THE HIGH COURT

MATRIMONIAL

[2013/45M]

BETWEEN

AR

PETITIONER

AND

DR

RESPONDENT

JUDGMENT of Ms. Justice Reynolds delivered on the 29th day of March, 2019

Introduction
1. In the within proceedings, the petitioner seeks a decree of nullity in respect of the marriage entered into by the parties in 1995 within this jurisdiction. The proceedings were commenced in 2013 and served on the respondent in early 2014.

Background
2. The parties, both of whom are Irish citizens, met in 1993 when they were both residing in New York, USA. After the marriage, they continued to reside in New York for a number of years before returning to Ireland in 1998.

3. There are two children of the marriage, X, born in 1997 and Y junior, born in 2001.

4. In 2008, the marriage between the parties broke down and they commenced living separate and apart. The petitioner left the family home with the dependent children of the marriage at that time.

5. The parties were granted a decree of judicial separation by order of the Circuit Court made in July 2011 which provided, *inter alia*, as follows:-

> (a) joint custody of the dependent children of the marriage;
>
> (b) the children to reside primarily with the respondent, and
>
> (c) access to the petitioner.

Both parties were legally represented in those proceedings.

6. The petitioner subsequently re-entered the judicial separation proceedings for the purpose of obtaining an order for the attachment and committal of the respondent for failing to comply with the access order. That application was unsuccessful and the petitioner thereafter brought judicial review proceedings in that regard.

7. In the interim, the within nullity proceedings were commenced and served on the respondent in 2014.

8. Further, divorce proceedings were issued in the Circuit Court by the respondent. Those proceedings were stayed pending the outcome of the within application.

The Nullity Proceedings
9. The petitioner sets out the grounds upon which she seeks the decree of nullity in the Petition as follows:

> (a) The respondent subjected the petitioner to duress to the extent that their marriage took place without her consent, that is, without the full, free exercise of her independent will, and that
>
> (b) The respondent lacked the capacity to enter into and sustain a caring and considerate marital relationship.

10. In his Answer, the respondent denies that he subjected the petitioner to any duress and further denies that he lacked the capacity to enter into and sustain a caring and considerate marital relationship. In addition, the respondent claims that:

> (a) The petitioner is estopped from claiming nullity as she approbated the marriage by her conduct and acceptance of the validity of the marriage in the judicial separation proceedings and;
>
> (b) there was delay in bringing the within proceedings, such that it would be unjust and inequitable to grant the decree of nullity sought.

11. In 2014, the High Court made an order, *inter alia*, fixing the issues to be tried in the following terms:

> (a) Whether the respondent at any time before or on the 5th day of July 1995, the date of the alleged marriage the subject of these nullity proceedings, subjected the petitioner to duress to the extent that she lacked consent to the said marriage, not having exercised a full, free and independent will on her part.
>
> (b) Whether the respondent at the time of and subsequent to the said marriage lacked a capacity to enter into and sustain a caring and considerate marriage relationship.
>
> (c) Whether the petitioner gave true consent to the alleged marriage to the respondent.
>
> (d) Whether there is collusion or connivance between the respondent and the petitioner in the presentation of this

petition.

12. In addition, an order was made appointing Dr. Julie Hurley, Consultant Psychiatrist as Medical Inspector in the proceedings. Dr. Hurley subsequently prepared two reports dated the 10th February, 2015 and 7th July, 2015, consequent upon interviews with both parties.

13. When the matter came on for hearing on the 11th October, 2017 it became clear that a number of legal issues would be required to be determined in the context of the within proceedings, which were subsequently identified and agreed between the parties as follows:

> (1) "Whether in nullity proceedings, a marriage to be void can be ratified or approbated by a party to that marriage such that the marriage is rendered valid.
>
> (2) Whether a petitioner for nullity can be estopped from seeking a decree of nullity in respect of a marriage alleged to be void.
>
> (3) Whether delay in bringing proceedings is a bar to seeking a declaration of nullity in respect of a marriage claimed to be void.
>
> (4) Whether the petitioner herein is barred from seeking a decree of nullity in these proceedings by virtue of the grant of a decree of judicial separation in respect of the marriage and/or her participation in those judicial separation proceedings."

