

How would court deal with finances law family essay

Law



In order to contract a lawful marriage, the parties must have had the legal capacity to marry and must have complied with particular formalities: any failure in doing so would render the marriage void. Furthermore, parties must have the capacity to marry if and only if they are, firstly, married already, respectively male and female and lastly if they are over the age of 16 years. According to the Marriage Act 1949 s. 2[1], marriage that is solemnised between persons who are under 16 shall be deemed as void. However, it is known that Alice was 16 years old at the time of marriage. Therefore if an individual is over the age of 16 but under the age of 18, and has not been married before, s. 3(1)[2] of the 1949 Act requires the consent to the marriage of each of their parents or other persons having parental responsibility over them. Though, it is known that Alice was not on talking terms with her parents at the time, so could not obtain consent from them. Although, this requirement may have been dispensed by the superintendent registrar, or even by order of the court. Under s. 28(1)(c)[3], where someone is to be married under a registrar's certificate, a genuine declaration must be made that any necessary consent has been attained. Therefore, it seems Alice and James marriage is a valid one. Although, more information is needed in regards to whether Alice took the route of obtaining consent by the superintendent registrar, or by order of the court.

Assuming it is valid, how can Alice go about ending the marriage?

Divorce is the legal process to end a marriage formally. Before either party can file for divorce the parties must have been married for at least one year according to s. 3 Matrimonial Causes Act 1973[1]. According to s. 1 (1)[4], a

petition for divorce could be brought forward to the court, on the ground that the marriage has irretrievably broken down. Furthermore, according to s. 1(2)[5], the court hearing a petition for divorce, cannot classify the marriage as broken down irretrievably, unless the petitioner proves to the court, at least one of five facts, stated in s. 1 (2) (a-e)[6](*Buffery v Buffery*)[7]. Firstly, S. 1(2) (a)[8] is the ground of adultery, however Alice will not be able to rely on the adultery ground because, even though she has committed adultery in the past, it would have to be the respondent who has committed it himself. S. 1(2)(b)[9] is the ground of unreasonable behaviour. Though, there is no evidence of James showing any unreasonable behaviour towards Alice (*O'Neill v O'Neill*)[10]. Furthermore, Alice would have to argue that James behaved in such a way that she it would not be reasonable to expect her to live with him. Although. s. 1(5)[11] states that evidence brought forward of any of the five facts is sufficient on its own, unless James put forward evidence on the contrary. If Alice can put forward an acceptable type of unreasonable behaviour, and James does not raise an argument over it, then this ground is possible. Even if there were to be any allegation of unreasonable behaviour, it would have to be on going. S. 1(2)(c)[12] is the ground of desertion. However the requirements to pursue a divorce based on desertion are not made out in this case. Furthermore, S.(2)(d)[13], is the ground of agreeing to two years separation with consent of a divorce going ahead. Though, Alice cannot prove the physical and mental element of living apart, as we are told they eat their meals together. This would therefore mean there is not enough emotional separation for her to classify the 18 months of living separately, as legitimate separation. Even if she did satisfy

the emotional separation requirement, James would have to agree to a divorce. Therefore, once she is legitimately classified as living physically and emotionally separate from James, and he has given his consent to divorce, then this ground may be a possible option. S. 1(2)(e)[14], is the ground of a five year separation. This is a likely option for Alice, as she can wait until they have been living 5 years apart. At that point, she will not need James' consent. Although, the 5 years duration would have to start from the moment they are legitimately emotionally and physically separated by law. The procedure Alice would need to follow depends on whether James consents to the petition. If not, it would mean that the normal procedure cannot be used and a full hearing will be necessary to examine the facts of the case and determine the facts of the case. However this would be a very costly route for both parties. Nevertheless if a decree nisi is granted, Alice will then have to wait for 6 weeks and 1 day, before she can apply for her decree absolute, which finalises the divorce. Moreover in regards to James, and any of the facts put forward by Alice, James could contest the divorce, thus forcing the judicial procedure, which requires a district judge to consider the validity of Alice' petition. However, this would be an extremely costly option for James. Additionally, if the court is satisfied, that a fact is proven, then by virtue of s. 1(4)[15]it must grant a decree nisi of divorce.

