[1988–90 Gib LR 156]

PAYAS v. PAYAS

SUPREME COURT (Alcantara, A.J.): April 21st, 1989

Family Law—divorce—petition within five years of marriage—no exercise of discretion under Matrimonial Causes Ordinance, s.18(2)(b) to grant leave to petition within five years of marriage if reasonable probability of reconciliation within five-year period, to ensure due circumspection—extreme depravity or exceptional hardship to be shown before leave granted under s.18(2)(a)

The applicant sought leave to present a petition for divorce within five years of the marriage.

The applicant and her husband were married in December 1985 when the applicant was 15 years old, having obtained the permission of the Supreme Court pursuant to the Marriage Ordinance, s.15 for the applicant to marry although under the age of 16; in May 1986, their son was born. The couple had separated briefly several times during the marriage; the present separation had lasted for seven months.

The applicant submitted that (a) as the marriage had taken place when she was under 16, the court had a discretion to allow her to petition for divorce within 5 years under s.18(2) of the Matrimonial Causes Ordinance; and (b) the husband had been violent towards her, which supported an exercise of the court's discretion in her favour.

The respondent did not oppose the application, but submitted in reply that (a) he had not been violent towards his wife, and that (b) he still enjoyed a good relationship with his son, and was contributing towards the maintenance of both his wife and his son.

Held, refusing the application:

There were no good reasons for the court to exercise its discretion to grant leave to the applicant. No depravity—and certainly no "extreme depravity," as required by s.18(2)(a) of the Matrimonial Causes Ordinance—had been shown by the husband, and there was no evidence of "exceptional hardship." While the court also had a discretion under s.18(2)(b) of the Ordinance to grant leave for the applicant to present a petition before time, it would not exercise it in the applicant's favour: there was a reasonable probability of a reconciliation between the parties before the end of the period in which the leave of the court was required to present a petition for divorce, and the purpose of this period was to ensure

that parties did not seek to end their marriages without due circumspection (para. 1; para. 8; paras. 11–12).

Cases cited:
(1) *Felices (Catherine) (an Infant)* v. *Att.-Gen.*, *In re*, Supreme Ct., 1985 Misc. No. 65, December 2nd, 1985, unreported, *dicta* of Davis, C.J. applied.
(2) *Fisher* v. *Fisher*, [1948] P. 263; (1948), 92 Sol. Jo. 219; 64 T.L.R. 245, *dictum* of Bucknill, L.J. applied.
(3) *Makey (Stephen)*, *In re*, Supreme Ct., D. & M. No. 6 of 1986, April 7th, 1986, *dicta* of Alcantara, A.J. applied.

Legislation construed:
Marriage Ordinance, s.15 (1984 Edition): The relevant terms of this section are set out at para. 9.

Matrimonial Causes Ordinance (1984 Edition), s.18(1): The relevant terms of this sub-section are set out at para. 2.
s.18(2): The relevant terms of this sub-section are set out at para. 6.

E.C. Ellul for the applicant;
The respondent appeared in person.

1 **ALCANTARA, A.J.:** This is an application by a wife, the proposed petitioner, seeking the leave of the court to present a petition for divorce before time. The normal waiting time in Gibraltar is five years. Referring to the waiting time in England, Bucknill, L.J. in *Fisher* v. *Fisher* (2) said ([1948] P. at 264) that the provision was "enacted not only to deter people from rushing into ill-advised marriages, but also to prevent them from rushing out of marriage so soon as they discovered that their marriage was not what they expected."

2 The provision in Gibraltar to prevent people rushing out of marriage is to be found in s.18(1) of the Matrimonial Causes Ordinance. It reads:

> "(1) Subject to subsection (2), no petition for divorce shall be presented to the court before the expiration of the period of five years from the date of the marriage (in this section called 'the specified period')."

I shall have occasion to deal with sub-s. (2) later. It suffices at this stage to state that the court is empowered to allow the presentation of a petition for divorce before the expiration of five years in certain circumstances, but first I will deal with the facts of the case.

3 Less than 3½ years ago, the applicant came to this court and applied, pursuant to the provisions of the Marriage Ordinance, for permission to marry although she was under age. She was 15½ years old and she was

pregnant. The then Chief Justice, Davis, C.J., granted permission and in a written decision, *Felices (Catherine) (an Infant)* v. *Att.-Gen.* (1), said:

> "The power to give its permission to the marriage of a girl over 15 but under 16 in exceptional circumstances given to the Supreme Court by s.l4(lA) is . . . a discretionary power, and in my view such permission should not be granted unless the court is satisfied as far as possible—
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> (1) that the parties to the proposed marriage have been subjected to no pressure to get married by their respective parents, or families or anyone else;
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> (2) that the parties themselves genuinely wish to marry; and
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> (3) that the parties' own circumstances, their family circumstances, and [the circumstances] generally are conducive to the marriage taking place.
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> In this case I am quite satisfied from the report of the Family Care Officer, from the affidavits sworn by the plaintiff's father, and the father of the plaintiff's fiancé and from the letter addressed to me by the parish priest concerned in this matter that this matter has been dealt with extremely sensibly by all concerned. It does not appear to me that the plaintiff and her fiancé have been subjected to family pressure to get married, and I am satisfied that they wish to marry of their own free will."

