

McD v O'R

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THE HIGH COURT

1982/9M

M F McD
(OTHERWISE KNOWN AS M O'R)

PETITIONER

and

W O'R

RESPONDENT

JUDGMENT OF MR. JUSTICE HAMILTON

DELIVERED ON THE 26TH DAY OF JANUARY, 1984.

1.

This is a Petition brought by the Petitioner, seeking a Decree that a marriage which purported to have taken place between the Petitioner and the Respondent at St. James' Church, Bushy Park, Galway, on the 25th day of April 1972, is null and void.

As appears from the amended Petition sworn herein by the Petitioner on the 30th day of March 1983, the grounds of the Petitioner for her claim to a Decree of Nullity are that:

- (a) At the date of the said marriage and prior to and subsequent thereto the Respondent was a homosexual and had had homosexual relationships, that he represented himself to the Petitioner as being a heterosexual person and that he was, as a consequence, guilty of gross misrepresentation and deceit, that he lacked the capacity to form or alternatively to maintain or sustain a lasting and marital relationship with the Petitioner by reason of his homosexual nature and temperament,
- (b) By reason of the aforesaid matters the Respondent, prior to and at the time of the said marriage, had formed the intention not to develop or alternatively not to maintain a lasting and marital relationship with the Petitioner and had formed the intention not to be faithful to the Petitioner and since the marriage has continued to commit acts of

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homosexuality with the persons named in the Petition and with others whose names are unknown to the Petitioner.

The Petitioner claims that

- (i) The Respondent did not give any true or valid consent to the said marriage.
- (ii) Further or in the alternative the Respondent was incapable of giving true or valid consent to the said marriage.
- (iii) In the further alternative, the Respondent was, by reason of his homosexual nature and temperament and incapacity to form and sustain a lasting marital relationship, incapable of performing or implementing a fundamental purpose or term of the contract of marriage.
- (iv) The Petitioner did not give her full and free consent to the marriage and that she was not capable of giving her full and free consent to the said marriage in that she was not aware of the Respondent's lack of capacity or the deceit, misrepresentation, and the intention of the Respondent not to fulfil fundamental features of the marriage.

In his answer, the Respondent, inter alia, denies that he was at any time or is a homosexual or that he had or entered into homosexual relations with any of the persons named in the Petition or with any other person, he denies that he was lacking in the capacity or ability to form and

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maintain a lasting marital relationship and alleges that the Petitioner gave her full and free consent to the marriage and that his, the Respondent's, consent to the marriage was true and valid, that he had and exercised full capacity and capability in giving such true and valid consent and that he was fully capable and did perform and implement the terms and purpose of the Contract of Marriage.

Before proceeding to deal with these issues, I should say in the first instance, that I am satisfied that there is no collusion between the parties with regard to these proceedings and that I agree with the statement made by Mr. Justice Costello in the course of his Judgment in D -v- C unreported but delivered on the 19th day of May 1983 where he stated that:-

"The Courts have never approached claims for nullity decrees merely by applying principles of contract law or statutory prohibitions and even when marriages have been entered into with complete freedom untainted with illegality they may be declared null and void if one of the spouses is impotent at the time of the marriage and unable to consummate it. (See McM -v- McM IR 217). But marriage is by our common law (strengthened and reinforced by our constitutional law) a life long union, and it seem

to me to be perfectly reasonable that the law should recognise (a) the obvious fact that there is more to marriage than its physical consummation and (b) that the life long union which the law enjoins requires for its maintenance the creation of an emotional and psychological relationship between the spouses. The law should have regard to his relationship just as it does to the physical one. It should recognise that there have been important and significant advances in the field of psychiatric medicine since 1870 and that it is now possible to identify psychiatric illness, such as for example manic depressive illness, which in some cases may be so severe as to make it impossible for one of the partners to the marriage to enter into and sustain the relationship which should exist between married couples if a life long union is to be possible. Extending the law by reasoning by analogy is as old as the common law itself (in the thirteenth century it was pointed out that "if any new and unwonted circumstance shall arise, then, if anything analogous has happened before, let the case be adjudged in like manner, preceding a similibus ad similia") (Bracton "De Legibus" quoted in Cross "The English Doctrine of Precedent" p.24) and so it seems to me (as it did to Mr. Justice Barrington in R.S.J. -v- J.S.J.) that if the law declares to be null a marriage on the grounds that one spouse is through physical disability incapable of the physical

relationship required by marriage it should do likewise where one spouse is through a psychiatric disability unable to enter into and sustain the normal inter-personal relationship which marriage also requires."

I also agree with the statement of Mr. Justice Kenny in S. -v- S. unreported but delivered on the 1st day of July 1976 where he said:-

"Section 13 of the Act of 1870 did not have the effect of fossilising the law in its state in that year. That law is to some extent at least judge made and the Courts recognise the great advances made in psychological medicine since 1870 make it necessary to frame new rules which reflect these"

which statement was accepted by Mr. Justice Costello in D. -v- C.

and Mr. Justice Barrington in R.S.J. -v- R.S.J. unreported but delivered on the 11th of January 1982.

