

NEW Nutshells

FAMILY LAW

VICTOR DAVIDSON



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New Nutshells

Family Law
in a Nutshell

Victor Davidson

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Series Introduction

New Nutshells present the essential facts of law. Written in clear, uncomplicated language, they explain basic principles and highlight key cases and statutes.

New Nutshells meet a dual need for students of law or related disciplines. They provide a concise introduction to the central issues surrounding a subject, preparing the reader for detailed complementary textbooks. Then, they act as indispensable revision aids.

Produced in a convenient pocketbook format, *New Nutshells* serve both as invaluable guides to the most important questions of law and as reassuring props for the anxious examination candidate.

Family Law defines key concepts beginning with marriage, nullity, and the property relations of husband and wife. Maintenance agreements, parental rights, and custody disputes are all examined. Problems of legitimacy, the role of local authorities, the laws surrounding adoption and divorce, and matrimonial proceedings in magistrates' courts are explained. A separate chapter is devoted to violence in the family.

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1 Introduction

“Marriage is rooted in the family rather than the family in marriage” (Westermarck). The traditional attitude of English law has been that marriage is an essential prerequisite for the creation of a legally recognised family unit. The greater recognition of quasi-marital unions and the gradual increase in rights accorded the illegitimate child (see chaps. 2 and 8) have made us more acutely aware of the relationship of marriage and the family. The courts have recognised that the very concept “family” can change its meaning over a period of time. A “mistress” was not a member of a man’s family in 1950 (*Gammans v. Ekins*). By 1975 the C.A. thought she was for the purposes of Rent Act protection (*Dyson Holdings v. Fox*).

It has been suggested (by Eekelaar) that family law has four functions and, though it may be doubted whether “law” has functions as such (it is after all a social product and embodies certain values and recognises certain interests at the expense of others) it may be useful to state these:

- (i) “it must safeguard individuals from detriment, whether physical, emotional or economic. In the present context this means that *protection* must be available if the family environment threatens harm to any of its members” (Protective function).
- (ii) “Individuals are also at risk when a family unit

disintegrates. If the law cannot prevent this, it can assist in the *adjustment* which individuals must face" (Adjustive function).

(iii) "Social and economic policy can discriminate, through law, in favour of families" (Supportive function).

(iv) The education of people in the problems of family living (Preventive role).

English law would appear to emphasise functions (i) and (ii). Function (iii) sometimes find its way into state rhetoric but rarely into concrete politics. Function (iv) has hardly emerged at all in England. Whether it should do so is a political question.

2 Marriage

The classic definition of marriage is "the voluntary union for life of one man and one woman to the exclusion of all others" (*Hyde v. Hyde per Lord Penzance*). This involves: (i) the marriage must be voluntary and not, therefore, induced by duress (see chapter 3); (ii) it must be for life (that must be the parties' intention at the inception of the marriage: *Nachimson*); (iii) it must be monogamous (see chap. 3); (iv) it must be between a man and a woman (see chap. 3).

In order that a man and a woman may become H and W two conditions must be satisfied: (i) they must both possess the capacity to contract a marriage and (ii) the necessary formalities must be observed.

Capacity is determined by the parties' ante-nuptial domicile. The formalities to be observed are those required by the *lex loci celebrationis*. English law, however, recognises a *common law marriage* if no local form exists or if it would be impossible or unreasonable to expect the parties to comply with local formalities (e.g. if the only available form is polygamous). Capacity to marry is considered in chapter 3.

Parental consent

If either party to the marriage is over 16 but under 18, the express consent of his parents or guardians or the person to whose custody he has been committed is required, unless the minor is a widow or widower. If it is impossible to obtain the necessary consent or if it is withheld, the consent of the court (in practice a magistrates' court) may be obtained instead. In the case of marriages after the publication of banns express consent need not be given, but those whose consents would otherwise be required may declare their dissent from the intended marriage and the publication of the banns is then void.

