

**Chapter 3: Void, voidable and non-existent marriages**

**Question One**

Outline the grounds on which a marriage is considered void and voidable and discuss what the law of nullity tell us about the institution of marriage.

**Answer Guidance**

This essay question demands in-depth knowledge of the law relating to nullity and requires candidates to consider what the law tells us about marriage, which is an institution that the state has an interest in. The difference between a void and voidable marriage should be explained e.g. void marriages are fundamentally flawed, whereas voidable marriages are defective, but there are no public policy objections to the union. Rather, there is a problem that one or both parties might consider serious enough to justify annulling the marriage. The grounds on which a marriage is considered void, contained in s.11 of the Matrimonial Causes Act i.e. prohibited degrees of relationship, under-age, disregard of formal requirements and bigamy should be explained and discussed. Similarly, the grounds on which a marriage is voidable, which are contained in s.12(1) of the same Act i.e. non-consummation, lack of consent, mental disorder, venereal disease, pregnancy by a person other than the petitioner, gender reassignment prior to and after the marriage should be analysed. Candidates need to ensure that they do not simply describe the law but apply it to the question. For example, the prohibition against marrying one's close relatives and the consummation rules suggest that marriage is intended to be a sexual relationship. Whether this remains appropriate should be considered in the answer.

## Question Two

Genevieve and Horace met three years ago and married six months ago. Genevieve has just discovered that Horace was having an affair with Izzy just before the wedding and that Izzy was pregnant with Horace's child when Genevieve and Horace married. She has also found out that Horace changed his name from Hank Smith to Horace Sainsbury in 2010 and that he is not the son of one of the founders of the Sainsbury's supermarket chain as he claimed. Genevieve is furious and wants to end the marriage.

- a) Discuss the validity of the marriage.
- b) What would the legal position be if Genevieve and Horace had not had sexual intercourse since the wedding ?

## Answer Guidance

This problem question asks candidates to discuss the validity of the marriage between Genevieve and Horace. There is nothing to suggest that the marriage is void or non-existent and so it is not necessary to consider these topics further. The marriage may, however, be voidable: students should therefore discuss the grounds on which a marriage is regarded as voidable, which are contained in s.12 (1) of the Matrimonial Causes Act 1973 and the consequences of a voidable marriage (s.16 of the Matrimonial Causes Act 1973). The bars to an annulment contained in s.13 of the Act should also be considered. In relation to Horace fathering a child prior to the marriage, s.12 (1)(f) should be discussed, but students should be aware that this is only available if a wife is pregnant by a person other than her spouse and not if a husband fathers a child with another woman. Genevieve may try to argue that she would not have consented to the marriage if she had known the truth (s.12(1)(c)). This argument may also be asserted in relation to Horace's lies regarding his background. The difference between a mistake as to identity and a mistake as to attributes should be considered (*Wakefield v Mackay* (1807) 1 Hag Con 394). If Genevieve cannot establish lack of consent, she will have to initiate divorce proceedings to bring the marriage to an end. The second part of the question clearly focuses on non-consummation: students should consider the fact that this may be owing to incapacity of either party (s.12(1)(a)) or due to the wilful refusal of the respondent (s.12(1)(b)). It should be noted that the three year bar contained in s.13 of the Matrimonial Causes Act 1973 does not apply to petitions based on non-consummation.

### Question Three

Critically analyse the impact that the Gender Recognition Act 2004 has had on the law relating to void and voidable marriage (and civil partnerships).

### Answer Guidance

The Gender Recognition Act 2004, which was passed in response to cases such as *Goodwin v United Kingdom* (Application No. 28957/95) [2002] 2 FLR 487 and *Bellinger v Bellinger* [2003] 1 FLR 1043 enables a person who has or has had gender dysphoria and has lived in their acquired gender for a period of two year to apply for a gender recognition certificate. A person who acquires a full gender recognition certificate can marry (or form a civil partnership) in his or her acquired gender. As a result of the Act significant changes were made to the law relating to void and voidable marriage. Students should discuss the fact that, until the Marriage (Same Sex Couples) Act 2013 came into force, s.11 of the Matrimonial Causes Act 1973 provided that a marriage was void if the parties were not male and female respectively. The Gender Recognition Act 2004 changed the approach adopted by the courts in cases such as *Corbett v Corbett* [1071] P 83. Although the sex of the parties is no longer relevant in relation to marriage, it remains important in relation to the formation of a civil partnership, as the Civil Partnership Act 2004 requires the parties to be the same sex. In relation to voidable marriage, the Gender Recognition Act 2004 inserted two new grounds into s.12(1) of the Matrimonial Causes Act 1973. These should be explained and evaluated. The impact of the Marriage (Same Sex Couples) Act 2013 should be considered and the position in relation to civil partnerships should be examined.

#### **Question Four**

Jasmine (a 16 year old girl) and Krypton (an 18 year old man) are both members of the Happy Family religious cult. The rules of the cult require members to marry as soon as they reach maturity, which is set at 16 years of age for a female and 18 years of age for a male. The cult's leaders recently informed Jasmine and Krypton that they were required to marry one another as they had both reached the age of maturity. They were warned that if they refused to marry one another they would be physically punished. Last week Jasmine and Krypton went through a marriage ceremony that took place in a tent in a field owned by Lune, the cult's current leader. The couple were dressed in ceremonial robes by their parents and were required to confirm their identity to Lune. Lune then pronounced Jasmine and Krypton to be married. Yesterday Jasmine ran away from the cult. Advise Jasmine as to the legality of the marriage.

#### **Answer Guidance**

The facts of this problem question clearly indicate that this 'marriage' is defective in several ways. Students are thus required to discuss the law relating void and voidable marriages, contained in sections 11-12 of the Matrimonial Causes Act 1973, but should also consider whether the marriage is non-existent (*Hudson v Leigh (Status of Non-Marriage)* [2009] 3 FCR 401). The difference between a void, voidable and non-existent marriage should be discussed. The first thing we are told is the age of the parties. Jasmine is 16: the marriage would not, therefore, be void due to one of the parties being underage (s.11(a) Matrimonial Causes Act 1973), but the issue of parental consent should be considered. The marriage may also be void under s.11(a) if the parties knowingly and wilfully breached the formal requirements (s.49 Marriage Act 1949). However, it is more likely that the marriage is non-existent as it bears little resemblance to an ordinary marriage. Cases such as *Ghandi v Patel* [2001] 1 FLR 603 and *Dukali v Lamrani (Attorney General Intervening)* [2012] EWHC 1748 should be included in your answer. If the marriage was not void or non-existent, it would be voidable on the basis of lack of consent due to duress (s.12(1)(c) of the Matrimonial Causes Act 1973 – *Hirani v Hirani* [1983] 4 FLR 232).