Consequently it appears to me that if the Petitioner established that the Respondent was at the time of her marriage to him and by reason of his homosexuality incapable of entering into and sustaining the relationship which should exist between married couples if a life long union is to be possible, that she would be entitled to the relief which she seeks, a decree of nullity.

These are obviously questions of fact and the onus is on the Petitioner

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to establish them and, having regard to the nature of these proceedings and the allegations made against the Respondent, to establish them to a high degree of probability.

I do not propose to set forth the evidence adduced in this case with regard to these issues in any great detail.

To seek to establish that the Respondent was a homosexual prior to and at the time of her marriage to the Petitioner, the Petitioner relies mainly on the evidence of Mr. E. and Doctor F.

Having carefully considered their evidence and the manner in which they gave their evidence in Court and having regard to their friendship, particularly that of Mr. E., with the Petitioner, I consider them to be unreliable witnesses and where their evidence is in conflict with that of the Respondent, I accept that of the Respondent, whom I found to be an honest and truthful witness. He denies having sexual relations with either Mr. E. or Doctor F. and I accept his evidence in this regard.

It is further suggested by the Petitioner that the Respondent had prior to and subsequent to her marriage a homosexual relationship with one F.M.

It is quite clear from the evidence that the Respondent and Mr. M. were very close associates and friends and the claim that their relationship was a homosexual one is based on the evidence of Doctor F. that on the

occasion of a visit to Mr. M.'s home in County Meath in June 1971 the Respondent slept with Mr. M. and that on the following morning the Respondent informed Doctor F. that the relationship had come to an end and expressed sadness that it should have ended.

I accept Doctor F.'s evidence in this regard but I cannot find on the evidence any basis for holding that it ever resumed other than on the basis of friendship.

There is no evidence that after his marriage to the Petitioner the Respondent engaged in any homosexual activities. I reject completely that he had had a homosexual relationship with Doctor V.B. The allegation made by the Petitioner in this regard was made without any reasonable basis on evidence and I accept the evidence of Doctor B.

It seems to me that, having read the Petition and Answer and considered the evidence in this case, that there are two main issues which I have to decide in this case:-

1. Whether the Respondent was prior to and at the time of his marriage to the Petitioner a homosexual, and
2. If the answer to 1 is yes, whether the Respondent (a) was unable fully to understand the nature, purpose and consequence of the Marriage Contract, and/or (b) was unable to maintain and sustain a normal marriage relationship with his wife, and

3. If the answer is yes to both questions whether by reason thereof the Petitioner is entitled to a Decree of Nullity.

While I am satisfied as I said that the Petitioner had a homosexual relationship with Mr. M. I am satisfied that that relationship had terminated prior to the occasion of the Respondent's marriage to the Petitioner.

I am further satisfied that since the occasion of his marriage to the Petitioner there is no evidence that he engaged in or entered into homosexual relationships with any person. However it must be said that even if a person had a homosexual relationship prior to marriage that of itself is not a ground for a Decree of Nullity. It is submitted on behalf of the Petitioner and based on the evidence of Doctor S. that a person with homosexual tendencies and who had engaged in homosexual practice would have extreme difficulty in forming, maintaining and sustaining a lasting marital relationship. It is only if this was established in respect of the Respondent that the Petitioner would be entitled on the basis of the decision of Mr. Justice Costello in D. -v- C. to a Decree of Nullity.

It is quite clear that the Respondent did have prior to his marriage a homosexual relationship with Mr. M. It is also equally clear from his evidence and indeed from the evidence of the Petitioner that the sexual relationship between the Petitioner and the Respondent was satisfactory

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and normal, that the marriage was consummated, that the relationship led to pregnancies which unfortunately resulted in miscarriages, that the sexual relationship between the Petitioner and the Respondent had continued on a satisfactory and normal basis from the date of the marriage until the date on which difficulties arose between the Petitioner and the Respondent.

With regard to these difficulties and the reasons therefor I accept the evidence of the Respondent whom, as I have said, I have found to be on the whole an honest and truthful witness. The difficulty with regard to Doctor S.'s evidence is that he was giving evidence on the basis of researches which had been carried out, that he never had an occasion and was not granted an occasion to examine or discuss the problems with the Petitioner and consequently I cannot honestly hold on the basis of Doctor S's evidence that at the date of his marriage the Respondent was not capable of maintaining and sustaining a lasting marital relationship. I am satisfied that there was valid consent by both the Petitioner and the Respondent to this marriage and that the Petitioner is not on the law as it stands and on the evidence as it stands entitled to the Decree which she seeks and I refuse the application for a Decree of Nullity.



LIAM HAMILTON
JUDGE OF THE HIGH COURT.