Furthermore, in regards to a 5 year separation divorce, James could cite the defence of grave hardship (s. 5), but only if there is specific evidence of financial hardship. Going by the facts, there seems to be no indication that James has any financial hardship. However, James can rely on s. 10(2)[16], which enables the court to delay the making of the decree absolute, if

financial arrangements in place are not satisfactory. Nevertheless, James could take the route of speaking with Alice amicably, suggesting a judicial separation instead of a divorce (s. 17)[17]. A judicial separation is a court decree requiring a husband and wife to cease cohabiting, but not dissolve their marriage.

How would the court deal with finances?

Upon the marriage of Alice and James being dissolved, the Court have virtually unlimited powers to divide up all the marital assets they have. Under the current law it is not possible to enter into binding pre-nuptial agreements which currently can only be admitted as evidence as to the intention of the parties. This is considered unfair by many spouses particularly those wishing to protect assets acquired prior to a marriage. Ancillary order settlements, which are an application of financial relief following the presentation of a petition for divorce, have recently been highlighted by high profile cases such as *Mcartney v Mills McCartney*[18]. The courts findings in the case of *White v White*[19], were hailed as a fundamental deviation from the traditional approach adopted in ancillary order cases. Nevertheless, when the courts consider financial provisions in regards to Alice and James they must abide by s 25 MCA 1973[20]. S 25 (1) [21]sets out that the courts must look at all the circumstances of the case before reaching a decision. The first consideration is given to the children according to S 25 (1)[22]. The Matrimonial Causes Act 1973 provides in section 25(2)(a-h)[23], that the courts must have regard to and consider a list of various relevant factors when asked to decide any ancillary order application. However, there is no indication of the value to be attached to

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any of them. Lord Nicholls in the case of *White* stated that: "The weight, or importance, to be attached to these matters depends upon the facts of the particular case." [24] Firstly in regards to s. 25(2)(a) [25], the court will look at earning capacity of Alice and James, including any and pre martial assets. Furthermore, post separation assets may also be taken into account. Although it is known that Alice and James are separated, they are still married, therefore according to *Rossi v Rossi*, if Alice were to be living with her new partner Reg while being separated from James, it is possible that her assets based on the fact she's living with Reg, to be taken into account. A judge may regard Alice having more financial backing, due to third party assets, if she was living with a new partner. Though, judges usually have a mixed opinion on third party assets, (*Lambert v Lambert*). The court will also examine any future earning capacity, (*A v A*) [26]: (financial provision), and take that into consideration. In S. 25 (2)(b) [27], the financial needs and obligations that need to be fulfilled are the most common necessities such as accommodation, clothing and food. It is known Alice works only part time, and has like fulfilled the day-to-day needs of her son Dexter, so, if accommodation, food and clothing are among some of the needs, then Alice can rely upon this factor. The next factor, S. 25(2)(c) [28], is only applicable if both parties have sufficient resources, which seems unlikely in this case. S. 25(d) [29], is a section that takes into account the age of each party and the duration of the marriage. Alice is aged 24 and James is aged 34, thus, the duration of their marriage is 12 years. The parties have been married for lengthy amount of time this and this factor will be considered important in relation to other factors, (*C v C*) [30] (financial relief: short marriage). S. 25(e)

