

1GC | Family Law

Capacity to Marry: the legal test and procedural steps.

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Introduction

- An important aspect of forced marriage – focus here is on (in)capacity to consent rather than marriage procured by coercion.
- We will look at the legal test for capacity and the responses in various scenarios – domestic and foreign ‘marriages’ – before and after remedies.

s.12(1)(c) Matrimonial Causes Act 1973

- A marriage is voidable on the ground that either party to the marriage did not validly consent to it MCA 1973, s 12(1)(c). whether in consequence of duress, mistake, unsoundness of mind or otherwise.
- Consent must be voluntarily given
- Test to be applied - whether the person in question was capable of understanding the nature of the contract into which he was entering, or whether his mental condition was such that he was incapable of understanding it.

Legal Test

Legal test at common law that predated Mental Capacity Act 2005, insofar as it relates to capacity to marry and engage in sexual relations, is not replaced by Act: RT and LT v A Local Authority [2010] EWHC 1910 (Fam)

What is the legal test?

Re E principles

Para 141 *Re E / Sheffield City Council v E* [2005] 1 FLR 965

“(i) The question is *not* whether E has capacity to marry X rather than Y. The question is *not* (being specific) whether E has capacity to marry S. The relevant question is whether E has capacity to marry. If she does, it is not necessary to show that she also has capacity to take care of her own person and property.

(ii) The question of whether E has capacity to marry is quite distinct from the question of whether E is wise to marry: either wise to marry at all, or wise to marry X rather than Y, or wise to marry S.

(iii) In relation to her marriage the only question for the court is whether E has capacity to marry. The court has no jurisdiction to consider whether it is in E’s best interests to marry or to marry S. The court is concerned with E’s capacity to marry. It is not concerned with the wisdom of her marriage in general or her marriage to S in particular.

Re E continued

(iv) In relation to the question of whether E has capacity to marry the law remains today as it was set out by Singleton LJ in *In the Estate of Park, deceased, Park v Park* [1954] P 112 at 127:

“Was the deceased.....capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it. To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without any degree of mentality it cannot be said that he understands the nature of the contract”

Re E continued

(v) More specifically, it is not enough that someone appreciates that he or she is taking part in a marriage ceremony or understand its words.

(vi) He or she must understand the nature of the marriage contract.

(vii) This means that he or she must be mentally capable of understanding the duties and responsibilities that normally attach to marriage.

(viii) That said, the contract of marriage is in essence a simple one, which does not require a high degree of intelligence to comprehend. The contract of marriage can readily be understood by anyone of normal intelligence.

(emphasis added)

Re E continued

(ix) There are thus, in essence, two aspects to the inquiry whether someone has capacity to marry: (1) Does he or she understand the nature of the marriage contract? (2) Does he or she understand the duties and responsibilities that normally attach to marriage?

(x) The duties and responsibilities that normally attach to marriage can be summarised as follows: marriage, whether civil or religious, is a contract, formally entered into. It confers on the parties the status of husband and wife, the essence of the contract being an agreement between a man and a woman to live together, and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance

Other important cases

- *X City Council v MB, NM and MAB [2006] 2 FLR 968*
- *A, B and C v X, Y and Z 2012 EWHC*
- *A Local Authority v AK & others 2012 EWHC (COP) B29*
- *PC & NC v City of York Council 2013 EWCA Civ 478*
- *CC v KK and STCC 2012 EWHC 2133 (COP)*

NB v MI [2021] EWHC 224 (Fam)

- Endorses the decision in *Durham v Durham* (1885) 10 PD 80 that the marriage contract is a 'very simple one' and the case law that sets the standard for capacity to marry at 'low-level'
- Mostyn J distances himself from language of Munby J (as then was) of 'obligation and rights'
- Capacity to marry is issue-specific – so distinct from capacity to consent to sexual relations
- If there was no jurisdiction to entertain a nullity petition the court could not then have recourse to a declaration of non-recognition to 'fill the gap'

NB v MI – Paragraph 26

Distillation of principles

- i) The contract of marriage is a very simple one, which does not take a high degree of intelligence to comprehend.
- ii) Marriage is status-specific not spouse-specific.
- iii) While capacity to choose to engage in sexual relations and capacity to marry normally function at an equivalent level, they do not stand and fall together; the one is not conditional on the other.
- iv) A sexual relationship is not necessary for a valid marriage.
- v) The procreation of children is not an end of the institution of marriage.

