

LEGAL STUDIES

Research Report: Family Law Essay

Compare and contrast the legal outcomes and obligations of marriage with those of ONE alternate family arrangement. In your answer, briefly explain how the legal system reflects the moral and ethical standards in the area of family relationships. Refer to case studies, legislation and media reports where possible.

Family law has evolved extensively in the past century, and with these changes the Australian legal system has been able to more effectively resolve conflicts within marriages, promote financial security for all family members, and ensure justice for the individual and society. The *Family Law Act 1975 (Cth)* defines a family as “*the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children*”. However, as the moral and ethical standards of society revolutionise, it is necessary for the legal system to reflect these adjustments by shaping the law in order to mirror community expectations. Traditionally, the legal concept of family was limited to the nuclear family or married heterosexual couples, consisting of mother, father and child. However, society’s changing values and composition has brought about the acceptance of many different family arrangements such as **same sex relationships**, and the law has been obliged to preserve this through legislation.

Marriage is an important social institution, which is seen to provide the basis on which society operates. However, marriage has evolved over time from a personal and private commitment to one of public and legal responsibility. The *Family Law Act 1975 (Cth)* establishes the legal outcomes and obligations that arise through the union of a male and female which must be upheld. Marriage was first defined through the case of **Hyde v Hyde and Woodmansee (1866)** as “*the voluntary union for life of one man and one woman to the exclusion of all others*”. Thus, the development of such a definition established specific legal principles in terms of married couples by prohibiting same-sex and polygamous marriages in Australia. It also created the notion of ‘*for life*,’ which has since evolved considerably with the introduction and acceptance of divorce.

Despite **Hyde v Hyde and Woodmansee’s** definition of marriage creating a strong legal precedent within Australia, society’s perception of marriage and of family has developed considerably in the past. Same-sex relationships were initially unaccepted by law and society, and thus couples in such relationships had limited rights and legal protection. However, as society’s moral and ethical standards revolutionised, the law recognised same sex relationships as having the same legal rights as de facto relationships. The *Property (Relationships) Legislation Amendment Act 1999 (NSW)* defined a de facto relationship as a ‘*relationship between two adult persons*’ who live together as a couple but are not married. This act was the first legislative piece to validate same sex relationships, providing protection under the law in areas such as maintenance, property division and inheritance. Essentially, this was an effective forward step in granting same sex couples equality before the law and recognising their individual rights. However, same sex couples are still deemed as disadvantaged within society to an extent, as they are not granted the same rights as those within a marriage. Despite the *Anti-Discrimination Act 1997 NSW* criminalizing any discrimination on the basis of sexuality, it has failed to protect same sex couples from indirect discrimination and institutionalised inequality, since ‘*marriage*’ involving people of the same sex has no legal basis in Australia under *The Marriage Act 1961 (Cth)*.

Society’s fluctuating moral and ethical standards has modernised the definition of justice within marriage and same- sex relationships. An example is the community’s changing perception towards children as being the most vulnerable members of the family, and thus require paramount protection. Family law has responded adequately to such change by establishing the principle that all children, no matter what arrangement or form of birth, are equal before the law under the *Status of Children Act 1996 (NSW)*. Furthermore, parents have many legal obligations to ensure the

protection and development of their child, despite their family arrangement. Under the *Family Law Reform Act 1995 (Cth)*, both parents are equally responsible for the short and long term care and control of their child. This includes providing the basic needs of children, medical care, adequate shelter and compulsory education. Government welfare agencies, such as the Department of Community Services (DOCS) may remove a child from the home if they suspect improper care or abuse. However, as highlighted in the SMH article '*Failing System Leaves Abused Children to Die.*' welfare agencies such as DOCS are deemed ineffective due to a lack of enforcement mechanisms and resources as well as under funding. In 2006, for example, 114 children died despite DOCS being aware that these children were at risk. The government argues that spending has increased by \$1.2 billion, however these financial contributions have not shown any improvements in resource efficiency.

Same sex couples now have more protection under legislation, but equality is still somewhat compromised in comparison to those within a marriage. This is despite the fact that the 2006 Census reported over 24, 500 same sex couples in Australia, which represented a 25.9% increase from the 2001 Census. One of the most challenging areas for family Law is that regarding surrogacy, adoption and birth technology. Apart from the serious moral and ethical questions these areas pose, the legal responses to these have been just as challenging. To reflect the standards of society and to increase equality, the *Status of Children Act 1996 (NSW)* removed the concept of illegitimacy and gave all children, including ex nuptial children equal rights in all areas of law. An ex-nuptial, under the *Marriage Act 1961 (Cth)* is a child born outside of marriage, for example a child born through birth technology in a same sex relationship. In the past, these children had no legal status or rights, such as inheritance or maintenance. However, changing moral and ethical standards has resulted in the *Status of Children 1996 (NSW)* granting ex nuptial children the same rights as those born within wedlock, hence providing them equal access to justice. This has been seen as an effective step in providing same sex couples equal rights to those couples within a marriage.

