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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION
(MATRIONIAL OFFICE)

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IN RE: Ms A – VALIDITY OF MARRIAGE

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Ms Fionnuala Connolly (instructed by Fisher & Fisher Solicitors) for the Petitioner
Mr S McQuitty (instructed by the Departmental Solicitor's Office) for the Registrar General
Ms N Murnaghan QC (appeared on the instructions of the Attorney General)

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O'HARA J

Introduction

[1] The issue in this case is whether the petitioner who has been anonymised without objection from any party and will be called Ms A, is entitled to a declaration that the form of marriage which she entered into at a hospital, with Mr M, on 26 May 2012 is one which is sufficient to be recognised in law and is a valid marriage.

[2] Ms A and Mr M knew at the time of the ceremony that he was dying. In fact he died later that day. His sudden decline over the previous 24 hours had made him and Ms A bring forward the plans which they had started to make to marry on 2 July. This acceleration of events meant that not everything which would normally be done with the Registrar General (the "RG") at the City Hall in Belfast had been done. The question is really whether enough had been done.

[3] For Ms A, Ms Connolly contended that the marriage should be recognised in law. Her case was supported by Ms Murnaghan QC on behalf of the Attorney General but opposed by Mr McQuitty for the Registrar General. I am grateful to all counsel for their helpful submissions.

[4] Mr M's family was put on notice of these proceedings and chose not to participate in them. I was informed that the outcome of the case has no financial impact at all in terms of inheritance, state benefits or otherwise.

Background

[5] On the evidence before me Ms A and Mr M enjoyed a long term relationship from in or about 1980. However, it was not until May 2012 when Mr M was diagnosed as having a malignant tumour on his lung that they began to put marriage plans into place. They bought rings, arranged a church service for 2 July and made a booking for the reception at a venue. Invitations were issued. To state the obvious, this was done in anticipation of Mr M still being alive and well enough to take part in those events.

[6] Ms A met a priest on 19 May. He explained to her the requirements of the Roman Catholic Church for marriage and also explained the civil requirements which would have to be complied with. As a result Ms A attended the Registrar General's Office at Belfast City Hall on 23 May to give the required notice and information. Mr M was not with her. In the course of the hearing before me there was some debate about what documentation Ms A had provided on 23 May and subsequently. As a result further enquiries were made. I am satisfied from the information which was ultimately provided that Ms A had brought short form birth certificates but was advised by a Deputy Registrar that what was required were long form certificates. She was also advised that she needed to provide some form of proof of nationality, such as a passport, in respect of Mr M.

[7] On 23 May Ms A did not anticipate Mr M would not survive until 2 July. It was certainly not anticipated that he would die within just a few days. She did however tell the Deputy Registrar that he was seriously ill. I am satisfied that the Deputy Registrar advised Ms A in light of that fact about the possibility of a 14 day waiver pursuant to Regulation 3(2) of the Marriage Regulations (NI) Order 2003. That is a waiver which allows the Registrar General to reduce the 14 day period for a marriage notice to a shorter period if necessary. The circumstances in which a waiver might be given are not prescribed but must include the provision of medical evidence that death is imminent.

[8] In any event Ms A had certainly started the process on 23 May with the Deputy Registrar. There was no further contact with the RG's office until Saturday 26 May. Specifically, despite some confusion on the part of Ms A, the long form birth certificates and Mr M's passport were definitely not sent to the RG until some weeks later, in June.

[9] Sadly Mr M's condition took a dramatic turn for the worse on the morning of 26 May. Ms A received a call at about 8am and hurried to the hospital. Other relatives arrived too. During the course of that morning it was decided to proceed with the marriage immediately. Despite the seriousness of his illness Mr M was

awake and lucid. A hospital Chaplain performed a marriage ceremony of sorts at 12 noon in front of family members. He was not the priest who had been scheduled to officiate on 2 July.

[10] Before that ceremony took place efforts had been made to contact the RG. This turned out to be difficult because it was a Saturday and the offices were not open for general enquiries. As it happened however, the Deputy Registrar who had seen Ms A few days earlier was in the City Hall to officiate at three weddings. The priest who had been due to officiate on 2 July got through to her by phone and told her about Mr M's deterioration. The Deputy Registrar said, in effect, that there was nothing she could do because she still had not received the birth certificates or a passport. Accordingly, no marriage notice had issued. Nor did she receive any written medical evidence in relation to the deterioration of Mr M. The Deputy Registrar suggested that a priest might give a form of blessing short of a marriage ceremony. Although she was clear in her own mind about this the Deputy Registrar told the priest that she would check the position with a Registrar and get that Registrar to ring the priest. This was done and the Deputy Registrar's understanding was confirmed. It appears that this information was passed on by the priest to the Chaplain.

