H. v H.

Supreme Court (in chambers)
Spry, C.J.
17 January and 19 April 1977.

Legitimacy — child of void marriage — when treated as legitimate.
Child — power of court to order custody, etc. — whether extends to child of void marriage.
Child — law of status.

The applicant obtained a decree of nullity on the ground that the man with whom she had gone through a ceremony of marriage had a wife then living, and was given custody of the child of the union. She then applied for an order giving her care and custody, with full authority to decide the upbringing of the child without reference to the father. At the time of the application, none of the parties was resident in Gibraltar. Questions were argued as to jurisdiction and whether the child ought to be treated as legitimate.

Held: (i) Jurisdiction under the Infants Ordinance (Cap. 78, 1964 Ed.) must be founded on residence.

(ii) The power given to the court by s. 42(1) of the Matrimonial Causes Ordinance (Cap. 101, 1964 Ed.) to make provision for the custody, maintenance and education of children the marriage of whose parents is the subject of the proceedings extends to the children of a union which is not a valid marriage.

Per curiam. (iii) Under English law, the child would be treated as the legitimate child of his parents, although the marriage of his parents was void, since the father is domiciled in England and at the time of the void ceremony the mother believed it to be valid.

(iv) Gibraltar law would treat the child as legitimate, since his status is governed by the law of his father's domicile.

Cases referred to in the order.

Langworthy v Langworthy, (1886) 11 P.D. 85.
Galloway v Galloway, [1955] 3 All E.R. 429.
In re Grove, (1888) 40 Ch. D. 216.

Application

This was an application following the grant of a decree nisi of nullity, with an order for custody, for further orders regarding the upbringing and education of the child.

A.J. Vasquez for the applicant.
The Attorney General (J.K. Havers, Q.C.) as Queen's Proctor.

22 April 1977: The following order was read in court—

This is an application for an order for custody of a child of about five years of age, with the right of care and control and full authority to decide the upbringing and education of the child, without reference to the father. The applicant petitioned successfully for a decree of nullity on the ground that the man with whom she went through a ceremony of marriage and who is the father of the child had a wife living at the time of the ceremony. The applicant is Gibraltarian, although she is presently living with her son in the United States of America. The respondent is English: he is a mechanical engineer, whose work takes him to various parts of the world. The application was adjourned so that he could have an opportunity of being heard on it but he intimated in writing that he did not intend to appear.

The main question that has been argued is that of jurisdiction and in that connection the question was discussed whether or not the child should be treated as legitimate.

Mr. Vasquez, for the applicant, sought at first to rely on ss. 12 and 19 of the Infants Ordinance, as substituted by Ord. No. 16 of 1976, but as the Queen's Proctor pointed out, it would appear that the court has no jurisdiction under that Ordinance since, under s. 3 (3), jurisdiction must be founded on residence and in the present case the applicant, the respondent and the child are all resident outside the jurisdiction.

Mr. Vasquez then relied on ss. 42 (1) and 44 (1) of the Matrimonial Causes Ordinance. It was in this connection that I heard argument on whether the child should be treated as legitimate. Since I heard that argument, I have examined the decisions in the English cases of *Langworthy v Langworthy*[1] and *Galloway v Galloway*[2], authorities which I am satisfied that I ought to follow. I do not think it necessary to invite counsel to address me on them. It is quite clear from them that the power given to the court by s. 42 (1) of Cap. 101 to make provision with respect to the custody, maintenance and education of "children the marriage of whose parents is

---

[1] (1886) 11 P.D. 85.

[2] [1955] 3 All E.R. 429.

the subject of the proceedings" extends to children of a union which is not a valid marriage and which is the subject of the proceedings, and therefore that I have jurisdiction to make the order sought, irrespective of the status of the child.

Having seen and heard the applicant, I believe that she has the intention and the ability to bring up her son properly. The respondent appears to have taken no interest in the welfare of his son. He is apparently contemplating a fresh marriage, his first wife having divorced him. The applicant in evidence said that she did not wish to give him access to the child. That question does not arise at the present time, both because there is no application for access before me and because the applicant and the respondent are living so far apart. However, since s. 42 (1) allows the making of orders from time to time, he will not be shut out from applying in the future, if he so thinks fit and any such application will be considered on its merits in the light of the circumstances as they then exist.

Accordingly, I order as prayed that the applicant is to have custody of her son, J. P., with care and control and the right to decide on his upbringing and education, without reference to the respondent.

Moreover, for the purposes of s. 44 (1), I record that I am satisfied that such arrangements as have been made for the care and upbringing of the child are satisfactory.

As I have said, it is not necessary for the purposes of this application to decide the status of the child, but since I have heard argument on it, it may be useful if I record my opinion. In my opinion, the status of the child depends on the law of the domicile of his father. This may sound illogical, since, being technically illegitimate, he takes the domicile of his mother, but the reasons are historical. Before the passing of the English Legitimacy Act, 1926, an illegitimate child was not, in English law, regarded as legitimated by the subsequent marriage of his parents if the father was domiciled in England. If, however, at the date of the birth of the child, the father was domiciled in a country that recognised legitimation by marriage, the English courts would recognise such a child as legitimate, on the basis that a child should not be regarded as legitimate in one country and not in another and that the matter should be governed by the domicile of the father (*In re Grove*[1]). This was logical, because on the marriage the mother would take the domicile of the father and the domicile of the child would change with that of his mother.

The Legitimacy Act, 1926, introduced legitimation into English law and also widened the recognition of legitimation in the case of persons not domiciled in England or Wales to include cases when under the law of the country in which the father was domiciled at the time of the marriage, the marriage operated to legitimatize.

---

[1] (1888) 40 Ch. D. 216.

A further step was taken in 1959 when, by the Legitimacy Act of that year, it was provided that the child of a void marriage should be treated as legitimate if either or both the parents believed the marriage to be valid, provided that the father was domiciled in England. The position was substantially different from that when a child was legitimated by marriage, but the same reliance on the domicile of the father was presumably based on convenience and consistency and to avoid as far as possible any conflict of laws.

In 1973, the dependent domicile of a wife was abolished and a woman now no longer automatically takes the domicile of her husband on marriage (Domicile and Matrimonial Proceedings Act 1975, s. 1), but the rule that the status of the child is governed by the domicile of the father subsists.

The law of Gibraltar follows that of England. The Legitimacy Ordinance, 1927 (No. 5 of 1927) corresponds with the Legitimacy Act, 1926; the Legitimacy (Amendment) Ordinance, 1960 (No. 35 of 1960) with the Legitimacy Act 1939; and the Domicile, Matrimonial Proceedings and Recognition of Divorces and Legal Separations Ordinance, 1974 (No. 23 of 1974) with the Domicile and Matrimonial Proceedings Act 1973.

Turning to the facts of the present case, the respondent has stated in writing that his domicile of origin is England, where he was born. When his son was born in Nigeria, he registered the birth in the office of the High Commissioner for the United Kingdom. Although he has lived abroad, it has been in different places where his work has taken him. It was from England that he wrote to say that he would not be attending this hearing. There is no reason to doubt that his country of domicile is England.

I am fully satisfied that at the time of the ceremony, the applicant fully believed that it was a valid ceremony of marriage.

Under English law, as contained in s. 2 of the Legitimacy Act, 1926, the boy J. P. would therefore be treated as the legitimate child of his parents. In my opinion, the courts of Gibraltar would regard the status of the boy as governed by English law. Accordingly, in my opinion, under Gibraltar law, the boy is similarly to be treated as the legitimate child of his parents.