Neutral Citation Number: [2005] IEHC 384

THE HIGH COURT
(MATRIMONIAL)

[2000 No: 11M]

BETWEEN

O'K

APPLICANT

AND
O'K

RESPONDENT

Judgment of Mr. Justice O'Higgins delivered on the 29th day of July 2005.

1. This case comes before the court by way of a nullity petition which reads as follows:

> "1. Your Petitioner went through a ceremony of marriage to the Respondent,……..otherwise……. at the Church of . . . in the County of the City of Dublin on the 6th day of September, 1994.
>
> 2. Your Petitioner and the said [……..], are and were at the date of the said purported ceremony of marriage, domiciled in Ireland.
>
> 3. Following the said ceremony of marriage, your Petitioner lived and co-habited with the Respondent....
>
> 4. There are no children of the, marriage between the Petitioner and the Respondent herein.
>
> 5. Your Petitioner and the Respondent have lived separate and apart from one another since in or about the month of June, 1999.
>
> 6. Your Petitioner …. resides at ….Your Respondent herein …. resides at ….
>
> 7. Your Petitioner did not give nor was he capable of giving a full, free or informed consent to the said ceremony of marriage.
>
> 8. As of the date of the said ceremony of marriage, your Petitioner by reason of psychiatric illness, personality disorder and/or emotional immaturity was incapable of entering into and sustaining a normal marital relationship with the Respondent.
>
> 9. As of the date of the said ceremony of marriage, your Respondent reason of emotional immaturity and her state of mind, was incapable of undertaking the nature, duties and responsibilities of a normal marital relationship with your Petitioner.
>
> 10. The Respondent herein did not give a full, free and informed consent to the said ceremony of marriage.
>
> 11. As of the date of the said ceremony of marriage, the Respondent, by reason of emotional immaturity and her state of mind was incapable of entering into and sustaining a normal marital relationship with the Petitioner herein.
>
> 12. The Respondent herein has by her conduct repudiated the marriage between the Petitioner and the Respondent herein."

2. By order of the Master of the High Court dated the 19th December 2001, Dr. Michelle Cahill a consultant psychiatrist was appointed as the medical examiner in this case. By further order of the Master dated the 6th October, 2004 the issues to be tried were set out as follows:

> "1. Whether the Petitioner gave or was capable of giving a full free or informed consent to the ceremony of marriage.
>
> 2. Whether at the date of the marriage the Petitioner by reason of psychiatric illness personality disorder and/or emotional immaturity was incapable of entering into and sustaining a normal marital relationship with the Respondent.
>
> 3. Whether at the date of the marriage the Respondent by reason of emotional immaturity and her state of mind was incapable of undertaking the nature (sic) duties and responsibilities of a normal marital relationship with the Petitioner.
>
> 4. Whether the Respondent gave a full free and informed consent to the ceremony of marriage.
>
> 5. Whether at the date of the marriage the Respondent by reason of emotional immaturity and state of mind was incapable of entering into and sustaining a normal marital relationship with the Petitioner.
>
> 6. Whether the Respondent has repudiated the marriage and such other issue or issues as to the trial judge shall seem fit."

3. In her answer to the petition the respondent denies the incapacity alleged by the petitioner both in respect of his capacity to enter into the marriage and in respect of her own. She further contends that the petitioner has by his conduct approbated the marriage and ratified the marriage and contends that he has acted with undue delay and she claims the proceedings amount to abuse of process of the court.

4. The case was heard over a period of six days and the court heard evidence from no less than five medical doctors (four of whom were consultant psychiatrists) as well as evidence from four other witnesses, apart from the petitioner himself.

5. On the fourth day of the hearing counsel for the respondent indicated that her client no longer wished to context the nullity proceedings on foot of matters that had transpired since the hearing commenced. Quite properly the Court was told that financial arrangements had been put in place between the parties. However these arrangements were in no way dependent on the outcome of the proceedings. I am quite satisfied that no question of collusion arises in these proceedings.

6. The psychiatric evidence was directed principally to the two main issues in the case. Firstly the ability of the petitioner to exercise an informed judgment and to consent to enter into the marriage contract. At issue was the question as to whether the apparent consent to marriage was vitiated by reason of the mental condition and/or use of medication by the applicant. The second issue was whether the petitioner by reason of his mental condition was capable of sustaining a martial relationship.

The consent issue
7. In regard to the consent issue the evidence was as follows.

8. Dr. Corkery a consultant psychiatrist who treated the petitioner for bipolar disorder between 1991 and 1993 was of the view that ideally there should be "between six months and a year of the mood being absolutely stable and everything happening as regards compliance with advice, education and medication" before a person with bipolar illness should enter a marriage contract. She also said that she would advise persons who had an episode of illness "not to make serious decisions in life for a considerable time until they are very well settled".

9. Dr. Cahill was the examiner appointed by the Master of the High Court to report on these issues to the court. It was her considered opinion having read Dr. Shelley's psychiatric notes and having regard to the petitioner's own history that his decision to marry i.e. his consent to marry on the date of the marriage was not flawed. She was of the view that at that time his mood was stable and remained stable for a number of months after the marriage until he got depressed. However, Dr. Cahill revised her opinion in the light of further reports from Dr. Shelley and Dr. Lucey and the light of a fuller history of the applicant and told the court that by reason of his medication and history of illness she considered that the petitioner was incapable of forming a proper judgment to get married.