Formalities of marriage

Marriages according to the rites of the Church of England may be solemnised only after the publication of banns or on the authority of a common licence, a special licence or a superintendent registrar's certificate. Marriages must be solemnised by a clerk in holy orders in the presence of two witnesses between 8 a.m. and 6 p.m., though marriages on the authority of a special licence may take place at any time and in any place. All marriages other than those celebrated according to the Church of England rites may be solemnised only on the authority of a superintendent registrar's certificate, wither without a licence or by licence, or on the authority of the Registrar General's licence. A marriage on the authority of the super-

intendent registrar's certificate may be solemnised in a superintendent registrar's office, a registered building, or according to the usage of the Society of Friends or of the Jews. The Registrar General may issue a licence authorising the solemnisation of a marriage elsewhere, if he is satisfied that one party is seriously ill and is not expected to recover and that he cannot be moved to a place where the marriage could be solemnised under the ordinary provisions.

Reforms in the law as regards formalities were advocated by the Law Commission in 1973. It proposed that the superintendent registrar's certificate should become the standard legal authorisation to marry.

Recognition of foreign marriages

Polygamous marriages, entered into abroad by parties whose *leges domicilii* permit them to contract such marriages, are generally recognised in this country. Non-Christian monogamous marriages are also recognised unless they are "so offensive to the conscience of the English court . . . and in deciding that question the court will seek to exercise common sense, good manners and a reasonable tolerance" (*Cheni v. Cheni per Simon P.*).

The effects of marriage

(a) Consortium

H and W have a mutual duty to cohabit, though neither may compel the other to cohabit against his or her will. Indeed, it has been held that a H who steals, carries away or secretes his W against her will is guilty of the common law offence of kidnapping her (*R. v. Reid*). W has no greater right to force herself on H than he has to compel her to cohabit with him (*Nanda*).

It is impossible to spell out all that is involved in consortium. It is "a bundle of rights some hardly capable of precise definition" (*Best v. Fox per Lord Reid*). It includes (i) W's right to use H's name; (ii) a mutual right to

choose the matrimonial home (*Dunn*). Where the spouses cannot come to an agreement neither has, as a matter of law, a casting vote but, if one spouse provides the main financial support of the marriage, his or her interests may be considered paramount, since it is reasonable to live near one's place of work; (iii) each spouse owes the other a duty to consummate the marriage. This mutual *right to intercourse* continues after consummation provided it is reasonably exercised but neither is bound to submit to the demands of the other if they are inordinate, perverted or otherwise unreasonable. H is not entitled to insist upon using contraceptives or practising *coitus interruptus* against W's will if it is unreasonable to deprive her of the opportunity of bearing children. A husband can rape his wife with impunity, unless there is a judicial separation (*R. v. Clarke*), a decree nisi of divorce (*R. v. O'Brien*), an undertaking not to molest (*R. v. Steele*) or similar order; (iv) a mutual right to *protection* (v) a mutual duty of marital confidence (*Argyll*).

Consortium is lost by (i) an agreement to live apart; (ii) a decree of judicial separation or a decree nisi of divorce or nullity; (iii) matrimonial misconduct.

The courts will not enforce the right to consortium. Restitution of conjugal rights was abolished in 1970. If H is deprived of W's consortium by breach of contract or the defendant's tort, he may bring an action for that loss, independent of any action which W may be entitled to bring in her own right. W has no such reciprocal right to sue for the loss of H's consortium (*Best v. Fox*).

(b) *Maintenance*

The fact of marriage raises a presumption at common law that H is bound to maintain W. His duty is *prima facie* complied with if he provides her with a home and the necessities of life. He fixes their standard of living and life-style. W may lose her right as a result of her own

conduct. Her right to maintenance is co-extensive with her right to H's consortium (*Chilton*).

(c) *Other effects of marriage*

(i) if a married woman is cohabiting with H, there is a presumption that she has his authority to pledge his credit for necessary goods and services which belong to those departments of the household normally under her control (*Debenham v. Mellon*).

(ii) although spouses may sue each other in tort (Law Reform (Husband and Wife) Act 1962), the court has a discretion to stay the action where it appears that no substantial benefit would accrue to either party.

