

When is a marriage not a marriage?



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In order to consider *El Gamal v Al Maktoum* [2011] EWHC B27 (Fam), we need first to look at what constitutes a marriage in the eyes of the law. The law distinguishes between marriages which are annulled and marriages which are ended by divorce. The distinction is that annulled marriages are inherently flawed and therefore invalid, whereas marriages which are ended by divorce are proper and therefore valid, albeit that the marriage ought to come to an end.

Marriages which are capable of being annulled

Void marriages and voidable marriages are capable of being annulled. Even if there has been some semblance of a marriage ceremony, these marriages are fundamentally flawed in some way. A void marriage is invalid *ab initio*. Its invalidity does not require ratification by the court (though this is often preferable since it provides clarity and permits the parties to apply for financial orders). A voidable marriage is valid until it is annulled by the court.

Void marriages

The grounds on which a marriage is void are set out in s11 of the Matrimonial Causes Act 1973. This section deals with marriages which some aspect of public policy is against.

"Grounds on which a marriage is void.

A marriage celebrated after 31st July 1971 shall be void on the following grounds only, that is to say—

- (a) that it is not a valid marriage under the provisions of the Marriage Acts 1949 to 1986 (that is to say where—
 - (i) the parties are within the prohibited degrees of relationship;
 - (ii) either party is under the age of sixteen; or
 - (iii) the parties have intermarried in disregard of certain requirements as to the formation of marriage);
- (b) that at the time of the marriage either party was already lawfully married or a civil partner;
- (c) that the parties are not respectively male and female;
- (d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.

For the purposes of paragraph (d) of this subsection a marriage is not polygamous if at its inception neither party has any spouse additional to the other."

Voidable marriages

The grounds on which a marriage is voidable are set out in s12 of the Matrimonial Causes Act 1973. This section deals with marriages where there is a flaw which makes the marriage capable of being annulled if one (or both) of the parties wishes.

"Grounds on which a marriage is voidable.

A marriage celebrated after 31st July 1971 shall be voidable on the following grounds only, that is to say—

- (a) that the marriage has not been consummated owing to the incapacity of either party to consummate it;
- (b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it;
- (c) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;
- (d) that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1983 of such a kind or to such an extent as to be unfitted for marriage;
- (e) that at the time of the marriage the respondent was suffering from venereal disease in a communicable form;
- (f) that at the time of the marriage the respondent was pregnant by some person other than the petitioner.
- (g) that an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the time

of the marriage, been issued to either party to the marriage;

- (h) that the respondent is a person whose gender at the time of the marriage had become the acquired gender under the Gender Recognition Act 2004.”

Non-marriages

The law has also evolved to distinguish marriages which are not capable of either annulment or divorce, so called “non-marriages”, where the ceremony which takes place is so far from being a marriage that it constitutes a non-event, hence is neither valid nor invalid. In *Gereis v Yagoub* [1997] 3 FCR 755, Aglionby J explained that a couple who had pretended to marry as part of a play would have participated in a non-marriage.

Why distinguish between valid, void, voidable and non-marriages?

It is important to distinguish between valid, void and voidable marriages on the one hand, and non-marriages on the other hand, because the distinction has significant financial consequences. If dealing with a valid marriage, a void marriage or a voidable marriage, the court can make financial orders and redistribute property between the parties. If dealing with a non-marriage, the court cannot make financial orders, will not redistribute property between the parties and will treat the couple as unmarried.

El Gamal v Al Maktoum

This was the hearing of a nullity petition by Nivin el Gamal against His Royal Highness Sheikh Ahmed Bin Saeed al-Maktoum, a member of the royal family of Dubai. For ease, they are referred to as the mother and father respectively.

The facts

The mother was 35 and an Egyptian citizen. The father was 53 and the uncle of the current ruler of Dubai. S, the parties' child, was born on 21 April 2008.

The father had not given financial disclosure but was clearly a man of considerable wealth and influence. He had never seen S, although he made interim periodical payments for S's benefit following Schedule 1 proceedings.

