

Chapter 2: Marriage

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Aims of this Chapter

This chapter will enable you to achieve the following learning outcome from the ILEX syllabus:

- 3 Understand the legal definition of marriage

2.1 Introduction

If you hear the word “marriage”, you may be more likely to think of fairy-tale weddings or cosy domesticity than issues of legal status. Yet the law underpinning marriage is of fundamental importance: it defines who may marry whom and how they go about marrying. Certain combinations of couples are barred from marrying one another – for example, if they are too young or closely related – and, even if they go through a ceremony of marriage, the law will not regard them as being married. This chapter will consider who may marry whom and how the law deals with cases where there is a fundamental obstacle to the marriage (such as a former spouse).

2.2 The common law definition of marriage

The definition of marriage most often quoted in legal textbooks and cases dates from 1866: according to **Hyde v Hyde and Woodmansee [1866]**, marriage is “*the voluntary union for life of one man and one woman to the exclusion of all others*”.

Of course, this is not a particularly satisfactory definition of marriage: there are many marriages that are not monogamous and which end in divorce and there are many cohabiting couples who live together faithfully throughout their lives. The definition in **Hyde v Hyde** is best seen as an ideal. The crucial legal distinction between married and cohabiting couples is that the former have gone through a ceremony of marriage and the latter have not. A rather more precise definition of marriage was given by Thorpe LJ in **Bellinger v Bellinger [2001]** who suggested that marriage should be defined as “*a contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations*”.

This highlights the important fact that marriage changes the status of the parties. Marriage creates certain rights and obligations which cannot be excluded or varied by the couple.

In order for there to be a valid marriage, a couple must:

- have capacity to marry – that is, be able to marry one another;
- consent to marry one another; and
- comply with specified formalities.

2.3 Capacity

Whether or not the law will allow a particular couple to marry will depend partly on their individual characteristics (i.e. Are they both old enough to marry?) and partly on factors affecting them as a couple (i.e. Are they related or of the same sex?).

The following scenarios illustrate some of the issues that may arise.



Adam married Bella

In 2007 Adam married Bella. Both of them thought that Bella was 16, but they later discovered that she had mistaken her birthday and was only 15 at the time of the ceremony.



Yasmin

Yasmin's parents are upset that their daughter is dating a boy of whom they disapprove. They have told her that unless she marries her cousin, they will disinherit her.



Henrietta

Henrietta (previously Henry) is a male-to-female transsexual. He has fallen in love with Ian and wishes to marry him.

The legal restrictions are set out in **s11 Matrimonial Causes Act 1973 (MCA 1973)**, although some of the key concepts are defined by reference to other legislation.

(1) The parties must not be related to each other within the prohibited degrees of consanguinity and affinity (**s11(a)(i) MCA 1973**), as set out in the **Marriage Act 1949 (MA 1949)** and the **Marriage (Prohibited Degrees of Relationship) Act 1986**.

Consanguinity refers to the relationship between blood relations, while affinity refers to relationships created by marriage (e.g. step-relations). The rules on consanguinity are based on genetic considerations, whereas those on affinity arise from social policy, principally to prevent sexual abuse of a young person by an older person, such as a step-father, who is in a position to exert pressure on the step-child.

The rules on consanguinity state that a person may not marry his (or her) grandparent, parent, child, grandchild, sibling, aunt/uncle or niece/nephew. The rules on affinity prohibit marriage between a step-father/step-mother and his/her step-child and between a step-grandfather/step-grandmother and step-

grandchild. Exceptionally, a person may marry a step-child or step-grandchild if both parties are over 21 and have not lived together as parent and child at any time before the child was 18.

There used to be restrictions on marriage between former in-laws, but these have gradually been eliminated from the law, and in 2007 the last of these restrictions (which prohibited couples from marrying if one of them had previously been married to the other's child unless both were over 21 and the previous spouses were dead) was abolished.



"Jest married. It may sound like a joke but . . . I've just married my mother-in-law!"