(iii) although spouses may sue each other in tort (Law offence committed by her (not murder or treason) was committed in the presence of, and under the coercion of H (Criminal Law Act 1925, s. 47).

(iv) H and W cannot be convicted of a conspiracy together to commit a crime.

(v) although each can be convicted of stealing the other's property, neither a spouse nor a third person may institute proceedings against anyone for any offence of stealing or doing unlawful damage to property which at the time belongs to his or her spouse without the D.P.P.'s consent.

Quasi-marital relationships

The main differences between marriage and a quasi-marital relationship are (i) there is no duty of support (*Richards v. Dove*). The cohabitee is in a stronger position on the death of her 'lover' provided he died testate and, given her dependency, did not make reasonable provision for her (Inheritance Act 1975 s. 1 (1)(c)); (ii) the "mistress" who has a child cannot count upon immediate financial support enforceable by law. If need be she will have to bring affiliation proceedings (see chap. 8). The father cannot be ordered to support the mother; (iii)

many legislative provisions give a spouse with no legal or equitable interests in the home various rights both during (e.g. s. 37 of M.P.P.A. 1970 relating to improvements) and upon breakdown of the relationship (see the powers in ss. 23 and 24 of M.C.A. 1973). The position of unmarried parties is more precarious. Thus 'homemakers' services' (*Bruch*) give W no rights in H's property but can be taken into account under section 25 (1) (f) of M.C.A. 1973 on a divorce. A cohabitee cannot be similarly rewarded, though her services may be taken into account when determining property rights on equitable principles. Further, a spouse can acquire an interest or gain an increased interest in property by virtue of substantial contributions in money or money's worth to the improvement of property (s.37 M.P.P.A. 1970), but a cohabitee's interest will only arise where actual work is done and will depend on the principles of constructive trusts (*Cooke v. Head, Eves*). Additionally, W has statutory rights of occupation (M.H.A. 1967 s.1). The cohabitee has not though she may be able to exclude her "lover" under the Domestic Violence Act 1976, s.1 (*Davis v. Johnson*). Under certain circumstances she may also have a right of occupation derived from an equitable or contractual licence (*Tanner*), or based on estoppel (*Pascoe v. Turner*). If the licence is contractual it is terminable with reasonable notice (*Chandler v. Kerley*): if equitable, it may be revoked by subsequent conduct (*Williams v. Staite*).

The trend in English law is clearly in the direction of giving cohabitees equal or equivalent rights and this has been generally welcomed (*Pearl, Oliver*). The courts are eager to protect the economically weaker party particularly where she has children (*Eves, Tanner*) and where the relationship is lengthy (*Dyson Holdings v. Fox, cf. Helby v. Rafferty*).

3 Nullity

The law governing nullity was last changed in 1971. The present law is contained in the M.C.A. 1973. Marriages may be either void or voidable.

The meaning of nullity

“A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties without the necessity of any decree annulling it.” *Per* Lord Greene M.R. in *De Reneville*.

(i) a decree is advisable as the facts may be in dispute or it may not be known what the law is or whether the parties come within it.

(ii) a decree is also valuable as it enables the parties to get financial provision etc. under the 1973 Act.

(iii) as well as the spouses, any person with a sufficient interest may seek a nullity decree. (*e.g. Ray v. Sherwood*).

(iv) there is no time limit on the petition, which may be brought even if both spouses are dead.

(v) the decree is declaratory: there never has been a marriage, so if property is transferred on the assumption that persons are spouses, it may be recovered on the ground that the transaction is void because of mistake of fact.

(vi) a void marriage is not subject to the bar of statutory appropriation (s.13), though it is arguable that such a marriage may be *ratified* (*Valier*).

(vii) children of a void marriage may be legitimate (see Legitimacy Act 1976, s.1).

“A *voidable* marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it is pronounced by a court of competent jurisdiction” *per* Lord Greene M.R. in *De Reneville*.

(i) a decree is, therefore needed.

(ii) only the parties themselves can challenge such a marriage.

(iii) on the death of one of them a voidable marriage becomes unimpeachable.