10. The applicant was under the care of Dr. Rory Shelley, a consultant psychiatrist from 1993 to 1996. Dr. Shelley saw him on the 29th August 1994 just over a week prior to his wedding and described his mood as normal. When he saw him again two days after the wedding Dr. Shelley noted that the petitioner had got on well at the wedding. It was his view that the petitioner had the capacity to enter into a marriage on the date of the wedding and that there was nothing in his mental state at the time of his wedding that would have impaired his capacity. Dr. Shelley has since concluded that the petitioner suffers from a neurological deficit associated with his illness. However, even if that deficit were present at the time of his marriage, Dr. Shelley did not think that it was of such a severity that it would have interfered with his ability to enter into the marriage at the date of the wedding.

11. Dr. Lucey is a consultant psychiatrist who is currently treating the petitioner. He considered that the medication being taken at the time of his marriage would not have adversely affected the petitioner's judgment. He thought that the petitioner was quite clearly capable of consenting to marriage, but that he did not have the capacity to enter into a marriage because marriage involves commitment.

12. The petitioner himself said in evidence that "certainly I knew what I was doing when I got married".

13. The petitioner was under medical treatment for bipolar disorder at the time of his wedding. He was on appropriate medication. I consider that in regard to his capacity to enter the marriage much reliance must be placed on the evidence of the psychiatrist who was treating him at the time and who saw him shortly before and shortly after the wedding ceremony. I must also have regard to the evidence of the applicant himself. Moreover there has been evidence from the applicant's brother between that at his request the applicant deferred the wedding for a period of about a year. Whatever the advisability of the applicant waiting for a longer period of stability in his condition, I have little doubt that he was capable of exercising the judgment to get married.

14. In those circumstances the petition cannot succeed on the first issue.

The capability of the petitioner to enter into and Sustain a normal marital relationship with the respondent.

The evidence of the petitioner
15. The petitioner was born in 1946 and commenced work in 1969. He had a very rapid rise in his career and within a period of 10 to 12 years he had no less than 6 offices throughout the country. He had acquired a number of expensive houses as well. The petitioner told the court of some of his relationships with women. He was engaged at least three times. He was engaged several times to one particular woman and he told the court that rings were flying "hither and thither". Despite his success however the petitioner told the court that he felt lonely and unfulfilled. He felt that things began to go wrong in the mid 1980's. In 1991 he was first hospitalised for his bipolar disorder, but prior to that he had been under the care of his very concerned general practitioner. His first admission to hospital for bipolar disorder was an involuntary admission which occurred after a time when his general practitioner had attempted to treat him at home. The court was furnished with a synopsises of his attendance at work between the years 1998 and 2003. It is quite clear from that that because of his illness the petitioner was hugely impaired in carrying on his work during that period of time. Moreover the evidence of Mr. O'C. partner in one of his offices shows that the petitioner was unable to attend to hiswork, a fact which caused very great concern to many people. The petitioner described his involvement in fundraising and other things to which he devoted an inordinate amount of time and effort at a period when he was not very well.

16. The petitioner met the respondent in 1993 some weeks before he was hospitalised for his illness at the end of July of that year. On his discharge from hospital his mood was unstable. He described an incident where the respondent and himself were ejected from a public house for unbecoming behaviour while he was in a state of elation owing to his illness and further incidents some short time later where he took a number of sleeping pills in the early evening because of the onset of depression. During the year prior to his marriage he was frequently staying in bed. He worked very little and was generally unwell. Sometime before his wedding he resumed the lithium medication. It is unnecessary in this judgment to detail the history of the marriage given by the petitioner however in the year following the marriage he had a very poor record of attendance at work. He felt unhappy and frustrated. He encouraged the respondent to socialise and she frequently stayed out very late returning in the morning time. This was a matter of indifference to the petitioner. His marriage did not get him "back into normality". He felt guilty that he was not "behaving like a husband should in every sense of the word". The friction between the parties increased over the year. The petitioner described an incident in July of 1997. He was staying overnight with the respondent in the house of Mr. O'S. The petitioner went to bed early and in the morning he noticed that his wife and Mr. O'S. were still in the sitting room in a state of partial undress. Mr. O'S's shirt was open, he had no trousers on and his penis was exposed and the respondent's underclothes had been taken off. He knew from looking "that there was something happening, but he didn't want to see what was happening. However he did see them kissing. Mr. O'S adamantly denies that he was in such a state of undress although he may have his shirt open. He denies that there was sexual impropriety other than some kissing. There is also reference in a diary of the respondent which refers to sexual conduct short of "full sexual intercourse with Mr. O'S. The petitioner through his counsel relies on his version of this incident as providing evidence that the respondent repudiated the marriage. In my view if the petitioner's version of the incident is preferred the behaviour complained of was clearly inappropriate and hurtful conduct but in my view in the overall context of the marriage history does not prove repudiation of the marriage by the respondent for the purpose of this case. The petitioner told the court that he was surprised at his own lack of reaction to this particular event

however the physical relationship between the parties ended at that time. The petitioner and the respondent spent more and more time apart and by the time that they finally parted in 1999 the respondent was living apart from him for a period of about five months every year.

