

The edinburgh law review on succession law family essay

Law



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In this essay there will be analysis on the legal consequences for both marriage and civil partnerships. This essay shall be split into two sections; first section will focus on the legal consequences that are the same or similar, these consequences will be illustrated and explained focusing on how they affect the parties involved. The second section will highlight any sustainable differences and these differences will be examined while also explaining why these consequential differences exist. When two parties marry or enter into a civil partnership there is social and legal consequences, the legal consequences are the most fundamental and important for both forms of an adult relationship. There are key consequences that are the same for both marriage and civil partnerships; Delict, Parental rights and responsibilities includes IVF, Aliment, successions and then the criminal consequences, these will be explained below. A consequence that affects both marriage and partnerships the same is delict. [1]It was considered unfair that when two people are married they could not sue each other, this position was modified by the Law Reform (Husband and Wife) Act[2]which states; ' each of the parties to a marriage shall have the like right to bring proceedings against the other in respect of a wrongful or negligent act or omission, or for the prevention of a wrongful act, as if they were not married'. This basically enforces that those in marriage can sue each other if the other party is negligent and causes them harm. This rule was incorporated to include civil partnerships by the Civil Partnership Act. [3]Furthermore delict also covers the scenario where the husband or wife or civil partner has died from personal injuries caused by the negligence of a third party. This was covered by the Damage (Scotland) Act[4]which states '

where a person dies in consequence of personal injuries sustained by him as a result of an act or omission of another person... then... the person liable to pay those damages...shall also be liable to pay damages in accordance with this section to any relative of the deceased', if this did happen then the remaining spouse or civil partner has the right to claim for damages and receive compensation ' for the loss of the deceased person's services[5]funeral expenses and compensation for grief , distress and the loss of deceased's society[6]'[7]. It must be noted that the compensation will not be reduced in the case the spouse or civil partner know that the other party was suffering for a fatal illness that was apparently caused as result of the negligence of a third party.[8]However the spouse or civil partner that has suffered must identify and prove that the loss arose from delict therefore if it appears that those in the marriage and civil partnership save their wages and have a better than average living style but in reality they are ' supporting themselves' then the damages that the remaining spouse or civil partners will probably receive very little compensation. Furthermore parental rights and responsibilities have to be taken into consideration; this is due to the factor that if there is a child within the marriage or civil partnership then the rights and responsibilities the spouse or civil partner gains is a key legal consequence of marriage and civil partnership. There is a slight difference within this consequence; it surrounds how parental rights and responsibilities are gained because when a man marries a woman who has a child he will automatically gain rights and responsibilities because under the Children (Scotland) Act the man will automatically acquire the parental rights and responsibilities over the child.[9]This was enhanced to include the second

female partner within a civil partnership and now when she enters into a civil partnership she will automatically gain parental rights and responsibilities under section 42 of the Human Fertilisation and Embryology.[10]Moreover IVF has the same effect on the man in the marriage and the second female partner in the civil partnership. In both these circumstances where the man agrees to the IVF treatment he will be considered the child's second legal parent[11]this was further illustrated in the 2008[12]and examined in Leeds Teaching Hospital v A & Ors[13]. Furthermore when it is a civil partnership that is involved and similar to marriage if the second partner consents for the mother to receive IVF treatment then she will be considered to be the child's second legal parent.[14]This will grant the man and second partner all the parental rights and responsibilities that were outlined the Child's (Scotland) Act.[15]Aliment is another legal consequence that affects both forms of an adult relationship. Aliment is where a husband has a duty to maintain his wife and a wife has a duty to maintain her husband[16]this was expanded to include partners in a civil partnership where the party will have the duty to aliment their partner.[17]There is four aliment orders[18], 1) order the making of a periodical payment, whether for a definite or an indefinite period or until the happening of a specified event: but the court cannot substitute a lump sum for a periodical payment this was examined by Macdonald v Macdonald[19], 2) Order the making of alimentary payments of an occasional or special nature, for example hospital expenses: these will usually be small amounts, 3) Backdate awards to the date of bringing the action or, on special cause shown, even earlier and 4) award less than the amount claimed even if the claim is undisputed, this order was explained in