(iv) despite the decree which says the parties have never been married, the effects of the decree are prospective only (see s.16).

(v) statutory approbation is an absolute bar (s.13, discussed below). Apart from estoppel *per rem judicatam*, this is the only bar (the others were abolished by section 3 (4) of Nullity of Marriage Act 1971).

Void marriages—the grounds

A marriage is *void*:

(i) where the parties are not respectively male and female (s.11). ‘Male’ and ‘female’ are not defined by statute.

Ormrod J. has stated that ‘having regard to the essentially heterosexual character of . . . marriage, the criteria must be biological for even the most extreme degree of transsexualism . . . cannot reproduce a person who is naturally capable of performing the essential role of woman in marriage’ (*Corbett v. Corbett*).

(ii) where the parties are within the prohibited degrees of relationship, either by consanguinity (blood) or affinity (marriage) (s. 11 (a)(i)).

(iii) where one of the parties is already lawfully married (s. 11 (b)).

(iv) where either of the parties is below 16 years of age. A party with English domicile who is more than 16 cannot marry anyone under 16 anywhere, even if that party has

capacity by her domiciliary law (*Pugh*). (s.11 (a)(ii)).

(v) where certain of the necessary formalities have not been complied with (s.11 (a)(iii)) (see Marriage Act 1949). One example is where banns have not been duly published. Banns must be published in the names by which the parties are usually known. They will be held to be duly published unless there is a fraudulent intention to conceal a party's identity (*Tooth v. Barrow*). 'One of the purposes of the Marriage Act would be defeated if it were open to a person to have banns called in the name by which he was known in the district when the use of a legal name might lead to uncomfortable enquiries' (*Chipchase*).

(vi) where it is a polygamous marriage entered into outside England and either party was at the time domiciled in England. For these purposes a marriage is regarded as polygamous even though neither party has any spouse additional to the other (s.11(d)).

Voidable marriages—the grounds

A marriage is voidable:

(1) where either party did not validly consent to it, whether in consequences of duress, mistake, unsoundness of mind or otherwise.

(a) *Duress*

For *duress* to exist there must be

(i) fear of a sufficient degree to vitiate consent (*Cooper v. Crane*).

(ii) the fear must be reasonably entertained (*Buckland*). Note this is seemingly inconsistent with *Scott v. Sebright* where a subjective test was laid down. It may be possible to distinguish the cases by showing that a subjective test is applied where the fear emanates from R himself or R acting through his servants or agents and an objective test is applicable where the fear emanates from a source other than R (*Davies*).

(iii) the fear must arise from some external circum-

stances for which P is not himself responsible (*Buckland, Szechter*).

(b) *Mistake*

(i) *Mistake* as to identity, but not as to fortune, health, moral character or other quality, vitiates (*Wakefield v. Mackay*).

(ii) also mistake as to the nature of the ceremony, but not as to the effects of marriage, is a vitiating factor (cf. *Mehta*, where P thought ceremony of marriage was a conversion ceremony with *Kassim*, where P alleged that he thought a polygamous ceremony was monogamous).

(c) *Unsoundness of mind*

The question is: is the party concerned capable of understanding the nature of the contract into which he is entering? To do this, a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage (*Re Park*).

(d) "*Or otherwise*"

This refers to intoxication (*Sullivan*), and probably addiction to drugs and possibly being under an hypnotic trance or in extreme ill-health.

(2) at the time of the marriage either party, although capable of giving valid consent, was suffering, either continuously or intermittently, from mental disorder within the meaning of the Mental Health Act 1959, of such a kind and to such an extent as to be unfitted for marriage. A person is 'unfitted for marriage' when he is incapable of living in the married state, and of carrying out the ordinary duties and obligations of marriage (*Bennett*).

(3) at the time of the marriage R is suffering from V.D. in a communicable form. It is irrelevant how it was contracted. 'Communicable' means communicable to anyone (*Lawrence*).

(4) at the time of the marriage R is pregnant by some person other than P.

Proceedings on all these grounds must be instituted within three years of the date of marriage (s. 13(2)).