

Chapter 4: Divorce, Dissolution and (Judicial) Separation

Question One

Consider the ground and facts upon which a divorce can be based and assess whether the law is confusing & misleading, discriminatory & unjust, increases bitterness and does nothing to save marriages, as the Law Commission suggested in 1990.

Answer Guidance

This essay question requires an evaluation of the law relating to divorce in the light of the Law Commission's conclusions in 1990. Candidates should begin by explaining the ground for divorce contained in s.1(1) of the Matrimonial Causes Act 1973 (irretrievable breakdown of marriage) and should then briefly outline the facts which can be used to prove that a marriage has broken down irretrievably (s.1(2)). Care should be taken to ensure that the answer is not merely a description of the law relating to divorce, but is an assessment of it. Cases should be included, not to add superfluous detail, but to contribute to the evaluation. For example, *Hollens v Hollens* [1971] 115 SJ 327 can be included to support the point that the law is discriminatory and unjust and increases bitterness, because a couple will only be regarded as living apart for the purpose of s.1(2)(d) and (e) if they do not sleep together, eat together, communicate with one another etc. *Owens v Owens* [2017] EWCA Civ 182 can also be included to support the contention that the law increases bitterness. Other issues to consider are: the relationship between the ground and facts for divorce; the possibility of false claims based on adultery and behaviour; the requirement for a solicitor to certify whether reconciliation has been considered (s.6(1)) and the heterosexual definition of adultery (s.1(6)). Students should consider whether the model of divorce set out in the Family Law Act 1996, but never implemented, would have been an improvement. The provisions of the No Fault Divorce Bill 2015-2016 can also be included in the answer.

Question Two

Michael and Natalie met in 2008. In 2009, Natalie moved into Michael's house and in 2010 they married. All was well to begin with, but the marriage began to deteriorate after Natalie suffered a miscarriage in 2013. Natalie became very depressed and gave up her job as a receptionist, as she could not cope. Michael started to work late every day in order to earn more money, but also to avoid Natalie as much as possible as he struggled to deal with her depression. Two years ago Michael began an affair with Ophelia, a work colleague. After a while, Natalie began to suspect that Michael was being unfaithful and confronted him about it. Michael admitted that he was having an affair. Natalie said that she forgave him as she realised that she had been difficult to live with, however Michael did not end the relationship with Ophelia. Last month Michael announced that Ophelia was moving in and that Natalie had to sleep in the spare bedroom. When Ophelia moved in Natalie left, however she wants to reconcile with Michael. Michael says that the marriage is over and that he will divorce Natalie as she has deserted him.

- a) Discuss whether Michael can divorce Natalie.
- b) If Natalie changes her mind about reconciling with Michael, can she divorce him?

Answer Guidance

This question requires candidates to apply the substantive law relating to divorce to a problem scenario. The ground for divorce (irretrievable breakdown of marriage) contained in s.1(1) of the Matrimonial Causes Act 1973 should be set out and the facts that can be used to establish irretrievable breakdown should be identified (s.1(2)). The facts of the scenario clearly point students in the direction of desertion (s.1(2)(c)), which needs to be defined and explained with reference to case law, such as *Quorashi v Quorashi* [1985] FLR 780 CA. In addition, students should consider whether Natalie's behaviour would justify the granting of a decree (*Livingstone-Stallard v Livingstone-Stallard* [1974] Fam 47) and should be aware that behaviour does not need to be intentional and can be caused by illness (*Thurlow v Thurlow* [1976] Fam 32). If behaviour cannot be established, Michael would need to base his divorce petition on two years' separation with consent (s.1(2)(d), as Natalie may change her mind in time, or five years' separation (s.1(2)(e) if she does not. The meaning of 'separation' should therefore be considered. If Natalie wishes to divorce Michael she can base the decree on adultery (s.1(2)(a) or behaviour (s.1(2)(b), both of which should be explained and discussed with reference to case law. A brief explanation of the divorce procedure can also be included in the answer.

Question Three

Explain the difference between judicial separation and divorce and consider whether there is there a need for judicial separation ?

Answer Guidance

In order to answer this essay question, students require knowledge and understanding of the law of divorce and judicial separation, which is contained in the Matrimonial Causes Act 1973. The difference between divorce and judicial separation should be explained i.e. divorce brings a marriage to an end but judicial separation does not (s.18(1) Matrimonial Causes Act 1973). The ground for divorce contained in s.1(1) of the Matrimonial Causes Act 1973 (irretrievable breakdown of marriage) and the facts that can be used to establish breakdown (s.1(2)) should be identified, but it is not necessary to explain them in detail. Students should be aware that the grounds for judicial separation are the five facts contained in s.1(2) and should be able to explain why it is not necessary to prove irretrievable breakdown to obtain a decree of judicial separation. The similarities between the two suits should be discussed e.g. the ability to apply for financial relief under Part II of the Matrimonial Causes Act 1973 and the application of intestacy rules. Students should then consider whether there is a continuing need for judicial separation, given the small number of orders made each year. The advantages of retaining judicial should be discussed e.g. its availability during the first year of marriage, when divorce is unavailable (s.3(1)) and its relevance to those who believe that marriage is indissoluble.

Question Four

Compare the law relating to divorce and judicial separation with the law relating to the dissolution of civil partnerships and separation orders and consider whether the law should be reformed.

Answer Guidance

This essay question requires a comparison of the law relating to divorce and judicial separation, which applies to married couples and can be found in the Matrimonial Causes Act 1973, with the law relating to the dissolution of civil partnerships and separation orders, which is contained in the Civil Partnership Act 2004. The question itself reveals one of the differences between marriage and civil partnerships, namely, that different terminology is used for suits that are almost identical. Students should consider whether this is significant. The similarities between the two relationships should be discussed in detail i.e. the one year rule that applies to divorce and dissolution; the ground for divorce and dissolution; the common four facts that can be used to establish irretrievable breakdown; the common four grounds for judicial separation / separation orders and the effect of the respective orders. The answer should then discuss the fact that adultery can be used to establish irretrievable breakdown of marriage and is a ground for judicial separation (s.1(2)(a) Matrimonial Causes Act 1973) but the same does not apply to civil partnerships. Students should consider the significance of this and assess whether the law should change. Reference can be made to articles 8 and 14 of the European Convention on Human Rights.