

12 The law and the family

In this chapter, we will look at how the law sees the family as a special institution; how some legal systems treat married couples and their children differently from the unmarried; the process of divorce; custody of and responsibility for children; and protection from violence in the home. Finally, we will consider the rights of succession to the property of a family member when they die.

Beyond the mere function of providing a new generation of children, the family is often promoted for its moral contribution to society. Despite a growing labor shortage, the Japanese government has passed very little legislation challenging the assumption that mothers should stay at home rather than go out to work. In Ireland, which is strongly influenced by the doctrines of the Catholic Church, divorce remains illegal. Part I

In some societies the family is thought to be so important that there is very little legal intervention in family life. In many Islamic countries, for example, fathers, brothers and sons are allowed considerable authority over the females in their family. As late as the 1970s, the male head of the household in Switzerland was deemed to represent the interests of everyone within that household, and, consequently, none of the women could vote in national elections. But in many parts of the world, the law now promotes the rights of individuals within the family unit, and regulates family relations through legislation. Raised from the taxes of the working population as a whole, Child Benefit is paid directly to the mother, and retirement pensions are paid to grandparents, so that they are less dependent upon financial support from a family member. In Sweden, parents can be prosecuted for physically punishing their children and children have a limited capacity to divorce their parents. In Britain, as in many countries, there are special family courts with very strong powers to control and transfer private property in the interests of children. Much of the work of other courts is also directly relevant to family life.

Marriage law Part II

① The law in most countries places more emphasis upon marriages legally registered than social arrangements whereby people live together. In Japan, some couples prefer not to register their marriage because the law requires one of them to give up his or her name in favor of the other. The birth and residence documentation of children born to such marriages is different from that of other children and sometimes leads to

discrimination. In Britain, children born outside legitimate marriages have fewer rights to financial support from estranged fathers than legitimate children. In addition, if they are born outside the UK, they are less likely than legitimate children to be granted British citizenship. Their fathers have no automatic right to have contact with them. Some welfare payments are calculated on a different basis according to whether recipients are married or not, and more procedures are available to a married woman than an unmarried one in seeking protection from domestic violence. However, in most industrialized countries, the legal differences between the married and the unmarried are decreasing. It is not surprising this should be the case in a nation like the United States, for example, here 25 percent of babies are now born to unmarried parents.

In English law, some marriages may be readily dissolved, or **nullified**—for example: if the couple never consummated the marriage, are blood relations, are under the legal age of sixteen (Pugh vs. Pugh, 1951) are both women (Talbot vs. Talbot, 1967), or, despite a surgical sex change, are both men (Corbett vs. Corbett, 1970). In other cases, a couple may seek a divorce. The procedure may be lengthy, especially if one spouse does not want to get divorced, or if there are children. In no case will English law allow divorce proceedings to start within a year of the marriage, since it is thought this is too soon for the marriage to have tested itself. It is also feared that people would get married without serious thought if it were quick and easy to get a divorce.

Divorce law

Part III

Divorce proceedings in England take place in certain County Courts known as divorce county courts. Some matters are also dealt with in the Family Division of the High Court. It is necessary for one of the parties to convince the court that the marriage has broken down irretrievably—without any chance of reconciliation. To do this the person seeking, or **petitioning for** divorce, must prove one of five things: that the other party, or **respondent**, committed adultery (had sex with someone else); that the respondent's behavior has been unreasonable; that the respondent deserted the petitioner at least two years previously; that the couple has lived apart for two years and both agree to a divorce; or that they have lived apart for five years. Even if the court is satisfied that there is enough evidence of one of the above, a divorce will not be issued until satisfactory arrangements have been made for any children of the marriage, including determining who is to have **custody** of the children, the rights of the



Figure 12.1 *The wedding... and after.*



children to maintain contact with the other parent, and financial arrangement for the children's welfare.

The High Court or divorce county court has wide powers to order both an ex-husband and an ex-wife to make financial provisions for the other and for their children. This may include periodic payments, a lump sum of cash, transfer of property into the other spouse's name, or sale of property so that the money can be divided. In general, these orders are supposed to support the children and other spouse (usually the one taking care of the children; often the mother) until they become financially independent.

When a couple separates, whether married or unmarried, the welfare of any children and the division of any property are the most important, and often the most difficult problems, to resolve. People who once lived together happily may argue bitterly once the trust between them has dissolved. Although it is possible, and certainly much cheaper, to arrange most of the terms of a divorce privately without lawyers, many couples find that it is impossible for them to reach such an agreement.

