

影印版法学基础系列

家庭法基础

ESSENTIAL

FAMILY LAW

基思·摩根

Keith Morgan

(第二版)

(Second Edition)



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本书导读

本书对英国婚姻家庭法领域的主要立法和司法实践情况作了全面的介绍,以分析法条规定和援引司法案例相结合的方式,理论联系实际地阐明了英国婚姻家庭法领域的基本制度和原则,内容深入浅出,清晰简洁,是法学学生学习专业英语和快速了解英国婚姻家庭法制度的绝好工具书。

本书修订版适应了英国婚姻家庭法领域的最新变革和发展情况,在前次版本的基础上作了重大修订,反映了近年英国婚姻家庭法领域主要立法的变迁,并对其中一些主要立法的重点法条进行了深刻剖析,配以影响重大的代表性案例加以阐释,生动而具体,学习起来让人颇有兴味。所以本书在英国的法学专业学生中享有盛誉,特别受到那些备考学生的欢迎。

该书的结构主要分为六个部分:婚姻的无效、离婚的变革、离婚和分居的经济扶持、家庭居所和家庭暴力、子女婚生地位的确定和有关子女的其他问题。在每一部分的开头,都列有读者在学习本部分时应该重点掌握的知识点和法条,条理清晰,重点分明,让读者在学习时一目了然,印象深刻。

在学习本书的过程中,读者应重点学习 1973 年《婚姻诉讼法》、1996 年《家庭法》和 1989 年《儿童法》的内容,其中有许多别具特色的英国法律制度值得我们注意,如分居令的颁布、婚姻居所权的分配原则、针对家庭暴力的禁止骚扰令、《儿童法》第二部分第 8 条下的新命令(包括居住令、联络令、禁止行为令和特定问题令)、法院对子女的监护制度,这些是在中国婚姻家庭法领域所没有的制度;还有一些制度在中国已经存在,但和英国做法不一样,比如离婚财产的分割、离婚后对子女的经济扶持等方面。对于这些异同,读者可在阅读时进行横向比较。近年来在英国家庭法领域发生的变革,影响深远,而本书则及时地反映了这些最新变化,读者可从中了解英国家庭法的发展历史。

本书的目录、索引等内容由徐妮娜翻译,纰漏之处在所难免,希望广大读者提出宝贵意见。

译 者

2004 年 4 月

TO PAULINE, JOANNE, LYNNE AND DANIEL

Foreword

This book is part of the Cavendish Essential series. The books in the series are designed to provide useful revision aids for the hard-pressed student. They are not, of course, intended to be substitutes for more detailed treatises. Other textbooks in the Cavendish portfolio must supply these gaps.

The Cavendish Essential Series is now in its second edition and is a well established favourite among students.

The team of authors bring a wealth of lecturing and examining experience to the task in hand. Many of us can even recall what it was like to face law examinations!

*Professor Nicholas Bourne
General Editor, Essential Series
Swansea Law School
Summer 1997*

Acknowledgments

I would like to express my thanks to my wife Pauline for her help and encouragement during the preparation of this book and the advice and experience provided by my daughter Lynne. I should also wish to express my thanks to Maureen, the Swansea Law School secretary, whose help was an essential element in the preparation of this book.

Preface

The aim of this book is to assist students in their preparation for family law examinations. It will deal with the six major areas that are frequently examined and students are provided with a checklist and comprehensive notes on each of these essential issues.

The book contains up-to-date information and analysis of relevant cases and legislation which will be necessary for success.

The book should be read in conjunction with the Cavendish Principles Series, the leading textbooks recommended for particular courses, the law reports and other authoritative sources of information and opinion.

Students should remember that the knowledge gained should be put to the best use by proper analysis of examination questions and the relevant application of their knowledge to matters raised by the examiners.

The law is stated as at 1 May 1997.