14. The parties agreed to prepare and indeed the court has received very extensive and helpful legal submissions in respect of the legal issues identified.

15. The matter proceeded to a full hearing wherein the court heard evidence from the parties, the medical inspector and two additional witnesses called by petitioner.

The Law
16. Historically, nullity was the only option available to married couples who wanted to be released from their marital obligations. Since the enactment of the divorce legislation in 1996 however, such applications have become something of a rarity.

17. A decree of nullity is defined by the Family Law Act 1995 as a decree granted by a court declaring a marriage to be null and void. This means that the marriage is regarded as never having existed in law.

18. The law distinguishes between marriages which are void or voidable. For a marriage to be deemed void or voidable, it has to fall under very specific grounds and since the introduction of divorce in 1996, the courts have interpreted these grounds more narrowly.

19. In order for a marriage to be deemed void, one of the following grounds must be met:

> (a) the existence of a prior subsisting marriage;
>
> (b) the non-age of either party;
>
> (c) the non-observance of certain formalities required by law;
>
> (d) the absence of consent whether by reason of duress or lack of certain information;
>
> (e) The parties falling within the prohibited degrees of relationship.

20. In order for a marriage to be deemed voidable, one of the following two grounds must be met:

> (a) the inability of either party to consummate the marriage; and
>
> (b) the inability of either party to enter into and sustain a normal marital relationship.

21. As already stated, the grounds upon which the petitioner herein seeks relief are two fold, namely, duress and inability on the respondent's behalf to enter into and sustain a normal marital relationship.

The Petitioner's Case
22. The petitioner's evidence was that she felt under considerable pressure to marry the respondent after he had pursued her vigorously and sought to isolate her from her family and friends during their courtship. She contends that he has a very forceful personality and that she was easily manipulated and outwitted by him.

23. The parties became engaged in 1994, some nine months after they had commenced their relationship. The petitioner maintains that she felt pressurised by the respondent into agreeing to his proposal. Further, she maintains that after the ceremony of marriage on the 5th July, 1995, she was approached by one of the respondent's friends who allegedly intimated to her that his friends had always assumed that he was homosexual. She contends that whilst she was astounded by this remark, she now believes that it in fact may be true, or "that he is, rather, bisexual".

24. In addition to these allegations, the petitioner maintains that the respondent was violent and volatile during the course of the marriage and suggests that the respondent had a "very disturbed childhood".

25. She makes numerous allegations of mental, emotional and physical abuse which allegedly occurred post the birth of the parties' daughter in 1997 and continued up to 2008 when the parties separated. It is clear from her evidence that she is aggrieved by the fact that the respondent secured custody of the dependent children of the marriage in the course of the judicial separation proceedings.

26. The petitioner has not only maintained the within proceedings but also initiated proceedings to have the children of the marriage taken into Wardship and "into the temporary care of the HSE, pending the hearing of the within application". The petitioner was unsuccessful in this regard.

27. In relation to the delay in bringing the within application, the petitioner stated that she gave a full history of her marriage to her legal team at the time of the judicial separation proceedings and was not advised of the option of seeking a nullity. It was only after some discussion with a legal academic sometime after those proceedings had been determined that she became aware of the legal basis for a nullity application and felt entitled to pursue such a claim.

28. The petitioner called her sister as a witness in the proceedings to give evidence of an incident which occurred in 1994 involving a dispute between the parties herein, the witness and her husband. There is no issue between the parties but that this was a very heated dispute which got out of hand culminating in the involvement of the New York Police Department. When it was suggested to the petitioner in cross-examination that both she and the respondent were subsequently prosecuted and thereafter bound to the peace, she indicated that she had no recollection in that regard and did not appear to be in a position to refute this.

29. A further witness was called by the petitioner who was her former employer in 2005. It is difficult to see how his evidence could in any way assist the court as it was limited to commentary on events in 2005, in circumstances where it is accepted by the parties that their relationship had become turbulent and fractious at that stage.