The evidence of Dr. Corkery

17. Dr. Corkery is a consultant psychiatrist. The petitioner came under her care in June of 1991 having been referred by Dr. Smith his general practitioner. Her referral letter contains the following which is of relevance:-

> "Thank you for agreeing to see [the petitioner] who is suffering from hypomania. I note from my files that he first suffered from hyperactivity in October '87 for one month. At that time I was worried about him - he got depressed when he turned 40 years. I made an appointment for him to see Dr. Tubridy in Dublin but he didn't see the need and did not attend. At that time he developed an interest in religion again, darting into church throughout the day to light candles, feeling guilty about his past life's events. He became over-talkative and gave inappropriate interviews to the radio and newspapers. While the media people were delighted with his openness, he did spill out details of his personal life and feelings which were quite unnecessary to be publicised. Normally he was quite a private person.
>
> In October '88 he lost interest in work, even in enquiring how things were progressing at the office. He was out of work for one month, staying in bed in his darkened bedroom with phone off the hook and refusing to answer the doorbell. Normally fastidious about his person hygiene and clothing he neglected himself, became dirty and unkempt, spilling his bedside drinks and messing the food that he had his office manager deliver to him. This episode followed six weeks of hyperactivity-organising a massive Fund Raising event locally which was an extravaganza and also getting himself engaged to be married for the third time.
>
> In November '88 I admitted him to the Blackrock clinic for 'treatment for his D.U.'
>
> While there he was seen by Dr. Peter Fahy whom he had seen in the past. He felt that he was hyperactive but no evidence of any formal psychiatric illness. His follow up appointment was cancelled by G….
>
> After discharge G. went to see Dr. T. on two occasions on the advice of a colleague in Dublin.
>
> In June '89 he again came to see me complaining of being 'burnt out', 'wrecked', insomnia and requesting something to 'calm me down'. He was over-talkative, tearful with rapidity of speech. It was noted locally that he was emotionally labile at public meetings with inappropriate behaviour. He was elated about his new romance, dashing over and back to London to meet her and relating to all and sundry the details of their relationship.
>
> I prescribed Largactil but as there was nobody to monitor his medication I'm quite sure he didn't take it regularly. He was ill for three months. He has not worked for over two years. He attends the office but spends his time organising Fund Raising events. He spends a lot of his time with the [a singer's] fan club and promoting [a singer's]'look-a-likes', travelling to […..]etc.
>
> Having organised a huge Charity Auction in Dublin in April he took to his bed again and felt 'drained'. I prescribed Serenance in small doses but I felt he was untruthful when he'd tell me he was taking tabs. as prescribed.
>
> He is hypomanic but can appear to function well. He has no insight into his condition. He has no awareness of the embarrassment he causes to those around him. When he waits to see me in the surgery he converses in a very loud voice to the other patients, telling a blonde patient that she is 'beautiful' and handing out five pound notes to children.
>
> He is very ill, family and colleagues are very concerned about him. If he refuses treatment it may be necessary to commit him. I think we must be forceful about the need for treatment. I feel that there is ample evidence of bipolar disorder which ought to respond to Lithium. I spoke with B.W. the office manager who would take charge of medication. I do not think [the petitioner] would comply with treatment. He is unmarried and lives alone. There would be a problem at weekends when travels to Dublin usually. I would value your opinion.
>
> Sincerely,"

18. In June 1991 the petitioner was committed to hospital as an involuntary patient. However after approximately 2 days he was discharged and readmitted as a voluntary patient to another hospital in the area. There is some confusion as to his periods in hospital at that time but it appears that he was in hospital initially for a three week period returning home one weekend and that in July of 1991 shortly after his discharge he was readmitted for a period of some days. Dr. Corkery provided a report dated the 9th July 2004 for the purposes of this case. In it she says the following:

> "Course of illness:
>
> > When [the petitioner] was under my care he showed evidence of quite severe Bipolar affective disorder with considerable lack of insight into his illness i.e. poor realisation of the severity of the illness, the need for treatment and the need for compliance with treatment. As a result . . .[the petitioner's] illness was quite difficult to control and this resulted in his mental state being very unstable at times with resultant disinhibition, overspending, difficulty carrying out work and poor judgment when elated. While depressed [the petitioner] shows a poor level of functioning and often feels so depressed that he spent prolonged periods in bed and showed inability to carry out normal duties and even self-care.
> >
> > I do not feel that [the petitioner] was in my view capable of having the capacity to enter into and sustain a normal marital relationship because of his serious mental illness which caused disabling mood swings, disinhibition, variable levels of activity and impaired judgement also. The illness was compounded by the fact that [the petitioner] is a very able intelligent man who is a very successful man.
> >
> > [The petitioner] could be very difficult to persuade re: absolute compliance with medications and absolute avoidance of alcohol which resulted in his discontinuing his mood stabilisers when he persuaded me to literally succumb to his persuasive powers and give up lithium his mood stabiliser. This resulted in deterioration in [the petitioner's] illness when he was without Lithium which is the Gold Standard Treatment in the Management of Bipolar affective disorder. When [the petitioner] left my outpatient care in 1993 he was mentally quite unwell and appeared

at that time to see various medical people with ongoing difficulties in stabilising his illness due to [the petitioner]'s insistence in seeing doctors for psychotherapy and not pharmacotherapy which is the management of a severe illness such as Bipolar Effective Disorder.

