H v. M

SUPREME COURT (Schofield, C.J.): October 21st, 1997

Mental Health—next friend—patient's consent—patient's consent unnecessary for next friend to bring proceedings to annul marriage on ground of incapacity

Mental Health—next friend—conflict of interest—patient's son may act as next friend in proceedings to annul marriage—in absence of financial motive, emotional tie no bar to appointment

Family Law—nullity—capacity—patient's mental capacity to be determined before challenge to filing of nullity petition or to appointment of next friend heard—where proceedings already before Supreme Court, application to Court of Protection unnecessary

The petitioner applied by his next friend for a decree of nullity in respect of his marriage to the respondent.

The petitioner, who was aged 95, married the respondent, with whom he had lived for 17 years. His son brought proceedings as his father's next friend to nullify the marriage on the grounds that, as his father suffered from senile dementia, he had lacked the capacity to consent to it. The respondent applied for the dismissal of the petition or the removal of the son as next friend.

The respondent submitted that (a) since the court had a duty to comply so far as possible with the wishes of the petitioner, it would be wrong in principle for it to hear a petition which he had not authorized and the substance of which was against his expressed wishes; and (b) the petitioner's son was an inappropriate person to act as next friend, since he was too emotionally involved to be dispassionate about the proceedings.

The petitioner, by his next friend, submitted in reply that (a) the petitioner's consent was not required for the bringing of a petition to nullify his marriage on the ground that he lacked capacity, since his mental state was the same now as at the time of his marriage and he could be presumed to be incapable of authorizing the petition or of expressing a rational opinion as to whether it concurred with his wishes; and (b) the petitioner's son was not prevented from acting as next friend by virtue of his relationship with his father.

Held, adjourning the application *sine die*:

(1) It was not a necessary prerequisite to the appointment of a next friend or the presentation of the petition for nullity that the petitioner

should have consented to the action taken on his behalf. The petitioner should not be denied justice merely because he was unable to form the necessary consent. If the petitioner were able to form a rational opinion as to whether he wished the proceedings to be brought, that would be taken into account in considering the application to dismiss (page 196, line 37 – page 197, line 20; page 197, lines 27–30).

(2) Furthermore, the petitioner's son was an appropriate person to act as next friend if the petition were to be heard. In the absence of any proven financial motive on his part, his emotional tie to his father, although probably stronger than that of a friend, did not constitute a conflict of interest so as to prevent him from acting (page 199, line 43 – page 200, line 10).

(3) However, it was not proper for the court to decide whether the petition should have been brought and by whom until it had considered whether the petitioner was under a genuine disability. If the respondent wished to attack the appointment of the next friend it should be on the ground that it was unnecessary. Accordingly, should she wish to continue with her application to dismiss, the court would invite the parties to adduce further evidence on this issue. Alternatively, it could be resolved by proceeding to the hearing of the petition. It was not necessary for an application for directions to be made to the Gibraltar Court of Protection, which was essentially the Supreme Court by another name, or the English Court of Protection, whose determinations were subject to those of the Supreme Court. The application would be adjourned (page 197, lines 21–30; page 199, line 19–39).

Cases cited:
(1) *Fry* v. *Fry* (1890), 15 P.D. 25, applied.
(2) *J* v. *J*, [1953] P. 186; [1952] 2 All E.R. 1129, applied.
(3) *W (E.E.M.), In re*, [1971] Ch. 123; [1970] 2 All E.R. 502, considered.

Legislation construed:
Matrimonial Causes Rules 1957, r.66, as substituted by the Matrimonial Causes (Amendment) (No. 2) Rules, 1960, r.3: The relevant terms of this rule are set out at page 196, lines 25–33.

J.E. Triay, Q.C. and *J.R. Triay* for the respondent;
A.V. Stangetto, Q.C. and *J. Reyes* for the petitioner;
G. Licudi as *amicus curiae.*

SCHOFIELD, C.J.: H is 95 years of age. He is widowed. He has three children, the eldest of whom, W, came into these proceedings as his father's next friend. For a number of years H has maintained a relationship with M. They have lived together, albeit, it seems, not on a
45 permanent basis, for 17 years. On April 18th, 1997 they went through a

ceremony of marriage before the Registrar here in Gibraltar. W had learned once before that his father and M had intended to get married in England, and had lodged a caveat against the marriage on the basis that his father lacked the capacity to consent to marry. It is on that ground that W has filed these proceedings for nullity of the marriage entered into on April 18th. His case is that H is, and was, suffering from senile dementia.

In her summons M seeks an order dismissing the petition or alternatively removing W as next friend. A has been a friend of H for over 35 years. At the beginning of 1994, H decided to execute an enduring power of attorney, under the English Enduring Powers of Attorney Act 1985, and asked A to act as his attorney to look after his affairs. In early 1995 A became aware that H was having difficulty in managing his affairs and, after consultation with H, his solicitor and members of H's family, the enduring power of attorney was registered with the English Court of Protection.