The Medical Evidence
30. Dr. Hurley prepared two reports in this matter, one in respect of the petitioner and one in respect of the respondent. Clearly, the purpose of the reports was to establish whether or not the respondent lacked the capacity to enter into and sustain a normal marital relationship. Dr. Hurley was under the misapprehension that she was required to provide an opinion in respect of the duress aspect of this case which was understandable given that she had been provided with a copy of the order of the court setting out the issues to be tried in the proceedings. However, clearly these are issues of fact to be determined by this Court.

31. The first report recounts how the petitioner advised that she is a practising catholic and is keen to seek an annulment. She advised Dr. Hurley that she is unhappy about the fact that the respondent is the primary carer of their two children and raises issues about his fathering skills. In particular, she advised that she is unhappy that he does not take the children to Mass despite her wishes. Having elicited a history of the parties' relationship from the petitioner, Dr. Hurley advised that possible issues may arise in relation to the respondent's inability to engage in the contract of marriage.

32. However, it is clear that she wholeheartedly resiled from that position after she interviewed the respondent some months later and reported that there was "no evidence that he was not able to engage fully in a marital relationship despite the fact that it was turbulent and volatile". I do not propose to regurgitate the basis upon which she reached her conclusions as they are clearly set out in her detailed report. Suffice to say that she was satisfied that neither party suffered from any psychiatric illness and there was no evidence of the respondent's alleged inability to enter into and sustain a normal marital relationship.

The Respondent's Case
33. The respondent resides in the former family home with the children of the marriage pursuant to the order made in the Circuit Court proceedings. The petitioner had subsequently brought proceedings to attach and commit him for failing to comply with the order in respect of access and further made complaints against him to the Garda Ombudsman and the HSE in relation to child neglect and other more serious matters, all of which allegations proved to be unfounded. In his replying affidavit, the respondent exhibits a letter dated the 16th July, 2014 from a Social Worker confirming that there were no child protection or welfare issues regarding the children.

34. In relation to the history of the parties' courtship, the respondent recounted how the parties had been living together before he proposed to the petitioner in 1994. He denied all allegations of attempting to isolate the petitioner from her family and friends and contended that the petitioner had always had a difficult relationship with her sisters. He further alleged that it was in fact the petitioner who was herself responsible for isolating them as a couple from their friends and families.

35. Further, he stated how it was the petitioner who choose the wedding date as this was her birthday and made most of the arrangements with her family for their wedding day.

36. He strenuously denied all allegations in relation to his family background and advised that he has a loving and caring relationship with his parents and family.

37. He vehemently denied all allegations made by the petitioner in relation to his sexual orientation and maintained that she had no grounds whatsoever to make such allegations against him save and except to cause him further stress and embarrassment.

38. The respondent accepts that the parties had a difficult marriage and that they were at times violent and abusive towards each other. Matters deteriorated further after the parties separated with ongoing litigation since that time.

39. The respondent described a normal happy courtship between the parties and contends that they had a normal loving relationship at the time of their marriage, which he expected to be a marriage for life. He advised that they had made plans to have a family together and to move back to Ireland to be closer to their family and friends. Unfortunately, their relationship deteriorated over the years and he advised that in 2008 he realised that the marriage was over.

Legal Issues

Does the granting of a decree of judicial separation act as a bar to nullity proceedings?
40. Judicial separation was brought in by legislation in 1989 to give married couples, whose relationship had broken down, an accessible remedy for separation and allowed the court to make ancillary orders with regard to, *inter alia*, finances, children and property. The effect of a judicial separation however is merely a separation sanctioned by the court but the parties remain legally married to one another. If the parties wish to be relieved of their legal obligations to one another, a decree of divorce or a decree of nullity would have to be sought.

41. Due to the fact that the effect of a nullity decree is to render the marriage null and void, the question arises as to whether the granting of a judicial separation in of itself is a bar to the granting of a nullity.

42. In *S.B. v. F.L.* [2011] 1 IR 521 the applicant husband married the respondent wife in 1978 and shortly afterwards the wife discovered that the husband was transvestite. The parties separated 13 years after marrying and were granted a decree of judicial separation in 1993. In 1994, the applicant underwent gender transformation from man to woman. In 2005, he initiated divorce proceedings but the wife counterclaimed for a decree of nullity as a result of the applicant's undisclosed transsexualism and transvestitism.