In Conclusion chronic Bipolar Affective Disorder is a very disabling illness and causes very high disability. This was compounded it (sic) [the petitioner]'s poor compliance with treatment and non-avoidance of alcohol, and resulted in a very poor level of functioning and overall capability in a man who had previously been a very high achiever and Business Person.

At times [the petitioner] had to have the intervention of colleague such as Mr. B.W. to insure that his Business affairs were managed not to mention him being able to manage a serious demanding relationship such as matrimony".

19. Dr. Corkery gave evidence that the petitioner had difficulty with sustaining relationships. She based that partly on the fact that he had rejected such a caring person as the general practitioner Dr. Smith. He had also left Dr. Corkery herself and he had also come into dispute with Mr. W. who works in his office and was extremely helpful to him. The court has some difficulty with this evidence. Firstly there is no evidence of the circumstances in which Dr. Smith ceased being the petitioner's general practitioner. Secondly it appears that the petitioner's leaving of Dr. Corkery was at least partly due to his desire to have a "talking only" therapy. This may indeed, have been an unrealistic ambition, but in view of the side effects that he was experiencing on the lithium programme, it is a least understandable that the petitioner would wish to change to another regime. Thirdly some reliance is placed on the falling out with Mr. W. an employee of the petitioner who had been extremely helpful to and concerned about the petitioner during his illness. However Dr. Corkery was not aware that there are extant legal proceedings against Mr. W. in the name of the petitioner and his business partner. It is the view of the court that without knowledge of the details and merits of the dispute, no reliance can be put on the falling out between the petitioner and Mr. W. as impinging on the petitioner's character. The court has some difficulty too with the partial reliance placed by Dr. Corkery on a personality trait which she describes as a dislike of females. Firstly there is no mention of it in her report and no convincing reason has been given to the court for its omission. Secondly it appears that the opinion was derived very substantially from the view of Dr. Smith the petitioner's general practitioner, from whom the court has not heard any evidence. Thirdly the opinion is based at least to some extent on what has been called the rejection of Dr. Smith and the witness herself. Moreover Dr. Cahill the court appointed psychiatrist is of the opposite view, and considers that the petitioner likes women. I do not consider it safe to attribute much weight to this particular part of Dr. Corkery's evidence. In all those circumstances it seems to me that it would be unsafe to put much reliance on the existence or otherwise of that personality trait contended for by Dr. Corkery. Dr. Corkery also described an inability at times to understand how others were feeling and insensitivity to the feelings of other people as being manifested by the petitioner. She said that the petitioner at times "certainly didn't seem to be aware of other people's feelings". It is of considerable importance that this trait has been noted also by Dr. Mangan, Dr. Shelley and Monsignor O'C. This is a factor which has impinged on his ability to sustain relationships. Dr. Corkery was also of the view that the petitioner had many relationships without commitment was an indication that the petitioner would have "immense difficulty" in forming a caring relationship.

The evidence of Dr. Cahill

20. Dr. Cahill was appointed as medical examiner by order of the Master of the High Court dated the 19th December 2001. She assessed the petitioner on the 29th May, the 12th July and the 25th October and prepared a report for the Court.

21. Unfortunately in her original report the court appointed examiner did not address at all the issue of the capacity of the petitioner to sustain a marriage relationship - an issue at the core of this case. When this fact became apparent the petitioner sought by way of notice of motion dated the 7th May 2004 to have the matter rectified. That application was opposed by the respondent and in the event was not successful. In hindsight this appears unfortunate. However the witness told the Court that she saw the petitioner on four occasions over a period of eight hours - although it appears that there may have been only three meetings. Unfortunately the main focus of the report was addressed to the question of capacity to enter a marriage relationship given the medical history of the petitioner. The conduct of the partners throughout the marriage was also the subject matter of her interviews. The doctor conceded that the report could not be considered to be a thorough one. She had not the referral letter to Dr. Corkery who was the first treating psychiatrist. That letter contained some useful history from the general practitioner Dr. Smith and also referred to depressive episodes in 1997. The doctor did not have any information from Dr. Corkery. At the time when she saw the petitioner she had merely a copy of the petition however she subsequently obtained the notes from Dr. Shelley and was in possession of those notes prior to making her report. It is quite apparent there are serious difficulties with the report. Firstly as has been noted it did not address at all the central question of the petitioners capacity to sustain a marriage which is at the core of these proceedings, but rather concentrated on the capacity of the petitioner at the time of the wedding to enter a relationship. Secondly it is apparent that she was unaware of the full medical history of the petitioner. In particular she was unaware of the fact that he had an episode of depression in 1987 and that he had been under the care of Dr. Smyth for four years prior to being referred to Dr. Corkery the first consultant psychiatrist to see him. The medical examiner did not have any report from Dr. Corkery. She assumed understandably - but in the event incorrectly - that Dr. Shelley had had the benefit of the full relevant medical history of the applicant. Dr. Cahill was at a further disadvantage in that when preparing the report she was under the erroneous impression that she was not entitled to have regard to any matters that occurred after the date of the marriage and to take them into account. She had no material from Dr. Burke who the petitioner told her was treating him at the time, and she had no information from the psychiatrist of the details and nature of the depression that had lead the petitioner to be hospitalised in 1995. The result of all of these disadvantages was that on the first day of her evidence the witness had to state that she was not in a position to advise the Court on the issue of the capacity of the petitioner to sustain a marriage. She further told the Court that she was unable to stand over her report. Dr. Cahill however also told the Court that, in the light of all of the information of which she was now possessed (including post marriage data) that she thought - retrospectively that the petitioner was not capable of sustaining a long-term relationship. It has to be stated however that her evidence is somewhat confusing because later in the same day she told the Court that she was unable to express an expert view as to the capacity of the petitioner to sustain a marriage. On the fourth day of the hearing the reports of Dr. Shelley and Dr. Lucey were put to Dr. Cahill and the question of the capacity of the petitioner was revisited. Her final view was that in the light of all of the information in her possession that the petitioner was not capable of sustaining a marriage by virtue of his illness and personality traits (she told the Court that he was incapable of understanding the feelings of others). While there was an element of confusion caused by the evidence of this witness some of which has been set out above - it is safe to conclude that Dr. Cahill, on the fourth day of the case, felt able to and did in fact express her expert opinion that the petitioner lacked the ability to sustain a normal marital relationship. This evidence has to be assessed in the light of the rest of the evidence.