The News of the World, 18 March 2007

Special rules apply to adopted children, who are barred from marrying their adoptive parents but may marry any other member of their adoptive families (assuming that they are not otherwise related). Marriages between an adopted child and members of his biological family who fall within the prohibited degrees are also barred.

(2) Both parties must be aged 16 or over (**s11(a)(ii) MCA 1973; s2 MA 1949**).

If a person marries under the age of 16, the marriage is void. Although consent by a parent, or by the court, is required for the marriage of a 16- or 17-year-old, the absence of such consent does not invalidate the marriage, although the parents may be able to prevent the marriage going ahead.

(3) A valid marriage cannot take place if either party is married to, or in a civil partnership with, someone else at the time of the ceremony (**s11(b) MCA 1973**).

A person who has already been married is not, therefore, free to remarry until his first partner has died or the first marriage has been brought to an end. This requirement is absolute. An honest but mistaken belief in a spouse's death will not prevent a subsequent marriage from being void if the "deceased" is found to be alive.

(4) The parties must be male and female (**s11(c) MCA 1973**).

Although same-sex couples cannot contract a valid marriage, they can register a civil partnership and thereby gain the benefit of the provisions of the **Civil Partnership Act 2004 (CPA 2004)** that equate the legal position of civil partners to those of a married couple (see **Chapter 4**).

The fact that same-sex couples cannot contract a valid marriage in England and Wales is currently being challenged before the European Court of Human Rights as part of the 'Equal Love' campaign. Cases are also being brought to challenge the fact that only same-sex couples can enter into civil partnerships in this jurisdiction.

Transsexuals pose even more difficult questions for the law: is a male-to-female transsexual male or female for the purposes of marriage? Early case law on the topic held that gender was determined at birth by biological factors and could

not be altered by later events (see **Corbett v Corbett [1970]**). This rule was held to breach **ECHR** and Parliament enacted the **Gender Recognition Act 2004 (GRA 2004)**. A person can now obtain a “gender recognition certificate” from a Gender Recognition Panel upon proof that he has gender dysphoria and that he has lived in the gender opposite to his birth gender – his “acquired gender” – for at least two years and intends to do so permanently. Where such a person is married at the time of the grant of the certificate, he will be granted an interim gender recognition certificate, which can be converted into a full certificate once the marriage has been annulled.

The effect of a full gender recognition certificate is that the subject’s acquired gender is his gender for all purposes, including marriage (subject to any statutory exceptions).

It should be noted that if a transsexual has not obtained a gender recognition certificate, his gender will continue to be determined by the biological criteria set out in **Corbett**. These criteria have been refined in the case of persons who are inter-sex (i.e. whose gender was ambiguous at birth). In such cases, the court can consider psychological factors at the date of the “marriage” in determining the gender of the individual in question (**W v W (Nullity) [2000]**).

2.4 Consent

As the common law definition of marriage in **Hyde v Hyde and Woodmansee [1866]** emphasises, marriage is a “voluntary” union. This means that both parties must understand that they are entering into a marriage and give their full and free consent to it.

Thus, there is no consent if one party is of **unsound mind** and unable to understand the nature of the ceremony.

In **In the Estate of Park [1953]** Singleton LJ stated:

“To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality it cannot be said that he understands the nature of the contract.”

A more precise account of what the parties should be capable of understanding was set out in **Sheffield City Council v E [2004]**:

“Marriage, whether civil or religious, is a contract, formally entered into. It confers on the parties the status of husband and wife, the essence of the contract being an agreement between a man and a woman to live together, and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other’s society, comfort and assistance.”

In recent years there have been a number of cases in which local authorities have sought declarations that a particular adult is not capable of entering into a marriage because of his mental disability (**X City Council v MB, NB and MAB (By his Litigation Friend the Official Solicitor) [2006]**). In such cases, orders may also be made preventing the family of the adult from arranging a marriage for him (**M v B, A and S (By her Litigation Friend the Official Solicitor) [2005]**). Even if no such declaration is sought, the authorities may refuse to perform a ceremony: in **City of Westminster v IC**

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