Terry v Murray.[20] This legal consequence is founded on the basis that the spouse or civil partner are to provide support for their other half and is too reasonable in the surrounding circumstances, this will be taken into consideration by the courts who are entitled and allowed to use these circumstances when they are making aliment order, this factor was illustrated by the Family Law (Scotland) Act which clearly states; ‘ For the purposes of this Act, an obligation of aliment is an obligation to provide such support as is reasonable in the circumstances, having regard to the matters to which a court is required or entitled to have regard under section 4 of this Act in determining the amount of aliment to award in an action for aliment’.

[21] These provisions allow those married or in a civil partnership to always have a ‘ prima facie’ right, this means that they have the right to claim aliment from the other. However the duty of aliment will rely on the qualifications that are laid out before an order is awarded; these qualifications are emphasized in the Family Law Scotland Act[22]; 1) the needs (present and foreseeable needs) and resources (present and foreseeable resources[23]) of the parties, 2) the earning capacities (court concerned with earning capacity cannot claim to be unemployed) of the parties, 3) generally, all circumstances of the case. However although the courts allow the spouse or civil partner to have the prima facie right, in relation to s. 4 (3) (c) of the Family Scotland Act, section 4 (3) (a)[24] has an overarching factor where the courts will look at whether the spouse or civil partner is now supporting someone, this means that the resources that the spouse to civil partner that is left by themselves will be lower and will probably receive a lower aliment. Moreover if the spouse or civil partnership

is earning a law wage and is now supporting a third party then the spouse or civil partner that is applying for aliment would not receive any aliment.

Section four does illustrate many other key situations where aliment would be granted but would either be reduced or simply not given. The obligation to aliment ends in divorce of the marriage or dissolution of the civil partnership. Modern Family Law is a vital part of law and this is practically true in relation to Succession.[25]Succession has a fundamental role for both marriage and civil partnerships, this is because Scots law gives the ' surviving spouse of civil partner certain rights to succeed to proportion of the deceased spouse or civil partner's estate which cannot be defeated by testamentary deed'.[26]Although previously only deemed to a consequence of marriage it was implemented and enforced into civil partnerships in 2004[27]which states; ' Where a person dies survived by a civil partner then, unless the circumstance is as mentioned in subsection (2), the civil partner has right to half of the moveable net estate belonging to the deceased at the time of death'. Under modern family law the remaining spouse or partner has three ' prior rights' under the Succession Act[28]these three rights are; 1) the right to the deceased's interest in the house[29]and if the spouse or civil partner was ordinarily resident there the right to furniture[30]and the right to a cash sum[31], 2) The spouse or civil partner are then entitled to ' legal rights' being a fraction of any new moveable estate left after prior rights, and 3) the ' free estate' - the balance after prior and legal rights - goes to the issue or, failing issue, to the deceased's parents and siblings, so that the spouse or civil partner inherits the free estate only in the absence of these relatives[32]. Basically a surviving husband is entitled to his jus relictii

out of his deceased wife's free moveable estate[33]; a surviving wife is entitled to her jus relictæ[34]; a surviving civil partner has legal rights out of the deceased civil partner's free moveable estate.[35]On the other hand ' in practice the prior rights often exhaust the whole estate which is thus inherited by the spouse or civil partner.[36]However when the Edinburgh Law review on Succession was published it found that the current law in Succession does not in line with public opinion and relative's expectations. This is because, ' the amount which a spouse or civil partner will receive depends critically on the compensation of the estate'[37]Furthermore even though there is protection for the surviving spouse or civil partner it is neither marriage nor the registration of a civil partnership has the ability to null prior testamentary writings, and this means that if all the property was transformed into heritage and then transferring it to whoever the deceased spouse or partner chose. This would allow the surviving spouse to make an equitable claim for aliment (explained above) from the deceased spouse's estate[38]. Although succession applies to marriage and civil partnership this feature highlights one of the many differences between marriage and civil partnership because this idea does to appear to allow the surviving partner to make a claim. Upon a couple marrying or entering into a civil partnership it gives rise to a number of criminal consequences. The main criminal offence that affects both of them is incest. The Criminal (Scotland) Act illustrates the crime of incest and gives the clear definition; '(1)Any male person who has sexual intercourse with a person related to him in a degree specified in column 1 of the Table set out at the end of this subsection, or any female person who has sexual intercourse with a person related to her in