43. Abbot J. granted a decree of nullity holding that there was a lack of consent on the part of the wife due to the husband's failure to disclose, and the wife's consequent lack of awareness of, both his transvestitism and transsexualism.

44. It is clear that no argument was submitted to the effect that the decree of judicial separation granted 12 years prior was a bar to seeking nullity.

45. In relation to the issue of approbation, Abbot J. held that, where a case involved a lack of consent on the part of the person claiming the nullity, the question of approbation did not arise, as such lack of consent rendered the marriage void rather than voidable and a void marriage could not be approbated.

Delay in bring nullity proceedings
46. Delay in bringing proceedings for a decree of nullity is not an absolute bar to the remedy, as can be seen from a discussion of the case law below. However, the reason for the delay is vital as a long delay may give rise to an increased burden of proof on the petitioner to the extent to deprive him or her of the remedy sought.

47. In *P.W. v. A.O'C*. [1993] IR 324 the application was brought in 1989, 33 years after the marriage in 1956 and the respondent to the application sought to have it dismissed because of the delay in bringing it to the court. The petitioner had accepted that he had been getting legal advice in respect of the marriage since 1964 but argued that he was not informed until 1987 that he had grounds for annulment. Blaney J. accepted this explanation in circumstances where he held that it was not the conduct of the petitioner that caused the delay and that petitioner could not be blamed for the failure of his legal advisers.

48. In the *S.B*. case already referred to, the applicant husband argued that there was unreasonable delay in bringing the nullity proceedings. A judicial separation had been sought after the applicant husband and respondent wife learned of her husband's transsexualism but it was after this that he went on to get gender transformation surgery, which was concealed from the respondent. In determining that the delay could only date from the obtaining of the judicial separation, the court held that:

> "…any delay in seeking the annulment could only run from when the respondent found out about the gender transformation. Such delay as occurred after that date was not unreasonable as the applicant was not prejudiced by it as the 'marriage' was over and it would be unjust and inequitable to penalise the respondent for delay in the face of the concealment on the part of the applicant".

49. In *M.J.O.'D. v. C.D.O.'D* unreported High Court, O'Hanlon J. 8th May 1992, the applicant sought an order declaring his marriage to the respondent to be null and void. He claimed that he was forced into the marriage by his family and that he was suffering from psychological incapacity and emotional immaturity to the extent that he could not give informed consent to the marriage. O'Hanlon J. rejected both grounds in light of weaknesses of character on the part of the husband preferring to "attribute the failure of the marriage to faults and weaknesses of character on the part of the husband rather than to any inherent incapacity on his part to enter into and sustain a normal marital relationship". It was observed that the wife had been seriously prejudiced by the delay and that there was approbation of the marriage of such character as to disqualify him from being granted relief.

50. It is clear that the above case law must be viewed in the context of predating the enactment of the divorce legislation in 1996.

Can a petitioner be estopped from maintaining nullity proceedings?
51. In *Gaffney v. Gaffney* [1975] IR 133 the plaintiff married her husband and subsequently, on fraudulent grounds, obtained a decree dissolving the marriage from the English courts. Sometime after this, the husband died intestate and the applicant adduced evidence to say that the divorce was not valid as she and her husband were at all times domiciled in Ireland. The High Court, affirmed by the Supreme Court, held that:

> "…a spouse who has obtained an invalid decree of divorce in another State is not estopped in the State of the domicile from establishing the validity of the divorce and her status as spouse, for there can be no estoppel of any kind as to whether a marriage has been validly dissolved or not."

52. It was observed by Denham J. in *C.K. v. J.K*. and *F.McG*. [2004] 1 IR 224 that since the decision in *Gaffney*,

> "the prohibition on the use of estoppel in cases where marital status is relevant has been a kernel concept of Irish law."

Though it was argued that the application of estoppel in the case would be more just, the court was very wary of the consequences of permitting estoppel to be relied upon to alter a party's legal or family status and that the use of estoppel in marital proceedings could "give rise to anomalies and problems".