In the case of property, the courts have to find a balance between two principles. One is that any division should fairly reflect how much each party contributed to the property they held together. In the past, some women suffered when they separated from their husband because the house they lived in was bought with his money and registered in his name. Nowadays, courts look beyond legal ownership and cash contributions. Work done in the home, time spent caring for the family, even emotional support, are all considered as giving some rights to property. In the United States, there have been cases of the lovers of famous entertainers claiming a proportion of the income earned by their partner during the time they lived together, and sometimes millions of dollars have been at issue. When Cindy Nelson separated from her girlfriend, tennis star Martina Navratilova, she produced a contract that the two women had signed when they lived together to support her huge claim for money.

The other principle which courts must consider is the needs of the parties. It is no longer assumed that a woman who was financially dependent on her husband when they were married will remain so after they are divorced, but the length of the marriage and the age and skills of the woman will be considered in deciding how soon—if at all—she is likely to become independent. There are a few cases of a court refusing to grant a divorce at all because the couple in question was elderly and would never recover from the financial shock.

Protection of children Part IV

In general, the welfare of children is the biggest concern of family law. Virtually all societies, and certainly all legal systems, treat children differently from adults. There are special courts to deal with young people who commit crimes (see Chapter 4). In economically developed countries, there are limits on the type and amount of work a child is allowed to do. There are age limits on the rights and duties of citizens; however, these vary from country to country. A Japanese may not vote until he is twenty, but a German may vote at eighteen. A Briton may marry at sixteen with his parents' consent, or at eighteen without it; a French girl may marry at fourteen, but a boy must wait until he is sixteen. In some parts of the United States you may drive a car at fifteen, but in others, not until eighteen. It is interesting that in many places a person may be sentenced to death at an age when he is not allowed to vote. Parents have a duty to make decisions, for example those concerning education, on behalf of their children. When parents are dead or absent, a legal **guardian** is appointed to make these decisions. Sometimes this is an adoptive parent—a person who legally adopts the child as his or her own and has all the rights and duties of a natural parent. Sometimes, it is a local authority, as in the case of children who have been taken into care because their parents are ill, in prison or unable to take care of them.

Rights of succession Part V

An important event for a family, usually requiring consultation with a lawyer, is the death of a relative. The property of a dead person is mostly dealt with in Anglo-American law under the law of **probate**. This is distinct from family law and of course it is not only relatives who may receive (**inherit**) the property of a dead person. However, it seems appropriate to consider Probate in a chapter about family law since it is usually family members who are concerned with registering the death, paying the dead person's debts and tax liabilities, and acquiring his property.

Many people make a **will** before their death containing their instructions regarding what is to happen to their property when they die. In English law, the maker of a will is called a **testator**. The will need not be drawn up by a lawyer, but there are certain regulations about how it must be made. For example, it must be in writing, and there must be two witnesses who sign the will (see the document at the end of Chapter 5). Clearly such requirements are necessary since once the testator is dead, no one can ask him to explain his intentions. The testator may give away all of his

property (his **estate**), both real and personal. He need not give it to a family member. However, under the 1975 Inheritance (Provision for Family and Dependents) Act, English courts have some powers to modify the will if it is unfair to a spouse, child or other dependent.

A will can be quite a simple document. Yet many people never make one—they die **intestate**. Sometimes this is because of carelessness. But often it is simply because they do not have a great deal of property and believe it is clear who will inherit that property after their death. In most countries, there are **laws of succession** which clearly lay down who is entitled to the property of an intestate relative and in what order. Under English law, a surviving spouse is at the top of this order, followed by children, parents, brothers and sisters, grandparents and uncles, aunts and cousins. If there are no relatives at all the property passes to the State, but it is likely that the court will make some provision for any non-relative who had been a dependent of the dead person.

In the French Civil Code, as well as under a will or the laws of succession, property may be passed by a contract made with another person to come into effect on death, although this is unusual. In English law as well, the people administering the property of a dead person may need to consider contracts he had made. Actions in both contract and tort may be made against the estate of a person even after he has died. If a contract was in the process of being made at the time of death the law may have some difficulty in deciding if it is valid or not. The English case of *Bradbury vs. Morgan* (1862) suggests that an offer may be accepted (and therefore a contract made: see Chapter 6) even after the death of the offeror.

Whether there is a will or not, it may take some time to deal with the dead person's property. It is necessary to work out how much property there is; whether there are debts to be paid; whether a trust needs to be set up for gifts to children (see Chapter 9); and whether someone entitled to property prefers not to take it—for example, a business which is more trouble to run than it is worth. Sometimes there is **partial intestacy**: there is a will dealing with some of the dead person's property, but not all of it. In this case, both the terms of the will and the laws of succession need to be applied. And there may be Inheritance Tax to pay (unless the property is under a certain value or all of it is to pass to the dead person's spouse).