a degree specified in column 2 of that Table, shall be guilty of incest, unless the accused proves that he or she—(a) did not know and had no reason to suspect that the person with whom he or she had sexual intercourse was related in a degree so specified; or (b) did not consent to have sexual intercourse, or to have sexual intercourse with that person; or (c) was married to that person, at the time when the sexual intercourse took place, by a marriage entered into outside Scotland and recognised as valid by Scots law.’[39]. Although there is no supporting piece that states that incest is a crime from Civil Partnerships it can be assumed that it is because Incest is a criminal offence within its own right therefore it will be considered a criminal offence if it did happen within civil partnership. Another criminal consequence is Bigamy. Bigamy is a criminal offence under the Offences Against the Person Act that states; ‘ Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony’[40]. This means that a person who is married cannot then go and getting married a second time while still be legally married. However although it is fairly clear that this criminal offences applies to Marriage there is not a clear outline that illustrates that Bigamy applies to civil partnerships, the closest feature that could be argued is like bigamy is section 80 of the civil partnership act[41]which revolves around false statements. This could be argued is the crime of bigamy because if someone is already in a civil partnership and then goes and enters into another partnership and hasn’t dissolved the first partnership that person would have had to state that they are single therefore providing false information

therefore bigamy. There has only been one recorded case of a 'bigamous' civil partnership this case involved a woman being married but the while being married went and entered in to a civil partnership with another woman, but the charge that she received was due to her being in breach of the civil partnership act this. There is no clear law definition therefore it can be argued both ways. There are not many differences between marriage and civil partnerships and they are very minor. Even though divorce and dissolution are all but the same there is one key aspect of divorce that does not transfer over to dissolution. This key factor is adultery; adultery can never be used as a reason for a civil partnership to be dissolved. Adultery does not apply to civil partnerships because according to the law under section 1 (2) (a) of the Divorce (Scotland Act) which states; 'The irretrievable breakdown of a marriage shall, subject to the following provisions of this Act, be taken to be established in an action for divorce if since the date of the marriage the defender has committed adultery'[42], therefore it cannot used in civil partnerships because adultery has to be between to heterosexual people. Furthermore civil partnerships appear to have different taxation aspects compared to marriage because under the Income Tax Act, 'tax deductions for the maintenance of a child resident with him or her for a person not entitled to a deduction for maintenance of a wife not living with him, or to a deduction based on the death of a husband within the year, except in the case of a wife'[43]. This is what those in a married couple have but there has been no move by the government to create provisions that outline the principle above for civil partners. Moreover if civil partnerships are seeking legal aid over a property dispute unlike a married

couple who can seek a specific general prohibition under the civil legal aid act legal aid can be granted for the situation if the argument arose from a property dispute; however the small factor of marriage has not adjusted to include civil partners and even though legal aid can be granted under section 42 of the act[45]the assessment of income for the use of legal aid will use the spouse's income as a factor if those married are living together, this assessment has not been amended to include civil partners. In conclusion there are many similarities between the legal consequences of marriage and civil partnerships and it can be seen that the similarities can clearly out way the differences. And even though these differences to exist they are minor and it can be argued that there is not justifiable reason by the differences have been fixed to include civil partnerships and vice versa. The biggest difference that can be seen is not a legal consequence but is simply the fact that marriage is for heterosexual couples while civil partnerships are for homosexual couples.