The evidence of Dr. Lucey

22. Dr. Lucey is a consultant psychiatrist and is at present treating the petitioner who has been under his care since December 2003 during which period he has seen the petitioner 22 times. He had in his possession reports from Dr. Corkery, Dr. Shelley, Dr. Burke and a letter from Dr. Smith who had been his G.P. in 1991. His understanding was that the petitioner is suffering from bipolar disorder

which first manifested itself in 1984 when he suffered an episode of depression. In 1987 he had his first hyper-manic episode and other such episodes in 1989, 1991, and 1993 at which time he was first hospitalised under Dr. Corkery and put on lithium.

23. Dr. Lucey's report dated the 28th August 2004 contains the following:

> "His personality is histrionic in nature being extrovert, emotionally labile, self-centred and attention seeking, and incapable of understanding [the] feelings of others".

24. His conclusion was as follows:

> "It is my opinion that [the petitioner] has been suffering from longstanding bipolar affective disorder and has underlying personality difficulties. His illness has never stabilised, and with his underlying personality has resulted in significant impairment in personal, social and occupational functioning.
>
> It is my opinion that [the petitioner] lacked the capacity to enter into and to take on the responsibilities of the tasks of marriage and to sustain a marital relationship".

25. The witness expressed the view that the applicant had a personality disorder, a diagnosis not mentioned to the Court by the other professionals. Dr. Corkery, however, did mention a personality trait which has already been referred to. Dr. Lucey told the Court that he was 'very satisfied' that this man did not have the capacity to get married. He told the Court that he would be prepared to form his opinion purely on the basis of the bipolar illness even absent the personality disorder which he diagnosed. His opinion was at "the very high end of the scale of confidence in its correctness". Moreover his opinion that the petitioner had not got the capacity to sustain a normal relationship in the context of marriage was given on the understanding that whatever constitutes normal must convey a wide range of behaviour. He told the Court that the petitioner was incapable of understanding the feelings of others, he was insensitive to others.

The evidence Dr. Shelley

26. The petitioner came under the care of Dr. Rory Shelley on the 31st July 1993 when he was admitted to St. John of God's hospital. He was subsequently discharged on the 23rd August 1993 and continued to attend Dr. Shelley as a out-patient until October of 1995.

27. Dr. Shelley prepared two reports for the purposes of this case. Having expressed the view that the petitioner was capable of entering a marriage contract.

28. His report dated the 13th July 1994 expresses the following view in relation to capacity to sustain a normal relationship:

> "The issue of his capacity to sustain a normal marital relationship is less clearcut. The recurrent nature of his mood disorder medically would have predicted that following marriage it was likely that [the petitioner]would experience further episodes of mood change. My medical notes indicate that subsequent to his marriage he did have episodes of depressed mood and such required appropriate medication. Such alteration in mood would generally have created strain on his marital relationship generally and specifically appears to have caused difficulties such as impaired libido either as a consequence of the mood change in its treatment. This would have a negative impact on his capacity to sustain a normal marital relationship".

29. Dr. Shelley explained to the Court what he meant was that the petitioner was likely to experience further mood difficulties. He had trouble with depression which required treatment and that the depression and/or the medication necessary to deal with it would have a negative effect on his libido and that this negative effect on his libido would cause marital strain. He did not intend to convey that he saw the depression as an absolute bar to his capacity to sustain a relationship.