The proposed petitioner married Brian Payas on December 9th, 1985 at St. Joseph's Parish Church and on May 8th, 1986 was delivered of a baby boy, who was named Tyron Brian Payas.

4 In her affidavit in support of the present application, the proposed petitioner deposes that the marriage has never been a happy one and that her husband is violent and has manhandled her on a number of occasions. The couple went to live with the wife's parents after the marriage and have had a number of short separations: at present, they have been living separately for the last seven months. The applicant continues to live with her parents and her husband has gone back to his parents. Paragraph 12 of her proposed petition, which has been exhibited to her affidavit in support, contains the following allegation: "Even the period of courtship between the parties was heated and stormy. Had it not been for her pregnancy, the petitioner would in all probability not have married the respondent."

5 Although an application under s.18 of the Matrimonial Causes Ordinance can be made *ex parte*, the applicant in this case served the summons on the husband. He has appeared in person. He does not oppose an early divorce, but contests that he has behaved as alleged and further told me in chambers that, although his wife is going out with another man, he is still

paying her maintenance at the rate of £20 per week. Furthermore, he has a good relationship with his son whom he sees frequently.

6 Mr. Ellul for the applicant is relying on both limbs of s.18(2) of the Ordinance, but mainly on the second limb. The sub-section reads:

> "(2) The court may, on an application made to it, allow the presentation of the petition within the specified period—
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> (a) on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent; or
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> (b) in any case where the petitioner was under the age of 16 years at the date of the marriage—
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> but in determining any application on the ground in paragraph (a), the court shall have regard to the interests of any child of the marriage or of either party, and in determining any application under this subsection it shall in every case have regard to the question whether there is a reasonable probability of a reconciliation of the parties during the specified period."

7 In the case of *In re Makey (Stephen)* (3), I set out what I considered to be the proper approach in the case of an application under para. (a) of s.18(2). This is what I said:

> "First, the general rule is that there can be no divorce until at least five years of marriage. The new law of divorce, which has made divorces easier, wanted to safeguard the institution of marriage as much as possible. Hence the emphasis on reconciliation (Part IV of the Matrimonial Causes Ordinance and the five-year period: s.18 of the said Ordinance.) Secondly, the applicant for leave to petition before the five-year period has to prove positively not only hardship or depravity, but exceptional hardship or exceptional depravity. Thirdly, even if the applicant proves exceptional hardship or exceptional depravity, it is still discretionary on the court to grant or refuse leave."

8 In this application before me, there is not a scintilla of depravity. The applicant cannot rely on that ground. On the question of hardship, there is insufficient evidence. At the most, the husband behaved badly, which is contested. The parties are now living separately and there is no evidence that the husband has interfered with the applicant since they separated. At the worst, this is a marriage which did not work out. In any case there is certainly no evidence of exceptional hardship. The applicant also fails on this ground.

9 In the marginal note to s.18 of the Matrimonial Causes Ordinance, the source is said to be s.3 of the Matrimonial Causes Act 1973. In s.3 of the

English Act, para. (b) of s.18(2) is not to be found. The reason for this is that in England only persons who are 16 years of age or over can get married, whereas in Gibraltar girls over the age of 14 could get married. Paragraph (b) provided an escape route to girls who had been misled or had misled themselves into a hasty or unconsidered marriage to obtain an early divorce. In 1984, the age of marriage in Gibraltar was brought into line with the law in England, but again with a slight difference. Section 15 (originally s.14) of the Marriage Ordinance enacts:

> "(1) Subject to subsection (2), a marriage between persons of whom either is under the age of 16 years shall be void.
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> (2) The Supreme Court, on application by her or on her behalf, may in exceptional circumstances permit a female person who has attained the age of 15 years but has not attained the age of 16 years, to enter into a marriage, and where she enters into that marriage pursuant to that permission, the marriage shall not by virtue of subsection (1) be void."

10 The escape route is no longer necessary because permission to marry under 16 years of age has to be given by the court, and only in exceptional circumstances. To my mind, s.18(2)(b) of the Matrimonial Causes Ordinance has ceased to have any practical utility, and should have been revoked, but it was not and it is still there. It would be wrong for me to hold or suggest that it has been revoked or nullified by implication.

11 However, in the same way as the court has a discretion to refuse leave although it has been proved that there has been exceptional hardship or exceptional depravity, it is also discretionary to grant or refuse leave in the case of a petitioner who was under the age of 16 years at the date of marriage. The discretion must be exercised judicially.

12 In this case the permission to marry was given because there were exceptional reasons. There are to my mind no good reasons why leave should now be granted, taking into account the history of the case and the fact that I am not convinced that there is not a reasonable probability of a reconciliation during the specified period. The parties have only been apart for seven months. The application is refused.

Application refused.