A sent Mr. Licudi to act for him in these proceedings, taking an independent stance, although his affidavit evidence makes clear that he doubts the capacity of H properly to enter into a marriage. However, because the court could not have two persons purporting to represent the interests of H, in view of A's declared independent stance, I considered it prudent to hear representations from Mr. Licudi as *amicus curiae*.

By r.8 of the Supreme Court Rules, the English Matrimonial Causes Rules, 1957 apply to Gibraltar. Rule 66(2) of the Matrimonial Causes Rules, 1957 provides:

> "(2) A person under a disability may commence and prosecute any cause or make any application to which these Rules apply by his next friend and may defend or intervene in any such cause or assist any such application by his guardian ad litem, and except as otherwise provided by this Rule, it shall not be necessary for a guardian ad litem to be appointed by the Court."

"[A] person who, by reason of mental disorder within the meaning of the Mental Health Act, 1959, is incapable of managing and administering his property and affairs" is a "person under disability" (see r.66(1)). The rules apply to nullity proceedings. Rule 66 provides the procedure to be followed on the institution of proceedings by a next friend and I do not think it is argued that such procedure has not been followed.

What is argued is that H has not authorized the issue of the petition for nullity and, indeed, there is affidavit evidence that he has denied consent to the pursuit of these proceedings. In that event, says the respondent, the petition must be dismissed as a matter of law *in limine*. That, in my judgment, cannot be a correct proposition of law. If a person goes through a ceremony of marriage but by reason of his mental incapacity is incapable of entering into a valid contract of marriage, then that person's consent, which cannot be validly given to contract a marriage, cannot be required to petition for nullity if he still suffers from the same incapacity.

His consent cannot be proper consent for either marriage or annulment of the marriage, provided of course that his state of mind at the time of the marriage and at the time of presentation of the petition for nullity are the same.

There is evidence here that H's capacity is not likely to have improved with time and that at the date of the marriage ceremony he was suffering from senile dementia. A person who has a cause of action in nullity but is so mentally incapacitated as to be unable to present that petition himself cannot be prevented from receiving justice because he cannot give his consent to the proceedings. The respondent has put before me no authority for the proposition that consent of the person represented is a necessary prerequisite for the appointment of a guardian *ad litem*. The authorities go only so far as to determine that the Court of Protection, before it sanctions the presentation of a petition for divorce on behalf of a patient, should take great care to make certain, if the patient is in a position to form a rational opinion, that it was his wish that proceedings should be taken (see *In re W* (3)). That is a far cry from saying that in every case, whether the person to be represented is or is not in a position to form a rational opinion, the court will only allow proceedings to be pursued if his consent is forthcoming.

What really is in issue between the parties at this stage is whether H is under a disability so as to require a petition to be presented on his behalf. If he is not under a disability these proceedings should not be pursued. If he is under such disability then, in view of the medical evidence, it is likely that he was under that disability when the marriage ceremony was performed. In that case it is proper for the court to make a considered decision on whether the next friend should continue to represent H. In consideration of this, the views of H will be ascertained and not ignored but not so that his consent is an essential prerequisite to the appointment of the next friend. There is a great deal of affidavit evidence in regard to H's mental condition; much of it to the effect that H is under such a disability and some to the effect that he is not. Most of that evidence has been directed to the issue of whether he could validly enter into a contract of marriage on April 18th, 1997. There is medical and psychiatric opinion in favour of the petitioner and in favour of the respondent's contention that H was not, and is not, under a disability. It must be remembered that W did not require the leave of the court to enter into these proceedings as H's next friend. There has been no investigation by the court as to whether H is under a disability so as to require W to become his next friend.

In argument I was referred to the decision of *Fry* v. *Fry* (1) (15 P.D. at 50). The following extract from *J* v. *J* (2) sets out in detail the facts of that decision at first instance and also the reasoning of the Court of Appeal on appeal from it ([1952] 2 All E.R. at 1131):

"In *Fry* v. *Fry* . . . the facts were that the parties were married in June, 1889, and in November of that year a son of the wife by a

former marriage obtained from the registrar an order under what was then r. 196 of the Rules and Regulations of the Divorce Division assigning him to be his mother's guardian ad litem for the purpose of promoting a suit declaring her marriage with the respondent to be void on the ground that she was insane at the time of its being solemnised. Counsel for the wife moved to rescind this order, adducing evidence to show that she was of sound mind. BUTT, J., discharged the order, holding that an order under the rule assigning a guardian ad litem to a person alleged to be of unsound mind should not be made where there is a bona fide and substantial dispute as to the insanity of the party. On an appeal COTTON, L.J., said . . . :