30. Subsequently however as a result of communication with the petitioners solicitor he prepared a report dated the 1st June 2005. The second report of Dr. Shelley reads as follows:

> "This report is in addition to my previous report dated 13th July 2004. It has been prepared:-
>
> > "(1) Having received the documentation forwarded to me by Fawsitt, Solicitors on [the] 26th April 2005. This includes medical reports from Dr. Bríd Corkery, Consultant Psychiatrist, who treated [the petitioner] prior to his coming into my care, and also from Dr. Michael Lucey, Consultant Psychiatrist who has been treating [the petitioner] in recent times.
> >
> > (2) Having met with [the petitioner] on the 1st June 2005.
> >
> > In my report of 2004 I indicated that the issue of his capacity to sustain a normal marriage relationship was not clear-cut. On the one hand, on the basis of my experience of treating patients with Bipolar Mood Disorder, I would have found that the majority proved capable of sustaining normal marital relationships. It is a relapsing and remitting disorder. With treatment there is a reasonable expectation of long periods of well-being during which the person can function normally. The prognosis, and any impact on the marriage, is dependant on the patient's appropriate compliance with treatment, in particular mood stabilising medication. When a person who has this condition marries, it can often have a stabilising effect, in that having a spouse helps to monitor changes in mood more completely than when somebody is living alone, and in particular helps to ensure treatment compliance.

31. On the other hand having read the above named Reports, and met with [the petitioner] for the first time since he left my care in October 1995 the following is apparent:-

> > (1) [the petitioner].'s compliance with mood stabilising medication was not as good as I had estimated it to be prior to his marriage. Therefore the prognosis was poorer than I had anticipated. Failure to comply with medication meant that his illness was likely to have had a more negative effect on his marital relationship than anticipated.
> >
> > (2) There has been an overall deterioration in [the petitioner].'s general functioning in life. It is evident that he was once a successful [……]. Unfortunately, he has changed to being unable to attend to his [work] for long periods of time with a consequential negative impact on his business. Some of this change was also evident when I met with him on 1st June 2005. Whereas he retains his pleasant and affable style, there are indications currently that his cognitive function has deteriorated in some aspects. Whilst talking to him he tended not to grasp accurately what I

was saying and answered some of my questions off the point. This does not appear to be explained by an alternation in his present mood nor current prescribed medications. Therefore [the petitioner] has been unfortunate in that his condition has not followed the usual course of relapses followed by full remission. Rather he has sustained a neuro-cognitive decline. This would be of significant implication for his functioning on all aspects of his life, including his capacity to sustain a normal marital relationship. This decline is in my view an integral component of his Bipolar Mood Disorder, although it may only become evident over time as the condition became more chronic.

Arising from points 1 and 2 above, it would now be my view that [the petitioner] was unlikely to sustain a normal marital relationship."

32. Dr. Shelley explained his conclusion and said he was of the view that it was probable that the petitioner would not have been able to sustain a normal marital relationship.

33. There is a difficulty caused by the second report of Dr. Shelley. It appears the revised opinion is based on two factors, one of which is the fact that the petitioner's compliance with mood stabilising medication was not as good as Dr. Shelley hoped. However, there is no compelling evidence that there was an inability to comply with the medical regime as apposed to a failure to do so. Indeed the evidence to the Court by the petitioner was that he was compliant every day since July 1997. In those circumstances the Court cannot conclude that the failure to comply with medication was caused by incapacity other than choice. In those circumstances, the question of capacity to sustain a marriage is not addressed by mere evidence of non compliance with the appropriate medical regime.

34. The second of the reasons for the revised opinion is based on the diagnosis of a neuro cognitive decline which was unfortunately not anticipated. However the fact such neuro cognitive decline is now present does not in my view address the capacity of the petitioner to sustain a relationship at the time he entered this marriage. In order to address that issue the Court would need evidence that the neuro cognitive deficit - as a result of his bi polar condition was present at the time. The Court is in those circumstances not prepared to rely on the revised opinion of Dr. Shelley.

The evidence of Dr. Mangan

35. Dr. Mangan is a general practitioner who has known the applicant socially since about the year 2000. The petitioner became his patient in 2001 when he attended him because he was feeling very down. The Court was told the petitioner suffers from manic depression in which he gets episodes of depression and elation. The doctor's concern was to try and get the petitioner to comply with taking his medication because people with the petitioner's condition are more vulnerable to mood swings than they would normally be if they were compliant with their medication. When the petitioner was complaint with his medication he improved somewhat but Dr. Mangan's view was that he never got him to what he would call "calm waters". He was either a little depressed or a little elated. When he was depressed he was vulnerable and the doctor had concerns that the man who was now living alone and was suicidal. He also saw him elated on a good number of occasions and in those situations he was loud and had no comprehension of his own nuisance. On one occasion he stayed overnight in the doctor's house and in the morning came into the living room inappropriately dressed in that he was wearing a dressing gown that didn't cover him although there were daughters in the room. The witness emphasised that the petitioner's capacity to understand other peoples feelings was "very, very limited" and said that "he has no comprehension of other peoples feelings …[and] is so wrapped up in his own personality that he has no comprehension whatsoever". Dr. Mangan was of the view that it was impossible for the petitioner to sustain a normal marital relationship because of his mood swings, his inability to relate to others and the unpredictability of his personality.

The evidence of Monsignor O'C.

36. Monsignor O'C. is a Parish Priest. He is a doctor of divinity and a doctor of canon law. He came to know the petitioner well at the end of the 80's in which he was involved with him in a committee. He said that in dealing with a team or committee the petitioner's behaviour was problematic in the extreme "Constant competitiveness, Constant challenging people". He said that the petitioner did not realise how deeply he would hurt people. The first time the witness met the petitioner he was "absolutely on a high". He described him as "selling himself more than anything else", as a "kind of Lorenzo de Medici figure" and described him as being "abnormally high - definitely beyond the norm". He described him as histrionic.