Can a marriage purported to be void be approbated resulting in rendering it valid?
53. Approbation, or ratification, is often raised as a defence to a petition for nullity. However, in this context it is important to distinguish whether the marriage is void or voidable. Where a case involves a lack of consent on the part of the petitioner, for example, then the question of approbation does not arise, as lack of consent renders the marriage void rather than voidable, and a void marriage cannot be approbated.

54. In *S.B. v. F.L*. [2011] IR 521, the High Court, Abbot J., held that a void marriage could not be approbated. In so doing, Abbot J. relied on the earlier case of *D. v. C*. [1984] ILRM 173.

55. In dealing with the issue of approbation in the *S.B.* case, Abbot J. held that it

> "depends on full knowledge of the facts and legal implications of the condition of the partner affected".

It would therefore appear that whether a person may be held to have approbated a marriage depends on the assessment by the court of his knowledge of the possibility of obtaining a nullity decree and his behaviour following his first becoming aware of the position. In rejecting the defence of approbation in that case the court held that evidence amounting to approbation may include the grant of a decree of judicial separation. The judicial separation into that case however was sought in circumstances where the full nature of the transsexualism of the husband was not known to the petitioner.

56. In *O.B. v. R*. [1999] 4 IR 168 it was argued that the marriage had been approbated due to the petitioner seeking Social Welfare for herself and her child on the basis of being a deserted spouse. The court was of the view that this did not amount to approbation of any form.

Duress
57. In *N. (orse K.) v. K.* [1985] IR 733, the court recognised the requirement of full, free and informed consent to the marriage ceremony in the context of nullity. In that case, the petitioner sought nullity proceedings on the basis that she did not give consent by virtue of duress by her parents who pressurised her to marry the respondent after becoming pregnant with his child. The High Court refused to grant the relief but on appeal to the Supreme Court, it was held that:

> "…consent to the making of a valid marriage must be a free exercise of the independent will of the parties. The concept of duress is not restricted to threats of physical harm or of other harmful consequences".

58. Since that decision, the courts have adopted a broader concept of what is required in order to validate consent to marriage. The traditional concept of duress which required a fear of a threat of immediate danger to life, limb or liberty involved objective criteria so that the other party to the marriage would more often than not be aware at the time that the party under threat was not freely consenting. The concept of duress now includes more subjective feelings of coercion and lack of knowledge of certain material factors so that the other party to the marriage may be unaware of the forces operating to vitiate the apparent consent of their (apparent) spouse. In the circumstances, there is a responsibility on the party who believes themselves to have been coerced or to have entered a marriage with a material lack of knowledge to act with reasonable diligence both in seeking advice and in acting on that advice.

Inability to enter into and sustain a normal marital relationship
59. The essential question in determining whether a marriage may be declared a nullity on this ground is whether an examination of the evidence presented warrants a finding that either or both of the parties at the time of the marriage lacked the necessary capacity generally or particularly, vis-à-vis each other. This ground has been recognised as encompassing various physical and psychological reasons which might prevent a spouse from entering into and sustaining a normal marital relationship

60. In *D. v. C.* [1984] ILRM 173 Costello J. confirmed that it was possible to identify psychiatric illness, such as manic depression, which might be so severe as to impact upon the individual to prevent one of the parties from entering into and sustaining a normal marital relationship. This was the basis for the granting of relief in *O'K. v. O'K.* [2005] IEHC 384 where the petitioner was receiving treatment for bipolar disorder at the time of the marriage and claimed that he was incapable of entering into and sustaining a normal marital relationship by reason of a psychiatric illness. In noting the devastating effects of the illness on the petitioner, O'Higgins J. applied a subjective test and observed that:

> "…existence of bipolar illness of itself does not indicate that a person has not the capacity to enter into and sustain a marital relationship. Very many people subject to the illness are capable of contracting and sustaining rich enduring marital relationships".

61. In *F.F. v. E.D.*, unreported High Court Murphy J. 11th April 2003, the court dismissed a petition for annulment on the grounds that while there was medical evidence that the marital relationship was not normal because of an immature personality and a compulsion disorder on the part of the respondent, it was not of a sufficient degree as to prevent him from entering into and sustaining a normal marital relationship. Therefore, he did not believe that this was a marriage which did not exist from the beginning but was one that broke down over time.

