The modern family law and should essay

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To discuss the distinctions between void and voidable marriages, we must first establish that they are not the sole types of marriage. Firstly, there is a valid marriage; one where the ceremony follows the correct formalities and there are no defects at all. The fourth, and often ignored category is that of non-marriage; a ceremony that is so far removed from a valid marriage, it is not a marriage at all, e. g. in the case of Ghandi v Patel1.

In answering the question, it is inevitable that we discuss the grounds for void and voidable marriages and the differences between them. The law tells us in the Marriage Act 1949, what is a valid marriage, and in the Matrimonial Causes Act 1973, the law tells us how a marriage is void or voidable. A void marriage is a marriage that never existed (void ab initio – void from the beginning), whereas a voidable marriage is valid until it is annulled. Marriage is a status relationship.

Formality is extremely important, if not essential to a valid marriage. Heterosexual sex is a central feature of marriage also. Many grounds for a voidable marriage and grounds for divorce relate to sex. Although formalities exist for marriage ceremonies, religious ceremonies have never been necessary. However, according to the Marriage Act 1949 and Marriage Act 1994, it is necessary to have at least one set of formalities; either rites of the Church of England, a religious ceremony, or by civil procedure. A valid marriage can be terminated by dissolution or death.

In the Marriage Act 1949, there are three types of defect which are non-compliant with the formalities of divorce: the type that has no effect on validity, which is set out in section 24 and section 48; section 25 and section

49 shows the defects that causes the marriage to be void; and those defects that are not set out in the Marriage Act, of which the consequences are unclear, for example, if a marriage were to take place with locked doors, would this be void, voidable or valid? Set out in the Matrimonial Causes Act 1973, in section 11, there are the grounds to which marriages are declared void. These defects are so grave as to inhibit that a marriage ever existed. The grounds include prohibited degrees of relationship, either party under 16 years old, disregard of certain requirements, the parties being already married at the time of the marriage, in or out of the country or the parties being of the same sex. Under the Matrimonial Causes Act 1973, there are no bars to rendering a marriage void. Section 11 (a) (i) is the first ground which is the prohibited degrees of relationship2. It is set out in three parts: consanguinity, where a person is blood related to the person they are attempting to marry; affinity, which that person has a marriage tie with the other; and this ground is very much linked to the criminal offence of incest.

Under the terms of consanguinity, you cannot marry your parents, siblings, grandparents, aunts, uncles, nephews and nieces. Under affinity, you cannot marry your step-parents, parents in law or adoptive parents. For precedent see Cheni v Cheni3. In Alhaji Mohammed v Knott4 and Pugh v Pugh5, we see case law on underage marriages. If either party is under sixteen years of age, the marriage is declared void6. The validity of marriage is not affected if there is a lack of parental consent if either party is between 16 and 18, this type of marriage would become voidable7.

If both parties “ knowingly and wilfully” 8 marry in disregard of the formal requirements, the marriage can often be declared void9, although this is not

always the case. Section 11 (b) and section 11 (d) deals with the issues of polygamous marriages. If a person is already married, he cannot lawfully marry another person. This section gives complete disregard to the ‘ guilty’ spouse, for example if he thought the other spouse was dead, the marriage is still classed as void. There is a great deal of speculation among the laws regarding to marriages where the parties are of the same sex, particularly increasing due to the advances in sex change operations.

The law states in Section 11 (c) that parties must be respectively male and female. The law of void marriages has a great deal of case law relating to the problems faced with transsexuals, hermaphrodites, and homosexual couples wishing to marry. If for religious reasons, divorce was not available to a couple, nullity was obtainable in the form of voidable marriages. The grounds for determining a voidable marriage can be found in section 12 of the Matrimonial Causes Act 1973. The voidable marriage was ideally referring to defects present at the time of the marriage, but that do not generate the marriage to be completely non-existent (void).

The law on voidable marriages deals mainly with private matters, and therefore only parties to the marriage (the couple) can render the marriage invalid, whereas with void marriages, any third party can petition for the marriage to be declared void. Voidable marriages are prospective, consequently valid until annulled, so if a party to the marriage dies, the marriage is ended by death, not annulment. Sex plays a determining factor in the law regarding voidable marriages. Section 12(a) is where the marriage has not been consummated due to the incapacity of either party to consummate it. Pre-marital sexual relations are irrelevant and on these

grounds, sexual intercourse involving full penetration after the ceremony10 was necessary for the marriage to be consummated.

If either party had a wilful refusal to consummate the marriage, under section 12 (b) only the innocent person can petition. In Horton v Horton11 Lord Jowitt said that one refusal is not sufficient to be determined as a wilful refusal, there must be repeated attempts from the innocent party. Under these grounds, it is not necessarily the wilful refusal to have intercourse, it could be, for example, the refusal to have incapacity cured, as in S v S supra, or the refusal to arrange religious ceremony as in Kaur v Singh12. In this case, where the husband had refused to arrange the religious ceremony, the wife refused to co-habit and therefore consummate the marriage. The ruling saw that the husband had no just cause or excuse not to arrange the ceremony, but the wife did, and so the husband was stopping the act of consummation, so the marriage was annulled.

