

THE HIGH COURT

Record No. 158/CA/05

IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

A. B.

APPLICANT

AND
N. C.

RESPONDENT

Judgment of Mr. Justice O'Higgins dated the 16th day of February, 2006.

1. This case comes before the court by way of an order of appeal against the refusal of a decree of nullity made by His Honour Judge McDonagh in the Circuit Court on the 22nd April, 2005.

2. In the Family Law Civil Bill dated the 27th October, 2004, the applicant asked for an enquiry into the following issues.

- a. Whether the respondent gave full, free and informed consent to the ceremony of marriage.
- b. Whether the applicant gave full, free and informed consent to the ceremony of marriage.
- c. Whether as of the date of the said purported ceremony of marriage the respondent suffered from such state of mind, mental condition, personality disorder and/or emotional development to render him incapable of forming and sustaining a normal lifelong relationship with the applicant.
- d. Whether as of the date of the said purported ceremony of marriage the applicant suffered from such state of mind, mental condition, personality disorder and/or emotional development to render her incapable of forming and sustaining a normal lifelong relationship with the respondent.

3. By order of His Honour Judge McMahon (1st December, 2004) Dr. D. was appointed as medical inspector to the applicant and respondent for the purposes of preparing a report for the court. He duly furnished a report dated the 17th February, 2005. (At the behest of this Court on appeal to clarify certain matters, Dr. D. provided an addendum dated the 3rd January, 2006.) The matter came on for hearing in the Circuit Court on the 22nd day of April, 2005, at which time the applicant was represented by solicitor and counsel and the respondent appeared in person, the order reads:

"The Court not being satisfied that the Respondent is a homosexual or that at the time of the marriage the Respondent was a homosexual or at the time of Marriage the Applicant was misled. The Court Doth Refuse to Grant a Decree Nullity of the Marriage between the Applicant and Respondent solemnised on the 29th day of July, 2003, at the Registry Office, Dublin."

4. Notice of appeal was filed on the 28th day of April, 2005 and the case was heard in this court on 6th February, 2006.

History

5. The parties met in 1996 when the applicant was aged 29 and the respondent was aged 28. The applicant comes from a stable family. She was a clerical worker at the time she met the respondent and had her own house which she had bought with the assistance of her parents. The respondent was working in a fruit and vegetable shop at the time and was a separated man although he has since then divorced. He had been previously married when he was 18 or 19. His wife was pregnant at the time of that marriage. The marriage lasted a very short time and the evidence of the respondent was "the only reason the marriage didn't last because we both wanted different things out of life (sic). She wanted to travel so at that time I had to bring up A. as best I could." About a year after meeting the applicant and respondent moved in together. The applicant described the relationship as being "really very good" and the parties decided to have a baby. A daughter was born to the couple in 1998. The couple parted for a short period in 2001 because they were rowing. There was some friction between them at least partly due to the presence in the house of the respondent's daughter from his first marriage and the applicant asked the respondent to leave. He left the house for about two months but parties resumed living together after that. The parties lived together since 1997. The following evidence casts light on their intimate relationship.

Q. "And you had no reason to believe that he had any homosexual orientation?"

A. "He gave me absolutely no indication whatsoever."

Q. "And what was your intimate relationship like at that time? I mean in terms of your sleeping arrangements or how would you describe them over that period?"

A. "Well I have never lived with anybody before, to me we were normal."

6. The parties went through a marriage ceremony on the 18th July, 2003. At the end of January, 2004, the couple went to a birthday party for the applicant's brother in-law. In the course of the evening they went to the house of the applicant's sister. A row erupted between the respondent and the applicant's sister in-law. The evidence was as follows:-

A. "There was a row between my husband and my sister's husband and then he just told me."

Q. "What did he tell you?"

A. "I cant really remember what he said, his exact words what I said to him are you telling me you are a gay, whatever he said made me the penny just dropped." (sic). (She told the court that the reason that she could not remember was because of the consumption of alcohol).

Q. "Had he been engaging in a relationship or do you know?"

A. "He told me that he had met somebody and did I want to speak to them on the phone, and I said no I didn't want to speak to them."

7. When asked whether it came as a shock to the respondent that he was interested in other men the applicant told the court:-

"I don't think it was a shock to him, no he told me that he always felt it since he was a teenager, I asked him why did he marry me then, and he thought that if he married me then it would make the feelings go away. Then he told me that all the moods he would be in were because of those feelings."

8. The parties separated three weeks after the incident and the relationship broke up. The applicant told the court that she would not have married the respondent had he indicated to her that he is homosexual.

"When he told me it was like he is not the same person he was a different person. It is not like the person that I loved, he was like a whole changed person even though he looked the same, he spoke the same it wasn't him."

