen years, the woman bringing up the children, decorating and contributing to the household expenses, after they separated the house was sold and the court ruled that the woman had no right to any share of the proceeds because there was no common intention that the woman should have a ‘beneficial interest’ in the property.* This may involve the sale of jointly owned property (which either can usually insist upon) but the proceeds of the sale will be divided according to strict property rights.

What is more, a cohabiting couple can come to an agreement about what is to happen in the event of subsequent separation and, how it affects property, such an agreement will be legally binding. Such an agreement made by a married couple could be ignored by a court in dividing the matrimonial assets but that is not the case where the couple is unmarried. That could be said to be one of the advantages to being unmarried because the jurisdiction of the courts to interfere with property rights is almost entirely excluded where the partners are unmarried.

People often mention the possibility of “pre-nuptial agreements” which could regulate what would happen to the property of a married couple after divorce. These agreements are possible in other jurisdictions such as the United States, but pre-nuptial agreements are not binding in English law. The courts retain jurisdiction as to how to divide the matrimonial property after a divorce and they will not falter from ignoring such an agreement.

In the case where, say, a house is to be brought jointly by a same sex couple it would be sensible to enter into a written agreement as to who has contributed what and what is to happen if the parties later break up. This could save a lot of animosities later and is something which a solicitor can easily do. In the case of a joint house/flat purchase by an unmarried couple it is a matter of precautions to make such an agreement and it is a lot easier to do at the outset than later when difficulties may have arisen.

## Children.

Disputes about children are not uncommon when a relationship breaks down although most couples do make satisfactory arrangements which work very well without any assistance from anyone. This is the ideal situation and it is what happens in most cases. There is an inbuilt bias in favour of the courts not getting involved because s.1(5) Children Act (1989) reads:

- “where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.”

Unfortunately, agreement is not always possible and the matter becomes unfriendly. Sometimes the reasons for this are misguided and one (or both) parties are using the children to get at one another. On other occasions there are very real causes for concern as to the well-being of a child and so the court action becomes necessary if the parties concerned cannot come to an agreement. When a married couple have children, and the marriage then at some later stage breaks down, both parents would end up with joint parental responsibility, that is they both get a say in any major decisions that would affect their child. On the other hand you have the unmarried couple, where if their relationship breaks down and there are children from their union it would be the mother of the said child/ren who has sole parental responsibility, although the father could apply to the courts for parental responsibility, but the absent parent would still be accountable for the up keep of the child in ways of maintenance. The above would apply in almost the same way to transsexual and same sex couples as well, just with the facts being slightly different, but at the end of the day the courts are more concerned with what is in the best interest of the child.



## **Conclusion.**

Given that we are supposed to live in a modern, tolerant society. The laws relating to marriage and lack of laws relating to cohabitation, leave a lot to be desired. Couples who are of the 'non traditional' grouping I.E. unmarried men and women, transsexuals and same sex partners have very little if no safety net to fall on should things go wrong. As a society I think we are now a lot more understanding when it comes to transsexuals and same sex couples than we used to be, but we are still behind the times when it comes to the law regarding these people actually being able to marry. Many people see marriage as a very public way of showing their friends, family and anyone else who might pay an interest, that they love each other. There is something about the formality of a wedding, its official nature, that makes the decision to stay together that much more binding, and it is this very right that is being denied to some couples, just because (and excuse the expression) our government is being run by people who still live in the middle ages. I know that some people choose not to marry as is their right, but at the same time transsexual and same sex couples should also be able to make that decision and not have it made for them. Marriage can be a wonderful union and I feel that everyone regardless of gender should be able to enter into this union if they want to.

## **Table of Statues**

Children Act 1989.

Marriage Acts 1949 - 1996.

Matrimonial Causes Act 1973.

## **Table of Cases**

Bellinger v Bellinger & HM Attorney General (intervenor) 2000.

Burns v Burns 1984.

Corbett v Corbett 1970.

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