Capacity to consent to marriage, nullity and declarations under the inherent jurisdiction considered (NB v MI)

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Family analysis: The High Court was presented with an application for a declaration of non-recognition of a Muslim marriage and a petition for nullity. The parties were married in Pakistan under Sharia law in June 2013. The applicant sought to argue, relying on two expert reports, that she did not have capacity to consent to marriage at the time. The court had to consider the issue of her capacity and then consider whether to make a declaration of non-recognition, or alternatively annul the marriage. The High Court refused the applications as it considered, on the facts of this case, the applicant had capacity to consent at the relevant time. The marriage was therefore valid under English law at its formation. Even if he had formed the opposite view, Mr Justice Mostyn made clear the court would still not have made a declaration under the court's inherent jurisdiction as he was prevented by statute. Tahmina Rahman, barrister at 1GC Family, considers the case.

NB v MI [2021] EWHC 224 (Fam)

What are the practical implications of this case?

Mostyn J undertook a very comprehensive review of the capacity to marry. He endorsed the *Durham* dictum (from *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'. He distanced himself from Mr Justice Munby's (as he then was) language of 'obligations and rights', preferring to refer to expectations between a married couple. He reiterated that capacity is issue-specific, thus capacity to marry is distinct from capacity to consent to sexual relations. The judgment contains a very helpful distillation of principles from the relevant case law relating to capacity to marry. Ultimately, the test of capacity to marry is not a high hurdle: even if an applicant is not aware of the financial consequences of marriage (as the experts in this case said the applicant was not), they may still have capacity to consent to marriage. Modern marriage does not mean there is a duty to cohabit (in this case, the applicant had not) or a duty to engage in sexual relations or a duty to procreate.

There is also a careful review of the law relating to declarations in family matters and the Law Commission's recommendations in its report of 22 February 1984, which then led to the Family Law Act 1986 (FLA 1986). Mostyn J highlights the 'statutory prohibition' contained within FLA 1986, preventing a court making a declaration as to the initial invalidity of a marriage. Moreover, Mostyn J makes clear the Law Commission's view that if there was no jurisdiction to entertain a nullity petition, the court could not have recourse to a declaration of non-recognition to 'fill the gap'.

In *NB v MI*, the court concluded the applicant had capacity to consent, hence the June 2013 marriage was valid under English law at its formation. However even if the court had decided she did not have capacity and the marriage was voidable on the ground that the applicant did not consent to it as a consequence of unsoundness of mind, Mostyn J was clear he 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.

What was the background?

The applicant, suffered catastrophic injuries, including a significant brain injury, in a road traffic accident as a child. This affected her cognitive functioning and mental health. She received a significant lump sum as a result of the accident. A deputy was appointed to act for her as she was judged to lack capacity to manage her property and financial affairs. The deputyship was discharged in 2019, against a background where she was considered to have become more independent and was able to manage her property and financial affairs. A number of capacity reports were obtained over the years to inform the Court of Protection as to the applicant's capacity.

The applicant married the respondent I in June 2013. Two experts, in assessments in 2012 and 2016, considered the applicant did not have the capacity to marry in 2013.

The issues before the court were:

- did the applicant lack the capacity to marry in June 2013?
- if so, did the court have the power under its inherent jurisdiction to declare that the marriage between the parties, valid according to Pakistani law, was not recognised as a valid marriage in the jurisdiction of England and Wales, and if so should the power be exercised?
- should time be extended to permit the nullity petition to be heard?

What did the court decide?

The court considered that two of the experts in the case applied a test of capacity to marry that was higher than that laid down by the law. The court heard evidence from the applicant and was satisfied that she had capacity to marry in June 2013. She understood and was 'fully aware' of the simple nature of the contract, even if she was not aware of the financial implications. The latter may reflect on her lack of wisdom as at the time of marriage, but did not affect her capacity to marry. On that basis, the application for a declaration for non-recognition and petition for nullity were dismissed.

Case details:

- Court: Family Division, High Court of Justice
- Judge: Mr Justice Mostyn
- Date of judgment: 8 February 2021

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