[11] The Chaplain who performed the ceremony at the hospital on 26 May provided a note dated 9 June 2012 of what he had done. It explains that when he was called to assist Ms A and Mr M on the morning of 26 May he established from them that they were free to marry, that they were due to marry and that Mr M's condition was critical. On that basis he proceeded with what he described as "a simple ceremony of marriage." He did so on his stipulation to them and to their witnesses that if Mr M recovered they could repeat their exchange of marriage vows "in a way that would satisfy the legal requirements for the civil recognition and the religious recording of their marriage."

[12] The note from the Chaplain is quite clear and revealing. I interpret it to mean that he did not believe he was performing a ceremony which satisfied legal requirements and that he said so to everyone involved. Of course he may be wrong in that belief – Ms A and the Attorney General contend that he is wrong – but at the very least his note indicates how far removed from the norm he considered the ceremony on 26 May to be. In my judgment he was doing all that he could to provide some comfort to Ms A and Mr M in the most distressing of circumstances.

The Marriage (NI) Order 2003

[13] The state is permitted to make laws which impose restrictions and conditions on marriage, provided that those do not interfere with the very right to marry which is protected by Article 12 of the European Convention on Human Rights.

[14] In Northern Ireland the starting point is to be found in the Marriage (NI) Order 2003 (the "2003 Order") which was introduced to modernise and simplify

existing procedures in line with recommendations made by the Law Reform Advisory Committee. The 2003 Order provides for the following steps to be taken:

Article 3

Each party to a marriage which is be solemnised in Northern Ireland shall serve a notice of intention to marry on the Registrar. (That is in effect what Ms A purported to do on 23 May but she did not have the necessary documentation to complete the process.)

Article 4

The Registrar records the details and enters some of them in a marriage notice book which is placed on public display. (This was not done in the present case due to the lack of documentation.)

Article 5

The Registrar has a power to require specific evidence relating to name, age, marital status and nationality. (This is what the Deputy Registrar required of Ms A in relation to long form birth certificates and Mr M's passport on 23 May.)

Article 6

Objections can be made in writing to the Registrar before the solemnisation of any marriage.

Article 7

After the Registrar receives a marriage notice from the parties to an intended marriage, he is to complete a marriage schedule provided he is satisfied there is no legal impediment to the marriage. (In this case the Registrar was waiting to receive the long form birth certificates and the passport to enable a marriage schedule to be issued.) In the event of a religious marriage (which was intended by Ms A and Mr M) that marriage can only solemnised on the date, by the officiant and at the place specified in the marriage schedule.

[15] The Marriage Regulations (NI) 2003, made under the 2003 Order, make further provisions which, inter alia, provide for flexibility in the system. For instance, Regulation 3 requires the Article 3 marriage notice to be served on the Registrar at least 14 days before the intended date of marriage but that time period can be reduced or waived. Another example is found in Regulation 6 which provides that if the officiant named in the marriage schedule cannot solemnise the marriage another officiant may do so. Similarly, if the marriage cannot be solemnised at the place intended (e.g. a church) an alternative place (e.g. a hospital) can be substituted.

[16] As already noted at paragraph [7] above Regulation 3 allows for flexibility in terms of the marriage notice. The minimum period of 14 days can be waived if information is provided to explain why. In this case that could have been a note from a doctor confirming Mr M's expected imminent death. A note was provided in June by a consultant explaining what happened on 26 May but nothing was provided before the ceremony in the hospital.

[17] Article 15 of the 2003 Order provides that a religious marriage shall not be solemnised unless the parties produce to the officiant a marriage schedule in accordance with Article 7. In this case the Chaplain on 26 May had no such schedule provided to him. (Under Article 38 it is in fact a criminal offence for an officiant to solemnise a marriage without having a marriage schedule available to him.)

[18] Article 16 then provides that immediately after the marriage has been solemnised the marriage schedule is be signed by the parties, the witnesses and the officiant. It is then to be delivered to the Registrar. The Registrar is not to register if he does not receive a marriage schedule, save for a number of identified exceptions which do not arise here but again illustrate the flexibility in the system.

[19] It is important to record that what happened in this case was not because of any fault or neglect on any one's part. Rather things came undone because of the sudden and tragic decline in Mr M's condition which led to his death on the evening of 26 May. In terms of the 2003 Order and Regulations some initial steps had been taken but:

(i) The Deputy Registrar had not received the long form birth certificates or Mr M's passport.