Although equality has increased significantly for same sex couples, they still suffer discrimination in areas such as adoption. In contrast to married couples, same sex couples are deemed ineligible to adopt under the *Adoption Act 2000 (NSW)*. This has been a major factor contributing to ineffectiveness within the law, and has ultimately led to equality being compromised for same sex couples. Through the article Same-sex adoption move 'discriminatory' (SMH 2010), it is made apparent that the NSW government's failure to support adoption by same-sex couples is considered discriminatory and not in the best interests of the children. Furthermore, there has been almost no proactive approach on the issue at federal level, highlighting the ineffectiveness of the government in reflecting community values. The recent Same-Sex Marriages Bill 2006 has been delayed indefinitely, which would have fundamentally granted equal status and eliminated all legislative discrimination between same sex couples and heterosexual couples. Ultimately, this outlines the ineffectiveness of the legal system in protecting the rights of various individuals within society.

Since the Australian legal system has rejected same sex couples from adopting, they must now resort to IVF and surrogacy to have children, which may bring up legal complications such as parentage and custody issues. Following the introduction of artificial methods of birth technology, the legal definition of '*parent*' has been extended to include the idea of the '*birth mother*' or '*biological father*' and also the adult who takes on the role of caregiver. For any child conceived via IVF or artificial insemination the '*parents*' are considered to be the legal and natural parents of the child and have all the rights and obligations of maintaining and caring for the child. However, same-sex parents are continually facing legal obstacles, as revealed through the case of **Clarke v Tolley (2001)**. The mother who gave birth through IVF was given full custody while absolutely no legal status was awarded to the lesbian partner who had supported the child for 4 years.

Marriage is an important legal institution which requires various consequences and responsibilities to be adequately upheld. Upon union, mutual duties for both the husband and wife arise. There are social pressures on a couple to adequately care for each other, and it is expected that they will

support each other emotionally and be loyal within their relationship. However, the law allows the partners to carry out their rights and duties with little official intervention. Intervention will only occur when the law is broken such as in domestic violence situations, where police may issue ADVO's which act as an injunction under the *Crimes Act 1900 (NSW)*. However, these court orders are largely unenforceable, and the detriments of these flaws was shown in the 2006 SMH article 'Police Seek Right to Issue Orders' which listed 14 spousal murders in less than 8 months despite issued ADVOs. In an attempt to improve enforceability, chief police officers have been empowered to issue ADVOs without need for court approval, however the effect of this decision is yet to be seen.

Marriage became a legal institution to enforce promises made by each partner, to protect the parties in a marriage and most importantly, to safeguard children that may result from that marriage. As a legal institution it has also meant that the law is able to intervene in the *dissolution of marriage*, or in the breakdown of a relationship in the case of same sex couples. The introduction of 'no fault' divorce is a reflection of the changing ethical and moral standards of society. Under the *Family Law Act 1975 (Cth)*, the only ground for divorce now is the "*irretrievable breakdown of the marriage*".

One of the legal obligations of marriage is the provision of maintenance, which is usually sought after the marriage has ended. This is referred to as post-dissolution maintenance payments, which has become a fundamental issue in the breakdown of a marriage. Within a marriage, there is a moral duty to maintain each other and a legal duty to maintain children, which again reflects society's changing values towards children being the paramount concern in any relationship. Under the *Family Law Act*, spousal maintenance is the responsibility of a person to financially support their ex-partner after separation. The effectiveness of the legal system in supporting financially disabled individuals and essentially providing them with equality and accessibility is portrayed through the case of **Eliades v Eliades (1981)**. This case reinforces how the *Family Law Act* stipulates a duty on each partner to support the other, even when maintenance seems to be extreme. Similar to marriages, same sex relationships must maintain all dependent children within the relationship. In 1989, the federal parliament passed the *Child Support (Assessment Act)* to ensure that **all maintenance orders were complied with**. The *Child Support (Assessment) Act 1989* assesses the ability of a parent to financially support a child living with an ex-partner. The act outlines that "*the parents have the primary duty to maintain the child*" which effectively ensures equality for all children. This is epitomised in the case of **W v G (1994)**, where a same sex partner was required to pay child maintenance to his partner for their two children born via artificial inseminations. The Child Support Agency is a federal government agency that oversees the transfer of such payment. Child support is generally agreed upon dissolution outside the courts. The law encourages this approach, providing a resource efficient system for society and the individual, whilst maintaining an accessible court alternative.