'This is an appeal from an order of BUTT, J., discharging an ex parte order of the registrar assigning a guardian ad litem to a person alleged to be of unsound mind. I will not give any opinion on the question whether, on the evidence before us, she was of unsound mind at the date of her marriage, or whether she is so now, for I go upon this ground, that an order ought not to be made under r. 196 for assigning a guardian ad litem where there is a bona fide dispute whether at the time of the application the party is of unsound mind. The question is whether the court shall give to some other person the conduct of a suit, on the ground that this lady is incapable of acting for herself, and I think the court ought not to do so where there is a bona fide dispute whether she is not capable of acting for herself. I do not at present feel disposed to assent to the view of LOPES, L.J., that this rule only applies to the case of a person found lunatic by inquisition. The rule applies equally to a party suing and to a party defending, and it would be very serious to hold that, if a person of unsound mind is sued, no defence can be put in till he has been found lunatic by inquisition; but, where there is a bona fide dispute as to the sanity of the party, I think that an order for a guardian ad litem ought not to be made. The medical evidence adduced in support of the application to discharge the registrar's order shows that there is reasonable ground for contending that this lady is capable of managing her own affairs. I think, therefore, that the appeal must be dismissed, not on the ground that the registrar was wrong in making the order on the materials before him, but on the ground that the evidence adduced before the judge showed that the case was not one in which such an order ought to have been made.'

LINDLEY, L.J., gave judgment to the same effect, and, after stating shortly the facts, he said . . . :

'It would be monstrous if a self-appointed guardian was allowed to go on with such a suit when a defence like that is

> made. The son may apply for an inquisition, and if she is found lunatic by inquisition the committee can sue, and if no committee is appointed a suit may be promoted by a guardian ad litem.'"

In *J* v. *J.* (2), before Collingwood, J., and determined some 60 years after *Fry* v. *Fry* (1), the petitioner was described as "a person of unsound mind, not so found by inquisition." By her next friend she filed a petition for nullity. The respondent sought to amend his appearance to an appearance under protest on the ground that the petitioner was not a person of unsound mind or suffering from any incapacity necessitating or justifying the proceedings being brought by the next friend. It was held that the respondent was entitled to have the suit dismissed if it could be shown that there was reasonable ground for supposing that the petitioner was capable of managing her own affairs. In the event, the summons was adjourned so that further evidence could be adduced in that regard. The result of this decision is that Collingwood, J. was himself determining whether there were reasonable grounds for supposing that the petitioner was capable of managing her own affairs.

It seems to me, in the present case, following *J* v. *J*, that if the appointment of a guardian *ad litem* is to be attacked, it ought to be attacked on the ground that H was not under a disability at the date the petition was presented. This is an issue which is at the very heart of these proceedings but was not the basis of argument before me on this application or indeed the summons itself. The parties focused on the question of consent and on the question of whether W is the right person to be H's next friend. To do justice to the application I ought to invite the parties to call their evidence, adduce further evidence and address me further on whether H, the petitioner, is under a disability such as to require this petition to proceed further. The best form of "inquisition" into the question of disability of H is, I think, a determination, after evidence and argument, on this summons. That seems to be the course adopted by Collingwood, J. in *J* v. *J*.

I do not think it is necessary for the petitioner to go to our Court of Protection, pursuant to the Mental Health Ordinance, for directions. That would simply be going to the same forum under another name. Nor do I think it appropriate for directions to be sought before the English Court of Protection, for any directions of that court in relation to proceedings before the Supreme Court of Gibraltar are subject to any determinations made by our Supreme Court. This court, in exercising its discretion to permit the pursuit of proceedings by a next friend, is in control of its own proceedings, and it is sufficient that due enquiry into the propriety of the appointment as next friend should be conducted in these proceedings.

I should add that I do not accept the argument that W is an inappropriate appointment as next friend. There is no suggestion that he has any financial interest in pursuing the matter. The respondent is prepared to

enter into a deed that she in no way is to benefit from the estate of H and she is satisfied that this is not a squabble over money. The argument is that because of his emotional ties to his mother and father, W does not have the necessary dispassion to be next friend. It is often the case that a next friend or guardian *ad litem* has an emotional bond to the person whose interests he represents. If A, for example, were to step in, as may be thought an alternative, there would be an emotional bond between him and H, although perhaps not as strong a bond as between son and father. The emotional ties between W and his father are not a sufficient barrier so that I should hold there is a conflict of interest.

I do not make any order on the summons before me. In the event that M wishes to pursue the summons to dismiss the petition, I permit her to restore the summons to the list for further evidence and argument on the disability of H so as to require the appointment of a next friend. It may be, of course, that M considers that the issues regarding H's disability at the time of presentation of the petition are so proximate in nature and time to the issue in the main suit that it is better to abandon the summons and proceed to hearing of the main summons.

The summons stands adjourned *sine die* with liberty to restore and costs are reserved.

Order accordingly.