(ii) No marriage schedule has issued or could issue without them.

(iii) No application had been made to waive the minimum period of 14 days.

(iv) No written note had been provided from a doctor nor had there even been any direct discussions with a doctor by phone.

(v) The Chaplain did not have a marriage schedule when he took Ms A and Mr M through the ceremony he performed.

(vi) There was no marriage schedule for the parties, witnesses and Chaplain to sign.

(vii) The Registrar did not receive a signed marriage schedule to Registrar because there was none.

(viii) The Registrar could not register the marriage because there is no schedule.

[20] To the extent that this case falls to be considered by reference to the 2003 Order and Regulations it must fail because the statutory requirements have so obviously not been met. It seems to me to be very clear that this was understood by the Chaplain at the hospital on 26 May. It is encapsulated in the "stipulation", the word he himself used to describe it, referred to at paragraph [11] above. I think that it is highly likely that that is what he explained to everyone in the hospital since it is what his note so clearly describes. However, in all the tragic circumstances they might well not have understood the implications of his words.

The case for Ms A

[21] Against that background what then is the argument advanced by Ms A, with the support of the Attorney General, for making the declaration sought? The power to make a declaration lies in Article 31 of the Matrimonial and Family Proceedings (NI) Order 1989 which provides:

> "31.—(1) Subject to the provisions of this Article, any person may apply to the court for one or more of the following declarations in relation to a marriage specified in the application, that is to say—
>
> (a) a declaration that the marriage was at its inception a valid marriage; …"

[22] Article 34 then sets out general provisions as to the making and effect of declarations. The relevant paragraphs are:

> "34.—(1) Where on an application for a declaration under this Part the truth of the proposition to be declared is proved to the satisfaction of the court, the court shall make that declaration unless to do so would manifestly be contrary to public policy.
>
> (2) Any declaration made under this Part shall be binding on the Crown and all other persons.
>
> (3) The court, on the dismissal of an application for a declaration under this Part, shall not have power to make any declaration for which an application has not been made.
>
> (4) No declaration which may be applied for under this Part may be made otherwise than under this Part by any court.

(5) No declaration may be made by any court, whether under this Part or otherwise—

(a) that a marriage was at its inception void; …"

[23] Ms A relies significantly on the approach illustrated in the judgment of Moylan LJ in *MA v JA* [2012] EWHC 2219 (Fam). In that case the couple went through a ceremony of marriage conducted by an Imam in a mosque. Following the ceremony they were provided with a document entitled "contract of marriage" which certified that the marriage had been concluded according to Islamic Sharia law. They then lived together for some years and had three children but when the wife attempted to obtain a marriage certificate she learned that the marriage was not registered. It was then discovered that at the time of the ceremony the Imam was not an authorised person for the purposes of the statute (although an Imam who was authorised was present), that the Iman had thought he was conducting a purely religious ceremony and that no notice had been given to or certificate obtained from the Registrar.

[24] It was held that since some of the statutory requirements had not been complied with the presumption of marriage could not be applied. That being so the central issue was whether what had taken place was sufficiently within the terms of the Marriage Act 1949 for the marriage to be capable of being a valid marriage under English law. The court held that it was potentially valid because:

- The fact that the ceremony was conducted according to Sharia law did not prevent it falling within the scope of the 1949 Act.

- The parties had intended to contract a marriage which was valid under English law.

- The ceremony was sufficient to constitute a valid marriage.

- It was conducted in a registered building in the presence of (but not by) an authorised person.

[25] The court continued that such a marriage would only be held to be void if that were expressly provided by statute, that the parties had not knowingly and wilfully married in breach of the 1949 Act so the marriage was not void and accordingly the ceremony had created a marriage which was entitled to be recognised as valid.

[26] The judgment involved a sweeping review of the law of marriage over some centuries in England, a far more sweeping review than was opened to me. It is notable however that in the 1949 Act a marriage is only void if the parties "knowingly and wilfully" marry in disregard of certain statutory provisions.

Similarly, the officiant is only guilty of an offence if he "knowingly and wilfully" solemnises the marriage in disregard of specific requirements.

[27] It is also striking that Moylan LJ rejected the public policy argument advanced by the Attorney General who in that case had intervened against the couple and had resisted the application to have the marriage declared valid. In dealing with the public policy issue (the equivalent of Article 34 of the 1989 Order) the court held at paragraph 95 that although there were significant failings in adhering to the statutory provisions:

> "…in my view it is in the public interest that the rights and obligations consequent on marriage are provided to and imposed on those who 'marry' in this jurisdiction. It is not in the public interest that such obligations can be too readily avoided. This supports the conclusion that the 1949 Act net should not be cast too narrowly."