The mother claimed that, on 11 January 2007, the parties underwent an Islamic marriage ceremony at the father's flat in Knightsbridge. She asserted that although it did not comply with the formalities of marriage under English law, it created a void marriage and therefore a decree of nullity was possible. That, in turn, allowed her to make financial claims.

The father denied that the marriage took place. He did not give oral evidence, cancelling his scheduled appearance as a witness at the last minute, but his case was that (a) there was no ceremony, and (b) if, contrary to that, the judge held that there was, it was so far removed from anything resembling a marriage at English law that it would constitute a non-marriage, rather than a void marriage. Thus he asserted that the mother did not have any consequential financial claims.

The judge therefore had to consider:

1. whether there was a marriage ceremony on 11 January 2011; and
2. if so, whether it was a void marriage or a non-marriage?

Mother's mental health

The judge reluctantly found that the psychiatric evidence regarding the mother's mental health, which was otherwise personal to the mother, was essential to an understanding of how the mother reacted to events. The evidence had, therefore, to be taken into account by him when seeking to resolve the various factual disputes between the parties and the allegations levelled against the mother on credibility.

In February 2010 the mother had the symptoms of a major depressive episode with paranoid ideation. This followed a quite serious suicide attempt in May 2009. A psychiatrist instructed by her solicitors in relation to immigration proceedings concluded:

“... there are signs suggestive of an underlying personality disorder often [in] narcissistic, histrionic cluster, in which she experiences the world almost exclusively from her own point of view and only considers things from this rather narrow perspective. She over-dramatises and is impulsive.”

A different psychiatrist then treated the mother but largely agreed with this diagnosis. She described an incident when the mother was found by the police wandering on the M11 motorway in a “transient dissociative state”. The mother had expressed fears about the safety of herself and her son, suggesting that the father represented a threat. The father claimed that these were manipulative lies but the psychiatrist said that although they were excessive preoccupations as a result of her heightened sense of anxiety, they were not delusional beliefs.

There was also a report by a third psychiatrist in relation to her litigation capacity. She was found to have litigation capacity.

Following treatment, the second psychiatrist was able to

report that the mother's mental health was stable with no evidence of further paranoid thinking.

Was there a marriage ceremony on 11 January 2011?

The mother said that the father proposed to her in December 2006 on the telephone. Her Egyptian solicitor and her friend, both of whom gave evidence, told the court that she told them at the time that she was getting married. The judge accepted their evidence although pointed out that it was possible that the mother fantasised or dreamt up the proposal, but it showed that the assertion of a proposal of marriage was not a recent invention.

On 11 January 2007 the mother said that there was an Islamic marriage ceremony in the father's flat in SW1. She said that there was an Imam in attendance and two Muslim witnesses. She described her outfit and although she accepted that the father did not give her a ring, described a diamond encrusted Bulgari watch that he gave her on the day and said that he gave her a dowry of £30,000 in cash.

On 14 June 2008 the father married a cousin.

The father's case was that the mother had no credibility and should not be believed.

The burden was on the mother to establish that the ceremony took place, on the balance of probabilities. However, it was announced just seconds before the father was due to be called to give evidence that he had had to travel to Riyadh on government business. No notice was given and no adjournment was sought. This denied the mother the opportunity to cross-examine him. Thus although his statements would be admitted as hearsay, the judge said that little weight would be attached to them where an issue was controversial. An inference was also drawn that the father did not wish to subject himself to probing on the various issues, including the alleged ceremony:

"I am tolerably confident that had H attended, had been cross-examined and had given anything approaching a reasonably good account of himself, then I would probably have concluded the underlying credibility issue in his favour, holding that either the mother falsely invented the alleged wedding ceremony or else had somehow incorporated it into some sort of disassociated dream world where, for her, wishes come to be reality."

Furthermore, the father did not obtain any evidence from the two witnesses that the mother alleged were present at the ceremony, both of whom were his employees.

The mother's evidence was accepted – there was a wedding ceremony on 11 January 2007.

Did the ceremony create a void marriage or no marriage at all?