37. The witness has expertise in relation to the capacity to marry in the ecclesiastical courts and he worked in the marriage tribunal as the person who stands for the bonds of marriage and afterwards he became a judge in the tribunal. In that case he had familiarity with the capacity of person to sustain a marital relationship. The witness felt that he was incapable of sustaining a marriage. He thought the petitioner had not the capacity to sustain a marital relationship in the context of the jurisdiction that is the ecclesiastical jurisdiction of which he was familiar. When he heard that he had married he told the Court that "I shook my head and said this won't work". Monsignor O'C. is not a medical expert. It is clear that this Court is concerned only with the civil law concept of annulment and it is against that background that the evidence of the witness has to be assessed. Nonetheless because of his knowledge of the petitioner and his wide experience his views are valuable. His views were shared by the brother of the petitioner who told the Court that even on the day of the wedding he felt scepticism as to whether the marriage would endure.

38. The decision to grant a petition of nullity is a grave matter. In most cases concerning the capacity to enter into and sustain a marital relationship the Court hears expert opinion on the petitioner's mental state and frequently hears an analysis of the petitioner's personality. The Court is of course obliged to give due consideration to such expert opinion, proffered, as it is, for the assistance of the Court. However it would be wrong for the court in any case to accept uncritically the evidence of medical experts, no matter how distinguished. To do so would, in effect, be to substitute the opinion of the medical person involved for the decision of the Court itself. In this case for reasons I have stated I have reservations over aspects of the evidence of some of the professionals. I have certain difficulties with certain aspects of the evidence of Dr. Corkery but not necessarily with her conclusions. There were difficulties too with the original report and with the evidence of Dr. Cahill. For the reasons I have already indicated I do not propose to rely at all on the revised opinion of Dr. Shelley. However, Dr. Corkery, Dr. Cahill, Dr. Lucey, Dr. Shelley and Dr. Mangan were unanimous in their view that the petitioner was incapable of sustaining a marital relationship. Their view is shared by Monsignor O'C. and it is clear too that the petitioners brother had misgivings.

39. The petitioner suffers from Bipolar Disorder. It is described thus by Dr. Corkery:

"It is a severe illness which is characterised by severe sustained alteration of mood which exceeds customary sadness or customary cheerfulness and is present for a prolonged duration and is accompanied by severe excesses [of] either elation accompanied by some of the following; over activity, over talkativeness, over spending, promiscuous, disinhibited behaviour. It's frequently accompanied by insomnia and irritability. When the patient becomes depressed it is . . . a severe sustained lowering of mood which exceeds customary sadness. It's a profound illness which interferes very much with the persons life and quality of life. There could be severe insomnia as well. There could be periods of not eating properly. Certainly (he) would not be able to function at work or in personal life and often there would be low self-esteem

and inability to look after their own daily needs. Its quite a severe disabling illness and is characterised usually by a lack of insight. That the person themselves mightn't be aware that they had either elation or depression. . . . frequently judgement is impaired and it is a common manifestation of the illness".

40. It is important to note also that the existence of Bipolar illness does not indicate that a person has not the capacity to enter and sustain a marital relationship. Very many people subject to this illness are capable of contracting and sustaining rich enduring marital relationships. The question in this case is as to whether the petitioner, by reason of his illness and his personality was incapable of sustaining such a relationship. His illness manifested itself in the mid 1980's and has caused him to be hospitalised on several occasions on one of which he was an involuntary patient in a psychiatric hospital. The illness has had devastating effects on his professional life and led to huge disruption and unhappiness in his private life. Unfortunately despite medical treatment the petitioner continues to suffer from his illness and there has been some impairment to his cognitive function.

41. In addition to his serious illness the petitioner has a great difficulty or inability to appreciate the feelings of others. This was stressed by Dr. Corkery, Monsignor O'C. and Dr. Lucey and Dr. Mangan. It is not without significance that both Monsignor O'C. and the petitioner's brother had very serious misgivings when they heard they heard that the petitioner was going to get married.

42. Having carefully and critically considered all the evidence in this case, I have no doubt that the petitioner was incapable of sustaining a marital relationship by virtue of his illness - and its effects on his personality.

43. The Court having decided by reason of his illness that the petitioner was incapable of sustaining a marital relationship, it is necessary to consider two further matters, firstly, whether it is open to the petitioner to rely on his own incapacity as grounds for annulling the marriage and secondly whether it is necessary for him to show that the respondent repudiated the marriage by her conduct. In relation to the first matter it seems clear that a petitioner can rely on his own incapacity at least in circumstances where the other party has repudiated the matter (see the judgments in *McM. v. McM*. [1936] I.R. 177, *D.C. v. D. W*. [1987] 1 I.L.R.M. 58). However the question as to whether where a petitioner relies on his or her incapacity it is necessary for the marriage to be repudiated by the other party is a much more complex matter. In *McM. v. McM*. [1936] I.R. 177 it was held that a spouse can rely on his own impotence to nullify a marriage only if the other party has previously repudiated the marriage. This decision was followed in many cases including the *J. v. J*. [1982] I.LR.M. 263 and *D.C. v. D.W*. [1987] I.L.R.M. 58. However a different approach was taken by O'Hanlon J. in the case of *P.C. v. V.C*. [1990] 2 I.R. 91. At p. 104 of the judgment O'Hanlon J. stated:

> "The next question which arises is whether these findings of fact require that I should grant a decree of nullity, as sought by the husband but opposed with equal determination by the wife. As I have found this an unusually difficult case to decide, I propose to refer in some detail to the manner in which the law of nullity has developed in recent years in decisions of the Irish courts".