That was in the context of a couple who had intended to marry, who believed they had married, who had three children and who lived their lives as if they were married.

[28] Ultimately, the court held (at paragraph 102) that because the parties did not knowingly and wilfully marry in breach of the requirements of the Act the marriage was not void. Accordingly, they were granted a declaration that their ceremony of marriage was a valid marriage at its inception.

[29] The grounds on which a marriage shall be void in Northern Ireland are found in Article 13 of the Matrimonial Causes (NI) Order 1978. It provides at Article 13(1)(c):

> "that a marriage shall be void only on one of a number of grounds including…that it is not a valid marriage by reason of non-compliance with any statutory provision or rule of law governing the formation of marriage."

[30] For Ms A it was submitted that this provision, read with the judgment of Moylan LJ and other cases where there had been a significant failure to follow the statutory procedures such as *Collett v Collett* [1968] P 482, all share a common theme, namely the willingness of courts to overlook procedural failings and preserve marriages where possible.

[31] It was further submitted that in approaching the issue of non-compliance with the statute, the court should take the "common sense construction rule" cited in Bennion on Statutory Interpretation. To do otherwise would mean that many marriages might be void because of "non-compliance with any statutory provision" as per Article 13(1)(c) of the 1978 Order.

[32] In respect of the Human Rights Act it was submitted that I am obliged to read the domestic statutes in a manner compatible with Article 12 of the ECHR. If I do not grant a declaration sought here, said the applicant, I would substantially interfere with the exercise of the right to marry. This submission was made while acknowledging the indisputable public interest in ensuring compliance with the statutory obligations and rules of law on the formation of a marriage which provide legal certainty for both the state and the married couple.

[33] The Attorney General advanced the case on some additional grounds which included:

(i) That the marriage schedule should have been issued because long form birth certificates are not required by the Regulations.

(ii) That the form of ceremony performed by the Chaplain complied with the requirements of canon law.

(iii) The registration requirements in the 2003 Order impose a criminal sanction but contain no provision nullifying a marriage entered into in breach of those requirements.

(iv) The public policy interest is and should be to uphold rather than deny the validity of marriage.

The case for the Registrar General

[34] On behalf of the RG Mr McQuitty submitted four skeleton arguments. Before dealing with specific aspects of them a number of key themes can be identified:

(i) The 2003 Order and Regulations lay down a necessary, coherent and working scheme to protect the public interest in identifying who is married and when a valid marriage has taken place. This scheme provides certainty and there is no evidence that it is imposes excessive demands on those who intend to marry.

(ii) The scheme is not only clear and logical but it is also flexible e.g. change of officiant, change of location and potential waiver of the 14 day notice.

(iii) The statutory requirements do not unduly or inappropriately inhibit the right to marry guaranteed by Article 12 ECHR.

(iv) The decision of Moylan LJ in *MA v JA* relates to the law of England which is significantly different to the law of Northern Ireland.

(v) The better comparison is with the law of Scotland, on which the 2003 Order is based, and which is interpreted and applied in the way in which the RG contends the law of Northern Ireland should be applied here.

[35] It is necessary to record that neither the original intended officiant nor the Chaplain has sworn an affidavit in this case despite having had the opportunity to do so. Mr McQuitty placed some emphasis on this because the Chaplain in particular could have expanded on what he did on 26 May and on what he intended to do that day as explained in his note of 9 June – see paragraphs 11 and 12 above.

[36] So far as *MA v JA* is concerned, the RG highlighted the point that in English law a marriage is only void when the parties "knowingly and wilfully inter-marry" in disregard of statutory requirements. That term connotes a deliberate and conscious failure to comply with the statute and is consistent with a more permissive approach to protecting marriages which have not been entered into in compliance with the statute. The absence of any equivalent terminology in Northern Ireland, it was submitted, suggests a different approach.

[37] Developing this issue further, Mr McQuitty submitted that even on the present facts Ms A knew that she had not complied with the statutory requirement to provide the Deputy Registrar with the information and the documents which she had been asked for on 23 May. Without assigning fault to her for this, he suggested that the fact that events overtook her does not detract from her knowledge that more was required from her by the Deputy Registrar before the pre-requisites for a valid marriage had been satisfied.