Mr Justice Bodey turned to s11 of the Matrimonial Causes Act 1973, which states that a marriage will be void if it is not a valid marriage under the provisions of the Marriage Acts. He also examined the case law and the following in particular:

AM v AM [2001] 2 FLR 6

Here Hughes J (as he then was) concluded that all parties concerned intended the marriage in a London flat, by a Mufti, with a marriage certificate, and at which the "bride" wore a wedding dress to be a formal marriage by the Islamic process, but under English law the marriage was neither valid nor void as the marriage was an Islamic one rather than one contemplated by the Marriage Acts – it in no sense purported to be effected according to the Marriage Acts, which provide for the only way of marrying in England.

Gandhi v Patel [2002] 1 FLR 603

Here Park J concluded that for a ceremony which takes place in England to create a relationship which English law will recognise as a marriage, it must comply with the formal requirements of English law. If a man and woman whose families originated abroad take part in this country in a ceremony which would or might give rise to a lawful marriage by the traditions of their own community, but the ceremony does not comply with the Marriage Acts, they are not married in the eyes of English law. The marriage in question was neither valid nor void.

Hudson v Leigh [2009] 2 FLR 1129

Here Bodey J concluded that there is a concept of a non-marriage and that a court should consider:

- "(a) whether the ceremony or event set out or purported to be a lawful marriage;
- (b) whether it bore all or enough of the hallmarks of marriage;
- (c) whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage [under English law]; and
- (d) the reasonable perceptions, understandings and beliefs of those in attendance."

In *El Gamal v Al Maktoum* the mother argued that her belief that the ceremony gave rise to a valid Islamic marriage and that it was a valid marriage for the purposes of English law, and the Imam's similar belief, converted a ceremony that failed to comply with the Marriage Acts into a marriage, albeit a void one.

However, having heard evidence from Mr Ian Edge on the requirements of a valid Islamic ceremony, the judge found it hard to accept that the mother would have considered the ceremony, conducted secretly, and in particular with no writing, as being one which would be readily recognised in, say, Egypt.

The judge also found that the mother would have been aware that there are legal formalities in this country that must be complied with in order to marry in England. There was therefore nothing under English law that was susceptible to a decree of nullity under s11 of the Matrimonial Causes Act 1973.

The judge held that this was a non-marriage.

The status of the law of nullity

It has often been asked whether the law of nullity continues to have any valuable role to play in contemporary family law. The law is complex and petitions for a decree of nullity are relatively rare. One might argue that the significance of its relief from marriage has diminished as most parties shy away from the law of nullity in favour of the more

dependable law of divorce. Perhaps its main, albeit rare, use is in cases where the parties are within the prohibited degrees or where one is under age.

There has been some debate about the troublesome concept of a voidable marriage. In 1970 the Law Commission considered whether the concept of voidable marriages should be abolished, and those seeking to end their marriage on voidable grounds should divorce instead. The Law Commission saw no advantage to abolishing voidable marriages. It supported its retention and relied upon the importance to some couples that their marriage is ended by annulment and not divorce.

For many people there is a stigma that attaches itself to divorce but not to annulment. Certain religious groups see a distinction between annulment and divorce; Roman Catholicism does not permit divorce but accepts, if somewhat reluctantly, annulment.

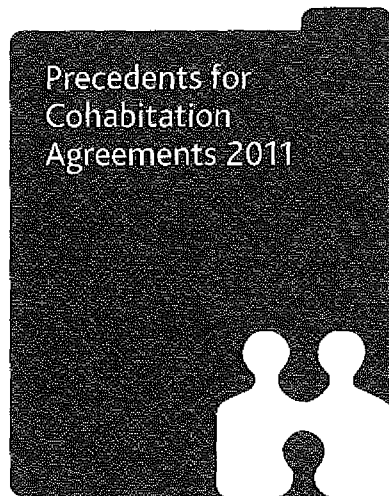
The future of the law of nullity is enshrouded in mist but, for now at least, it shines brightly and offers a permissible way to obtain a ruling that something which was not a marriage was nothing at all in law.

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