44. In *S. v. S.* (unreported, Supreme Court, 1st July, 1976) Kenny J. reiterated the well established principle that the petitioner must establish his or her case with a high degree of probability, or 'must remove all reasonable doubt'. He continued:

> "A petitioner cannot be granted a decree for nullity on the ground of his own impotence unless he/she can also satisfy the court that there has been conduct on the part of the respondent amounting to a genuine and deliberate repudiation of the marriage contract and its obligations (*McM. v. McM* [1936] I.R. 77, a decision of Hanna J. in the High Court followed)".

45. This passage in the judgment leads to some difficulty. It appears that O'Hanlon J. was of the view that the matter had been considered by the Supreme Court in S. v. S. However a perusal of the unreported judgment of Kenny J. in the Supreme Court contains no such passage as is referred to in the judgment of O'Hanlon J. The quotation referred to may have been part of some other judgment. It would appear to be a reference to the judgment of McM. v. McM already referred to. At p. 219/220 of that judgment the following passage appears:

> "To sum up finally on this difficult question of law, and having considered the argument advanced in its three branches, I have formed a definite opinion that the decree for nullity of marriage cannot, according to the principles of the Ecclesiastical Law as administered in our Matrimonial Courts, be granted to a petitioner on the ground merely of a petitioner's own impotence, but it is clearly established that if a petitioner can, in addition to proof of his own impotency, satisfy the Court that there has been, and is, conduct on the part of the respondent which has destroyed the *verum matrimonium*, e.g., by a genuine and deliberate repudiation of the marriage contract and its obligations, the Court may *ex justa causa* grant the relief".

46. O'Hanlon J. having reviewed the authorities continued at p. 107 as follows:

> "As there has been no repudiation of the marriage contract on her part at any stage, but rather the strongest possible affirmation of it, can the husband rely on what is in large measure his own want of capacity?
>
> In my opinion, he can, primarily because of the fact that the want of capacity existed to some extent on both sides, as it did in *B.D. v. M.C*. (Orse. M.D.) (Unreported, High Court, Barrington J., March 1987). If necessary, however, I would also incline to the view that as both parties entered into the marriage contract innocently, in the sense that they were unaware that by reason of factors connected with the personality and psychology of each partner, it would be impossible for them to sustain a normal marriage relationship for any length of time, the petitioner should not be denied a decree of nullity because the respondent wishes to hold him to the marriage bond.
>
> I think there is a good deal of substance in the criticism expressed by Mr. Shatter, in his excellent book on Family Law, concerning the application of the principle that a petitioner cannot be heard to rely on his or her want of capacity (be it physical or psychiatric) in seeking nullity, if the other partner wishes to uphold the marriage bond and has done nothing to repudiate it. (Family Law in the Republic of Ireland, 2 edn. pp. 73-75). Whereas the law in respect of want of capacity has developed by analogy with the law applicable in cases of physical impotence, it has resulted in the development of a new concept, and it appears to me to call for the re-examination of the applicability of the principle stated by Hanna J. in *McM. v. McM.* [1936] I.R. 177 in such cases. Such re-examination has already been undertaken by the Court of Appeal in England in *Harthan v. Harthan* [1949] P 115. Their conclusion was that even in the case of want of capacity resulting from physical impotence, unknown to the impotent spouse at the time of the marriage, a decree of nullity should be granted on his (or her) application, without requiring evidence of repudiation of the marriage by the other spouse.
>
> For the reasons already stated, I do not consider that it is necessary for me to decide the present case on that basis,

but if it were open to me to do I would tend to follow the lead given by that judgment".

47. This decision of O'Hanlon J. was specifically followed by Quirke J. in the case of P.McG. v. A.F. (Unreported, High Court, Quirke J., 7th May, 2003)

48. In the light of the above decisions it appears that it is not always necessary that a petitioner seeking nullity on the grounds of his or her incapacity must also prove repudiation by the other party. That being so in my view (at least in cases where no defence to the petition has been entered or where such a defence has been abandoned) it is not necessary for the petitioner to prove repudiation of the marriage by the other party even in cases based on the incapacity of the petitioner. However, it is unnecessary to decide the case on that basis. In September of the year 2000 the respondent commenced proceedings seeking judicial separation and ancillary relief in which she claims *inter alia* that she can "no longer be reasonably expected to live and cohabit with" the petitioner. The talking of these proceedings constitute sufficient repudiation of the marriage for the purpose of this case.

Accordingly the petition is granted on the grounds that the petitioner by reason of his serious mental illness and its effect on a man with the personality traits as outlined in the psychiatric evidence was incapable of sustaining a normal marital relationship with the respondent.