[38] Turning then to the Scottish system which is closer to, though not identical to ours, Mr McQuitty relied on authorities which emphasised the absolute need to have a marriage schedule – *Sohrab v Khan* [2002] SC 382 and *Saleh v Saleh* [1987] SLT 633. As Lord McEwan said at paragraph [84] of *Sohrab*:

> "However, I am unable and unwilling to conclude that the very need to have a Schedule at the solemnisation following upon a notice is a requirement which can be dispensed with even where registration follows, as happened here. To take that view would encourage carelessness and dishonesty; would defeat the purpose of notice and effectively render sections 3 and 5 as nugatory. It will not do to ignore the clear terms of the Act at the time and then try to put the paperwork in order later. None of the cases cited to me compels any different conclusion …"

[39] On the issue of statutory interpretation the RG's case is that the legislation should be interpreted as it reads because to do so is to give effect to the public policy and the intention of the legislature. The system is not rigid and inflexible. If it was

there might be a need to avoid absurd outcomes but that is not this legislation nor is it this case. Our legislation could have been made to include the "knowingly and wilfully" test when the law was changed in 2003 but that did not happen.

[40] On the RG's submission there may be cases where the nature of non-compliance is minimal and the validity of the marriage might be saved. For instance, assuming everything else had been in order, if a doctor had spoken to the Deputy Registrar and followed up with written confirmation after the event rather than before (because he didn't have time that morning) the degree of non-compliance with the scheme would have been minimised. However, such examples cannot include cases such as this where the ceremony took place without any marriage schedule at all.

[41] Dealing with the Attorney General's submissions about canon law, the RG submitted quite simply that those are not relevant. The issue is not whether the requirements of canon law have been satisfied. On his broader submissions the RG submitted that the existing system which works well cannot be set aside in the sad circumstances of the present case because to do so would undermine the certainty which public policy legitimately requires. The fact that Mr M was close to sudden death, it was submitted, does not somehow render the legal requirements excessive or unnecessary.

Consideration

[42] The submissions advanced in support of the declaration sought by Ms A have been comprehensive and extensive. The difficulty with them is that they must take as their starting point the fact that the legal requirements for entering into a valid marriage had not advanced beyond initial steps having been taken. There was no marriage notice because the Deputy Registrar had required more information to be produced. While the Attorney General challenged the legitimacy of that request, it was one which was made reasonably within the powers conferred by Article 5 of the 2003 Order. It also seems to me to have been particularly reasonable in the present case where because of his illness Mr M did not go to the City Hall with Ms A so the Deputy Registrar could only go by what Ms A was telling her without the reassurance of seeing and speaking to Mr M. That does not mean that Ms A was being dishonest, only that the Deputy Registrar was entitled to seek more information.

[43] In the circumstances which developed between 25 and 26 May there simply was not time to comply with the statutory requirements. But that does not mean that the requirement somehow became excessive as the Attorney General ultimately contended. The system has plenty of flexibility built into it, just not enough to make up the ground that had to be covered on 26 May.

[44] In my judgment the critical factor in this case is the extent to which there was a failure to comply with the statutory requirements. While Mr McQuitty was surely

right to concede that there may be de minimis cases, this case could hardly be further away from de minimis. The public policy argument which so influenced Moylan LJ was to uphold a marriage which the parties had committed to and lived by, unaware of the procedural deficiencies. That is far removed from this case and is in any event based on the different statutory test of "knowingly and wilfully."

[45] In my judgment the more relevant authorities are those of the Scottish courts. Their system is closer to ours. It is clear from them that Scottish courts require substantive adherence to the procedures. The responsibilities of the RG would be rendered almost impossible to fulfil if this case succeeded. Short of fraud or deceit it is difficult to imagine what case might fail.

[46] In reaching the conclusion that it is simply not possible to declare this marriage valid I am influenced to a significant degree by the Chaplain's note of 9 June already referred to above. It may well be that given all that was happening that morning the Chaplain's message was not clearly understood but in the absence of an affidavit from him which supports anything different I conclude that he was explaining that this would not be a marriage for civil, or indeed religious, purposes. In this context it is relevant to note the position of officiants. They face the risk of prosecution under Article 38 if they purport to solemnise a marriage without a marriage schedule. How are they possibly to know where they stand if there is some sort of laissez-faire approach to the statute? Are they really to leave themselves open to prosecution and hope that a court will take a relaxed view of what they did? I think not.

[47] I trust that what the Chaplain took Ms A and Mr M through on 26 May was a comfort to them and that it salvaged something meaningful from that day but it is not a marriage which remotely satisfied the 2003 Order and it is not one which I can declare valid.

[48] For the reasons set out above the application of Ms A for a declaration is refused and the case dismissed.