Burden of Proof
62. In the *N. (orse K.)* case, the strong status of the institution of marriage was recognised where it was stated that "there is a presumption of law in favour of its validity." Therefore, in proceedings looking to impugn the marriage, the onus is on AR to rebut this presumption.

63. More recently the Supreme Court in *L.B. v. TMcC* [2009] IESC 21 recognised the obligation on the courts to demand a heavy burden of proof before granting an annulment and held that:

> "The Constitution imposes a clear obligation on the courts to uphold a marriage contract and it would require far stronger evidence than has been adduced in this case to satisfy me that the respondent lacked the requisite capacity to enter into a valid contract of marriage".

Conclusions
64. In evaluating the evidence herein, this Court is mindful of the heavy burden of proof which must be discharged by the petitioner in the within application. The courts require a high standard of proof due to the protection afforded to the institution of marriage and the rarity in the granting of annulments since the introduction of divorce legislation.

65. It is clear from a consideration of the legal authorities referred to above that a decree of judicial separation in and of itself is not a bar to maintaining nullity proceedings. The parties were still legally married after the judicial separation and are therefore entitled to the benefit of maintaining divorce or nullity proceedings.

66. In respect of the delay issue, the courts have determined that whether there is a delay will depend on the particular circumstances of the case and on the petitioner's own conduct prior to the seeking of nullity proceedings. In the instant case, the parties were married for 13 years before they separated in 2008. The parties obtained a decree of judicial separation 3 years later and a further 2 years after that, nullity proceedings were commenced by the petitioner in circumstances where she maintains that her legal advisers failed to apprise her of the legal basis for a nullity. In applying the *ratio descendi* in the *P.W. Case*, a petitioner cannot be blamed for the failure of her legal advisers, if there was such failure.

67. In respect of the issue of estoppel, the authorities clearly suggest that the doctrine of estoppel does not apply to proceedings determining matrimonial status.

68. Turning to the first ground relied upon by the petitioner in the within application, there is simply no plausible evidence upon which this Court could conclude that the respondent subjected the petitioner to duress to the extent that their marriage took place without consent on her part. The reality of the matter is that the petitioner was living as an independent young woman working in New York when she commenced her relationship with the respondent. The relationship evolved in circumstances where the parties were living together and thereafter became engaged before returning to Ireland to celebrate their wedding day with friends and family.

69. There was a paucity of evidence in respect of the petitioner's assertion that she lacked the requisite consent to enter into the contract of marriage and the court is satisfied that the petitioner's evidence in this regard is coloured by the subsequent deterioration

and demise in the parties' marital relationship. The court granted the petitioner some latitude in the manner in which she led her evidence in this regard in circumstances where she was representing herself in these proceedings. However, the court was faced with the insurmountable task of resolving conflicting evidence on issues which arose in the parties' marriage over 23 years ago. Even at the height of the petitioner's case, there was simply no sustainable evidence of duress before this Court and certainly no convincing evidence to discharge the burden of proof required.

70. Moreover, this Court is satisfied that the failure of the marriage in this case was due to the incompatibility of the parties in circumstances where the marital relationship broke down over time. It is an unfortunate reality of life that marriages break down, hence the necessity for divorce legislation.

71. The wholly unsubstantiated claims by the petitioner in respect of the respondent's sexual orientation are utterly reprehensible. Further, the allegations pursued by the petitioner against him with the HSE, Garda Ombudsman and other State bodies were malicious and vindictive and proved to be unfounded. The petitioner has maintained a sustainedly vengeful and vitriolic campaign against the respondent since she lost custody of the dependent children of the marriage and her actions in that regard are regrettable to say the least. Her motivation in pursuing these proceedings was further fuelled by her religious beliefs and her understanding that the relief, if obtained, would assist her in pursuing a church annulment.

72. In respect of the second ground, there is simply no evidence to support the petitioner's contention that the respondent lacked the capacity to enter into and sustain a caring and considerate marital relationship as already outlined above.

73. For the reasons aforegoing, this Court is not required to consider further the issues of approbation and delay as raised by the respondent in these proceedings.

74. Furthermore, the issue of collusion or connivance between the parties does not arise in this application.

75. In the circumstances, I will refuse the relief sought by the petitioner herein.