Changes to the *Marriage Act 1961* reflect modern community standards by dismissing *unito caro* and providing fairer property division laws - considering both the financial and non-financial contributions of each spouse. Any property acquired during the marriage belongs to the person who has a legal title to it. Although marriage may not change legal ownership of property, many factors come into consideration during the dissolution of marriage in the Family Court which may change legal ownership. If a marriage is to break down, property is divided along the lines of previous financial contributions, contributions throughout the marriage, and the future needs of both parties, particularly those of any children involved. By providing equality and accessibility, the legal system promotes order and encourages the resolution of familial conflict through compliance with the law. Similarly, *The De Facto Relationships Act 1984* legislated in regards to de facto couples and same sex couples, effectively providing them equal rights with married couples to claim property settlement. This has led to a significant increase in accessibility, as many individuals are no longer constrained by the congestion of arduous court proceedings. Since the *Property (Relationships) Legislation Amendment Act 1999 (NSW)* same sex couples are no longer required to use the Equity Division of the Supreme Court for property disputes, as they are now recognised as being in a domestic relationship. As seen through the case of **Ball v Newey and Another (1988)**, Ball's

appeal to the Equity Division of the Supreme Court was successful, however it did incur a great cost to all parties. The elimination of this process has meant that same-sex couples now have the same access to resource and cost efficient tribunals as other de-facto and married couples.

Despite the rights brought about the *Property (Relationships) Amendment Act 1999 (NSW)*, many land mark cases have also brought same sex couples rights. One case is **Hope and Brown v NIB Health Funds (1995) (EOC)**. This case involved a same sex couple that claimed that for their health insurance fund had discriminated against them because the fund denied them 'family' status. Although the fund did not recognise the couple as a 'family' the NSW Equal Opportunity Commission did. Same sex couples from this case were granted access to family health insurance, thus granting same sex couples the right to access family health insurance. However, equality has been compromised for same sex couple in certain areas. For example, same sex couples do not have automatic claim to their partner's superannuation in the event that their relationship ends. Also, same sex couples can be compelled to give evidence against their partner, whereas married couples cannot.

Society's fluctuating moral and ethical standards has brought about the acceptance of many similar rights in comparison to married couples, and the law has been obliged to preserve this through legislation. The *Wills, Probate and Administration Act 1898 (NSW)* outlines that a marriage revokes any will in existence prior to the wedding. This legal consequence as a result of marriage is an attempt by the law to ensure that married couples provide for the other after death, thereby relieving the burden on the rest of society in the form of welfare benefits. Generally, if one spouse dies during the marriage without a will (intestate), the other will inherit all of their property, except where one spouse has murdered the other. Furthermore, the development of the *Family Provisions Act 1982 (NSW)* allowed the Supreme Court to overturn any will that excluded a spouse or child from inheriting. Prior to the introduction of the *Property (Relationships) Act 1984* same sex couples did not have the same rights as a heterosexual couple in relation to the death of a partner. With the changes to *Property (Relationships) Legislation Amendment Act 1999 (NSW)*, the surviving partners of same sex de facto relationships have the same inheritance rights as heterosexual married couples. Also, since 1997 same sex partners have been able to be compensated up to \$50 000 following the death of their partner as a consequence of an act of violence. This occurred when the *Victims Support and Rehabilitation Act 1996 (NSW)* was amended to broaden the definition of 'family victim.'

Society's attitudes towards different family arrangements have changed dramatically over the past century. It can be concluded that the area of family law focuses more on reconciliation and on encouraging compliance than on the use of sanctions or coercion to enforce compliance. Through the development of legal processes via common and statute law, and institutions, such as government agencies and support services, the legal system has achieved varying levels of effectiveness for different family relationships. It is exceedingly evident that despite the many flaws within family law, it is still able to reflect the changing values of society in regards to achieving justice for all members of the family unit. As society continues to evolve, the law must be able to adapt to achieve justice for alternative family arrangements.

Bibliography

Text Books

- Cambridge Legal Studies HSC
- Heinemann Legal Studies HSC Course- Third edition
- Macquarie Revision Guide HSC Legal Studies- *Janet McCarthy*

Online Websites

- Sydney Morning Herald <http://www.smh.com.au/> (Last Accessed 17/7/10)
- Overview of the Australian Governments Same Sex Law Reforms http://ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_SameSexReform (Last Accessed 17/7/10)
- Australian Bureau of Statistics <http://www.abs.gov.au/>
- 2006 Census Statistics <http://www.coalitionforequality.org.au/2006census.pdf> (Last Accessed 17/7/10)