[31]deals with any mental or physical disability of either of the parties. If any of the parties in question suffered from a physical or mental disability, this would ultimately mean it would be likely that they receive more compensation (Seaton v Seaton)[32]. There is no evidence of any of the parties in this scenario suffering from any medical or physical disability. S. 25(2)(f)[33]deals with the contributions each of the parties have made towards the welfare of the family. Any contributions made financially, should be judged in a non-sexist and non-biased manner (White v White)[34]. The cases of Miller v Miller[35]and McFarlane v McFarlane[36]expanded the approach of the courts further. Previously the approach of dividing assets to meet needs of the parties housing and financial needs did not go far enough and there was often insufficient assets to meet the housing and financial needs of both parties. The House of Lords said general principles to be applied when making financial awards were ‘ needs, compensation and sharing.’ In H-J v H-J[37]the court sanctioned an equal division moving on to the ‘ clean break’, which is set out by S 25A[38]. The aim of this would be to settle all finances for once and all according to the case of Minton v Minton[39]. S. 25(2)(g)[40]is in relation to the conduct of each of the parties. Negative conduct of the parties will not be taken into account when the court decides the asset distribution. However, the only exception to this is when there is evidence of a “gross and obvious” conduct, seen in the case of, Watchel v Watchel[41], and Kyle v Kyle[42]. It is known that Alice committed adultery in the past, by having an affair with Reg, however this cannot be deemed as ‘ gross and obvious’ conduct in court. S. 25(h)[43]is a factor which states that the courts have to examine whether both parties will lose

any benefit they gained from the marriage. The courts will take into account whether the husband has a large pension. In this case, it is known that James does indeed have a large pension, due to his high earnings. The court will decide whether Alice has any chance of having a portion of his pension, especially if Alice works part time to look after kids, which seems to be the case. The most common and reasonable option for James and Alice, would be to go ahead with the pension sharing order. The courts can set aside a percentage of it for Alice. The courts do seem to favour this method as it promotes a clean break. After the court goes through s. 25(2), they will then deal the issue of several orders. These order help establish who gets what in relation to different assets. There are 3 categories of orders. The first being a financial provision order of periodical payments, the second being a property adjustment order of a lump sum, and finally the last being a pension order. A financial provision order that involves periodical, are payments made either on a weekly or monthly basis usually by the husband. Furthermore, there are no fixed guidance's, as the courts decide the exact figure. Moreover they can be limited or indefinite (s. 23)[44], (*Parlour v Parlour*)[45]. Though, if James was to lose his job, the payment can be varied, if he requests a variation to be applied by the court. Nevertheless any payment would continue until Alice is married to a new partner. However, it must be said that the negative side of periodical payments, is that it doesn't promote the idea of a clean break. Though, the court could issue a financial provision order of lump sum instead, as this would be a clean break. It is known that following their marriage, James purchased a property under his sole name, however as he still married to Alice, the value of the property is shared. Property

adjustment orders, is another option, under s. 24[46], it states that the courts have the power to redistribute property, as well as transferring the name under the property to someone else. However a reasonable way of settling this matter amicably would be that due to the property being valued at £1. 2m, with a £500k mortgage, it can be sold and the proceeds could then be divided. Although, James does have another option, this being he can, if he has the means to, buy the other spouse out of the property. Thus, James can essentially keep the property, while the Alice is left with a lump sum, which reflects the share of the property. Importantly, the disclosure of financial assets is another essential factor the parties involved must be aware of. In axillary order proceedings, Alice and James must make full disclosure of their finances. The court has the authority to freeze bank accounts, if they suspect any suspicious or dishonest activity. If Alice and James were to fail in disclosing their finances completely, then this would result in heavy consequences, (P v P[47]: financial relief). Moreover in the case of NG v SG[48], it was held that, a judge can guess the amount of any secret investment or finances there is, if he is certain they're being hidden to deceive the court. So it will not be beneficial for Alice or James, to lie about their finances. Nevertheless, Alice and James can enter into an agreement at the end of their marriage themselves without going to court; this is called a consent order. These are contractual agreements negotiated on divorce, which then can be incorporated into a consent order. Furthermore, this consent order can only be overruled, if it can be deemed to be emotionally stressful and unfair order. Separation agreement can be drawn up as a deed which sets out what the couple agree on pending the divorce. This is a more

reasonable option for Alice and James, as all that is required for them is to draw up an agreement over certain finances, send off the forms to court, where the judge would approve it he deems it as fair.