Keith Morgan
Swansea Law School

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1 Nullity

You should be familiar with the following areas:

- | | |
|------------------------------------|---|
| • s 11 Matrimonial Causes Act 1973 | Void marriages |
| • s 12 Matrimonial Causes Act 1973 | Voidable marriages |
| • s 13 Matrimonial Causes Act 1973 | Bars where marriage is voidable |
| • s 15 Matrimonial Causes Act 1973 | Changes to the form of decree |
| • s 16 Matrimonial Causes Act 1973 | Voidable marriages exist until the decree absolute is granted |
| • s 41 Matrimonial Causes Act 1973 | Arrangements for children |

Although less than 1% of marriages are now terminated by nullity petitions today examiners still require a knowledge of this area.

Changes have been introduced into the area of nullity by the Family Law Act (FLA) 1996 but generally these changes have been to the types of decree now required and to the financial provisions; the grounds and bars remain unaltered.

Nullity falls into two categories – void and voidable marriages. Each area has its own concepts and grounds for its existence.

Void marriages

There are social and public policy reasons as to why the marriage should not exist, as illustrated by the grounds contained in s 11 of the Matrimonial Causes Act (MCA) 1973.

Marriages celebrated after 31 July 1971 shall be void on the following grounds.

Section 11(a)(i)

That the parties to the marriage are within the prohibited degrees of relationship; either blood relations (consanguinity) or non-blood relations (affinity).

Under the former, the immediate family, ie parents, grandparents, aunts and uncles, and siblings are prohibited from intermarrying. Under the latter, step-parents and parents-in-law are prohibited except under limited circumstances, as are adoptive parents.

Section 11(a)(ii)

That either party is under the age of 16. However, if both parties are domiciled abroad at the time of the marriage, it will be recognised as valid if the marriage is recognised as valid in the country in which it was celebrated.

In *Allhaji Mohammed v Nott* (1968), a Nigerian man married a 13 year old girl. Both were domiciled in Nigeria. The marriage was valid in Nigeria, therefore, it was valid in the UK when they later became domiciled here.

If either party is aged over 16 but under 18, then consent is required from certain people:

- each parent or guardian with parental responsibility for the child.
This does not include an unmarried father who has not acquired parental responsibility;
- each person with a residence order in force with respect to the child;
- if a court order exists then the consent of the local authority.

However, if this consent is lacking, then the marriage will not be void unless the parents have publicly objected to the banns thereby voiding the banns. An application can also be made to the High Court, county court, or magistrates' court to obtain consent if consent cannot be obtained because of the parents' absence or inaccessibility.

Section 11(a)(iii)

That the parties have married in disregard to certain requirements as to the formation of marriage.

Publicity had been deemed necessary in earlier times to prevent clandestine marriages as is illustrated by the existing rules which are complex and dealt with here only in outline.

Church of England weddings

Banns have to be read three times in the required churches and then the parties may marry in one of the churches where the banns were read. Anyone publicly objecting to these banns causes the banns to be void.

Marriage can also take place after the granting of a common licence which requires that one of the parties has resided in the parish district for 15 days immediately prior to the granting of the licence. An affidavit is also required stating that there is no lawful impediment to the marriage and that the requirements of residence and consent are met.

The Archbishop of Canterbury may also grant a special licence which allows the marriage to take place anywhere at any time.

A marriage may also take place after the granting of a Superintendent Registrar's Certificate. This requires seven days residence and a solemn declaration that no lawful impediment exists and residence and consent requirements have been met. An entry is put in the marriage notice book and is open to public inspection for 21 days, then a certificate may be issued. This procedure is also used for non-Anglican marriages as is the issue of a Superintendent Registrar's certificate with a licence. This requires 15 days' residence in the district, and the notice entered in the marriage notice book. The marriage can take place one clear day after this notice has been given.

A Registrar General's Licence allows marriage at any named place because of the serious illness of one of the parties but, since the Marriage Act (MA) 1983 which allows marriage of the housebound and those detained in their home or place of confinement on the issue of a Superintendent Registrar's Certificate, is rarely used.