Paragraph 26 continued

vi) Marriage bestows on the spouses a particular status. It creates a union of mutual and reciprocal expectations of which the foremost is the enjoyment of each other's society, comfort and assistance. The general end of the institution of marriage is the solace and satisfaction of man and woman.

vii) There may be financial consequences to a marriage and following its dissolution. But it is not of the essence of the marriage contract for the spouses to know of, let alone understand, those consequences.

viii) Although most married couples live together and love one another this is not of the essence of the marriage contract.

ix) The wisdom of a marriage is irrelevant.

NB v MI – decision

- Applicant had capacity to consent.
- Thus June 2013 marriage was valid under English law at its formation
- Even if court concluded she did not have capacity Mostyn J would have refused to grant a declaration the marriage should not be recognised as it would have been a ‘blatant bypassing and flouting’ of the statutory prohibition.
- Statutory provision being s 58 (5) FLA 86 *“no declaration may be made by a court that.....a marriage was at its inception void”*.

Mundell v Name 1 [2019] EWCOP 50

- Another Mostyn J decision
- Similar facts to NB – but marriage yet to take place
- Durham test referred to again
- Para 31: It would be inappropriate and indeed arguably dangerous to introduce into the test for capacity to marry a requirement that there should be anything more than a knowledge that divorce may bring about a financial claim
- P (or Name 1) gave evidence as to his understanding of marriage
- Mostyn J satisfied P had capacity to consent to marriage

Can court intervene where P has capacity but is vulnerable to exploitation?

- Re SA (Vulnerable Adult with Capacity) [2006] 1 FLR 867 Munby J decision
- DL v A Local Authority and others [2012] EWCA Civ 253
- Re SK (an adult) (forced marriage: appropriate relief)[2005] 2 FLR 230
- Westminster City Council v C [2008] EWCA Civ 198
- RYJ LBL v RYJ and VJ [2010] EWHC 2665
- But the remedies are limited to enforcing steps designed to facilitate a capacitous decision where undue influence such as, for example, investigating the issue of consent only when the person is not with those influencing him or her.

English/Welsh Marriage

- Context – questionable consent & failure to comply with formalities.
- No Consent ➔ nullity + MCA 73 remedies
- No attempt to comply with the formalities = declaration of “non-marriage”

Non- marriage declaration.

- Hudson v Leigh [2009] 2 FLR 1129
- A LA v SY [2013] EWCOP 3485
- NB v MI (above)

Remedies

- Foreign marriage = query declaration of non-recognition under English Law (inherent jurisdiction);
- Nullity based on lack of consent;
- But – s 13 MCA 1973 - there is a 3 year limit unless time extended under the Act;
- Grounds for extension – s 13(4) – mental disorder under MHA 1973 – see MHA Code – does include LD.

Anticipated marriage - remedies

- Injunction or FMPO s 63 A –S FLA 1996.
- *A is forced into a marriage by B if forces A to enter into a marriage without A's free and full consent; s 63 A (2);*
- *Orders: directly prohibiting marriage arrangements; leaving the jurisdiction; passport orders etc*

In England – Caveat on the register

- A person who fears that arrangements are being put in place which would result in a person who is unable to consent entering into a marriage may enter a caveat with the Superintendent Registrar under s. 29 of the Marriage Act 1949 against the issue of a certificate for the marriage of named person.
- Not always as effective as it should be – see for e.g. *YLA v PM* [2013] EWCOP 4020

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