9. The applicant felt like she had been deceived, used and humiliated. The applicant cannot remember exactly the words used by the respondent indicating his sexual orientation. Her evidence was:

"I can't really remember what he said, his exact words but I just said to him are you telling me you are gay, whatever he said made me the penny just dropped." (*sic*).

10. The respondent suggested that he did not admit to being homosexual but that he was having difficulties with his sexuality and I accept his evidence on this point. The applicant cannot remember what was said. She agreed however when they went home he said that he was having difficulty and was confused and that they discussed the question of counselling.

11. Dr. D. furnished a report to the Court and gave evidence. He was of the opinion that the respondent by virtue of sexual orientation was not capable of sustaining a normal marital relationship. It was also his opinion that the applicant would not have married the respondent if she had been aware of his sexual orientation.

12. Dr. D. estimated that his interview with the respondent as being over an hour, his view was that taken together with his interview of the applicant of similar duration that was sufficient time to enable him to form an opinion.

13. He disagreed with the suggestion of the respondent that the interview took 25 minutes and told the court that it would have taken more time than that to take a history. Whatever the duration of the interview, unfortunately the report and the evidence of Dr. D. is less than fully satisfactory. Firstly the respondent's contention that he was bisexual rather than homosexual does not appear to have been investigated in any detail at the examination, although the evidence of Dr. D. was that he disagreed with the respondent's assessment of himself as bisexual. The Kinsey rating scale was not mentioned in the report and in evidence the witness referred to the Kinsey rating scale as being from zero to ten rather than being from zero to six which is usually the scale referred to in the courts (see *U.F. (or se U.C.) v. J.C.* [1991] 2 I.R. 330 at p. 335). Secondly the question of sexual encounters with males (or the lack of such encounters) prior to the date of the marriage ceremony does not appear to have been addressed in the report or evidence although the respondent told the court that he had no sexual relationship with males prior to the wedding ceremony. Thirdly the sexual history of the respondent after the breakdown of the relationship with the applicant is something that would appear to be a matter of some significance in relation to the nature of the respondent's sexual orientation. The evidence of the respondent is that since the breakdown of the relationship with the applicant he has dated two women and one man. Unfortunately that matter was not referred to either in the report or in the evidence of Dr. D. Fourthly in his evidence the doctor placed at least some reliance on the breakdown of the first marriage informing his views on the inability of the respondent to sustain a marital relationship. The unchallenged evidence of the respondent as to the breakdown of the marriage was due to the fact that the parties wanted different things out of life. This has already been referred to. It is also the position that the respondent's first wife was pregnant at the time of the marriage and that both the parties were very young at the time. In those circumstances and in default of evidence that the matter was probed in any significant extent at the time of the examination the court considers it unsafe to attach any significance to the breakdown of the respondent's first marriage in assessing his ability to sustain a marital relationship. In particular the court has no evidence in which it could fairly base a view that the sexual orientation of the respondent caused or contributed to the breakdown of the first marriage.

14. The two issues argued before this court were, firstly whether the applicant gave full, free and informed consent to the marriage, and secondly whether as of the date of the purported marriage the respondent suffered from such state of mind, mental condition, personality disorder and/or emotional development as to render him incapable of forming and sustaining a life long relationship with the applicant. I will deal with these matters in turn.

15. The consent issue. The applicant's contention that she did not give full and informed consent at the time of the marriage ceremony is based on her evidence that on the night in January, 2004, the respondent told her that he had sexual feelings for men since he was a teenager and that his reason for getting married was because he hoped that after marriage those feelings would go away. I am unable to accept the accuracy of the account given by the applicant of that conversation. Firstly there was much drink consumed by both parties and the applicant candidly told the court that in relation to another part of the conversation that evening she was unable to have an accurate recollection. Secondly the circumstances in which the conversation took place were one that was extremely fraught and both parties were extremely upset. Thirdly the respondent denies that any such conversation took place, although he too was affected by drink on the night in question and he too was upset. He does admit that he had been attracted sexually to men a little bit in his teenage years but that he liked women as well. I accept his evidence that at the time of his marriage he did not consider that his sexual orientation was an issue,

"I never thought it would be something that I would have to deal with like the way I was with her for so long, I had planned to be with her but why it came up, I just don't know. I have asked myself that question why did I just explode the way I did?"

16. I accept his denial that he was deliberately suppressing his feelings, and accept that,

"At the end of the day you know when I married her, I married her for all the right reasons. When I was with her why would I be disloyal or deceive her or use her as a shield. Sure the way it is to the two of us loved each other and that is why we lived together." (*sic*).