Derived from section 12 (c) the lack of consent " in consequence of duress, mistake, unsoundness of mind or otherwise" is a further ground for a voidable marriage. Examples of this ground include a threat to life, limb or liberty (in the case of duress), genuine mistake to the nature of the ceremony, e. g. Mehta v Mehta13, where wife thought she was converting to Hinduism, but instead was undergoing a marriage ceremony.

Also a mistake as to the identity of a person, but not personality, would render the marriage voidable. Not all aspects of mistake make a marriage voidable, for example, in Way v Way14 the fact that the husband did not know the Russian marriage regulations was irrelevant and could not be cited

as a ground to get the marriage annulled. However, if either party is not of sound mind, and does not fully understand the nature of the marriage and the duties it upholds, or “ otherwise”, for example, under the influence of alcohol or drugs, the marriage can be declared voidable. Yet, if only the parties to the marriage can petition for annulment, under this section, how can the marriage be annulled? Section 12 (d) states if a party is unfit for marriage due to a mental disorder, the marriage can be annulled, but it must be a mental disorder under Mental Health Act 1983. Similarly, if a person has a venereal disease, section 12 (e) the marriage can be declared voidable.

This is a fault based ground, and so only available to the innocent party, but they must not know about the venereal disease at the time of marriage, or they will be considered to have fully consented to the marriage, regardless of the disease. The final ground to declaring a voidable marriage is pregnancy15. Another fault based ground, which is only available to the innocent petitioner. The wife must be pregnant by someone else (not the husband) and the husband must be ignorant of either the fact the child is his, or that his wife is pregnant at the time of marriage.

Certain bars are applicable to the grounds for voidable marriages, (set out in section 13 of the Matrimonial Causes Act 1973), including approbation, delay and knowledge. For approbation to be a bar, the petitioner must firstly approve of the marriage, and know that the marriage could have been annulled. The petitioner must have made the respondent believe they would not get the marriage annulled, which would make it in unjust to the respondent to grant the decree. The bar of delay is a three year bar16 which only applies to grounds set out in section 12(c), (d), (e) and (f). This does not

apply to non-consumption of marriage, and if the petitioner has a mental disorder, the time bar starts when person is in a fit state. The bar of knowledge17 only applies to the grounds of pregnancy and venereal disease, sections 12 (f) and (e) respectively, in which, the petitioner must be ignorant of the facts.

After discussing the grounds for void and voidable marriages, we must now discuss whether or not the law should continue to have these vague grounds and whether or not to alter them and add to the grounds for divorce. According to the judgement in Chief Adjudication Officer v Bath18, couples who co-habit are seen by the law as married unless proved otherwise. If co-habiting couples have the same rights as married persons, surely the idea of being married is becoming outdated? The grounds for nullity are often confusing and in some cases, unclear, and couples who co-habit have the same rights as married couples, why cause the courts unnecessary confusion? Before the reformation in the sixteenth century, there was no divorce, although, according to Cannon Law, marriages could be annulled. The law in the twenty-first century, although has divorce, is still following ideas from over 300 years ago.

Is this not somewhat outdated? Perhaps parliament is attempting to retain ideas from the past so as to keep tradition in law, but should the law not reflect today’s society? If we look at the differences between void and voidable marriages, we can discuss whether having two separate distinctions are necessary, or if any should exist at all. In the instance of void marriages, the marriage never existed and the decree, when granted is retrospective, whereas voidable marriages are valid until annulled, similar to dissolution. If

the grounds for voidable marriages only annul the marriage prospectively, why not disregard this idea and have only void and valid marriages, which can be ended by divorce? The idea that void marriages are matters of public policy is understandable, as third parties can petition for a decree, yet voidable marriages, which relate to private matters, can only be petitioned by the parties to the marriage. With grounds such as duress and unsoundness of mind, it could be very difficult if not impossible for the innocent party to petition.

If these grounds19 were put into the category for grounds for a void marriage, any third party can petition and therefore get the innocent party out of what could be a potentially unjust situation. Looking at the statistics20 we have for 2002, we can see that although there were 171, 054 petitions filed for divorce, only 758 petitions for nullity were filed. To fully comprehend this idea, the number of divorce petitions that were actually granted was 147, 538, whereas the number of petitions for nullity that were granted was only 197. If so few amounts of people are actually using this part of the law, to have their marriages annulled, why continue to keep a vague and confusing part of the law for such a small number of people. Similarly, almost 86% of divorce petitions filed are declared absolute, yet only 26% of petitions for nullity are granted.

If such a small percentage of the petitions are granted, is the whole idea of nullity relevant to today’s society? Many people choose not to dissolve their marriage due to traditional or religious reasons. According to many religions, divorce is not acceptable, yet if circumstances do not allow for a couple to undergo a normal marital relationship (see grounds for voidable marriages)

nullity seems a perfectly tolerable option. In conclusion, the idea of void and voidable marriages is becoming somewhat outdated. Although it serves the purpose for people not to have to undergo what could be seen as a difficult process, divorce can also have religious or social taboos, whereas nullity does not carry the same stigma. If the amount of people petitioning for a decree of nullity is substantially lower than those petitioning for divorce, why continue to confuse and contradict people, with an unclear system of law?