Anglican marriages must take place in the church where the banns were published or where authorised by the various licences and be conducted by a clergyman in the presence of two witnesses.

Other marriages

The MA 1994 now allows civil marriages to take place on 'approved premises', ie premises approved by the local authority. The local authority must be satisfied that the premises provides a 'seemly and dignified venue for the solemnisation of marriages' and must be a separate room in the building and be separate from other activity on the premises at the time of the ceremony.

The MA 1994 is restricted to civil ceremonies and provides that no religious service is to be used at a marriage on the premises and that

the parties use the prescribed forms for use at register office ceremonies.

When there are defects in the formalities the marriage will only be void if they are done 'knowingly and wilfully' by *both* parties.

This is the case if no certificate or licence has been issued, or where the marriage takes place in a church other than where the banns were published or over three months after the banns were published.

Where the banns have not been properly published the marriage may be void. This can happen if someone has publicly objected to the banns or there has been a false description of one of the parties. In the latter circumstances, the cases of *Dancer v Dancer* (1948) and *Small v Small* (1923) can be compared and the intention behind the false description can be judged and a decision will be made if the banns are properly published. In the former, there was held to be no attempt to deceive or hide the party's identity whereas in the latter there was such an attempt.

The situation in relation to false information being given to obtain a Superintendent Registrar's Certificate and licence is different as the aim is not to obtain publicity but to keep a public record and so the marriage will not generally be void (*Puttick v AG* (1979)).

It must be remembered that a defect does not necessarily void a marriage.

Consent is such an area and the necessity of showing that both parties know of the defect and wilfully partake in the ceremony also illustrates the point.

Section 11(b)

That at the time of the marriage either party was already lawfully married.

This section requires the parties to fulfil the definition of marriage contained in *Hyde v Hyde* (1866), ie 'The voluntary union for life of one man and one woman to the exclusion of all others'.

The case of *Maples v Maples* (1987) illustrates that if a party has entered a valid marriage then to terminate that marriage and be able to enter another then the termination must also be valid.

In the recent case of *Whiston v Whiston* (1995), the woman had contracted a bigamous marriage in 1973 knowing that her first husband was alive. There were two children of the marriage which lasted 15 years.

At first instance, the sum that the woman was to receive was reduced by 20% as her conduct was such as to be inequitable to ignore. However, the Court of Appeal held on policy grounds that her application should be totally rejected.

She was not to be allowed to benefit solely from her wrongful act and she should not be allowed to benefit more than a woman who had not committed bigamy.

Section 11(c)

That the parties are not respectively male and female.

The cases arising in this area normally concern a party who has undergone surgery for a sex change.

In *Corbett v Corbett* (1970), April Ashley, born a man, had undergone such an operation and now went through a ceremony of marriage with another man. It was held that a person's biological sex is fixed at birth and cannot be changed by artificial means.

This decision was followed by *Rees v UK* (1990), a case before the European Court of Human Rights, which stated that the ruling had not violated European Convention on Human Rights. This was also the decision in *Cossey v Cossey* (1991).

In the recent case of *S v J(T)* (1996), the respondent was a person who had been born a woman but had undergone two out of three surgical procedures necessary to complete the change to a male appearance.

She had committed perjury by falsely declaring that she was a bachelor and knew of no lawful impediment to the marriage.

The petitioner withdrew her petition for divorce and petitioned for nullity. The defendant applied for ancillary relief by way of periodical payments and a property adjustment order. The petitioner applied for a ruling that following *Whiston* the respondent's application should be barred.

The Court of Appeal held that even though the petitioner was a rich woman and the respondent had nothing other than the assets given to her by the petitioner, the respondent's conduct was so overwhelmingly against public policy that her appeal was dismissed.

Section 11(d)

That in the case of a polygamous marriage entered into outside England and Wales that either party was at the time of the marriage domiciled in England or Wales.