17. I also accept he married the applicant in good faith and denied that he married her knowing that he had a sexual interest in men. It appears unlikely and implausible circumstances where the parties had lived together in satisfactory heterosexual relationship that

the respondent would actually go through a marriage ceremony in the hope that feelings of attraction towards men would go away. I do not accept that the marriage was entered into in the hope that the respondent's attraction to men would go away or that the applicant's consent was procured by fraud or deceit in any way. I accept that the "explosion" on the night in January, 2004, how it came as a surprise and a shock to the respondent as well as to the applicant. If the respondent indeed had the conversation alleged by the applicant I do not think that reliance can be placed on it as accurately reflecting his state of mind at the time of marriage, as apposed to an analysis of possible cause for what he too found a shocking experience. I prefer his evidence to this court.

18. Did the respondent suffer from such a state of mind/mental condition/personality disorder and/or emotional development such as to render him incapable of forming and sustaining a life-long relationship with the applicant.

19. In this regard I have already pointed out the unsatisfactory nature of the medical evidence. In particular I am unable to conclude that the sexual orientation of the respondent was homosexual, as apposed to being bisexual as he contends. The inability to form such a conclusion is in my view fatal to the contention to the applicant's case. The court has no evidence on which to assess whether if the respondent were bisexual then this would have rendered him incapable of forming a lasting relationship with the applicant. The respondent himself candidly admitted that he did not know whether he was capable of sustaining a lasting relationship with the applicant and it is clear that he is in a state of uncertainty and confusion as to his capabilities.

The Law

20. It is clear that "in certain circumstances the existence in one party to a marriage of an inherent and unalterable homosexual nature may form a proper legal ground for annulling the marriage at the instance of the other party to the marriage in the case, at least, where that party has no knowledge of the existence of the homosexual nature." *U.F. v. J.C.* [1991] 2 I.R. 330 at p. 357 per Finlay C.J. The facts of that case however are very different from the present one and in that case it is clear that the respondent was a practising homosexual at the time the marriage and that there was a condition that he concealed from the petition. In the present case the unchallenged evidence is that the respondent had no homosexual experiences prior to the marriage. In that case too the respondent confirmed his homosexual practices in the course of the marriage. There is no such evidence in the present case.

21. In the case of *M.O'M. (or se O'C.) v. B.O'C.* [1996] I.R. 208, it was held that the failure to disclose a circumstance of substance which would have influenced the petitioner in making up her mind with grounds for nullity on the basis that the consent was not an informed consent. In the case of *P.F. v. G.O'M. (or se G.F.)* [2001] 3 I.R. 1, the Supreme Court considered the nature of the information and non disclosure of which would give rise to grounds for decree of nullity on the basis of a lack of informed consent it was held that while considerations of information in relation to inherent disposition and mental stability fell within that category the non disclosure of misconduct or other misrepresentation were not the type of information for which would give grounds for decree of nullity. I have already found that at the time of contracting the marriage the question of sexual orientation was not an issue for the respondent in circumstances where he had been living in a heterosexual relationship for a number of years. I cannot accept in the particular circumstances of the case the question of the respondents sexual orientation was a real concern and a "circumstance of substance" which should have been disclosed to the applicant and in default of which her consent was vitiated, and therefore I do not accept that he concealed any "circumstance of substance". The evidence discloses that the attraction towards another male which led to the row in January, 2004, came as a shock to the respondent as well as to the applicant. In my view at the time of contracting the marriage, the respondent was unaware of any issue concerning his sexual orientation being of significance I do not consider that the respondent acted dishonestly to his intended partner and I do still ask was he guilty of any deceit (although the question of intention to deceit may well be of no significance in non disclosure cases in the context of nullity).

Conclusion

22. In the circumstances it has not been shown that the applicant did not give full, free and informed consent to the ceremony of marriage. There was no "circumstance of substance" of which the respondent was aware which he failed to disclose to her applicant. Both parties having lived freely together in a heterosexual relationship for a number of years consented to the marriage. I am unable to conclude that, at the date of the marriage ceremony, the respondent suffered from such a state of mind/mental condition/personality disorder and/or emotional development as to render him incapable of forming and sustaining a normal life long relationship with the applicant. There is simply no evidence of any inability of the applicant which would render her incapable of forming and sustaining a life long relationship with the respondent. I am acutely aware that the break up of the short lived marriage was in circumstances that were extremely hurtful and traumatic to the applicant in this case. There is little doubt that it was very upsetting for the respondent as well. However for the reasons that I have stated I am unable to hold that there was no valid marriage entered into between the parties and accordingly I must refuse a decree of nullity and affirm the order of the Circuit Court.