THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2021] IECA 55

Record No. 2019/225

Costello J.
Haughton J.
Binchy J.

BETWEEN/

A R

PETITIONER/APPELLANT

- AND -

D R

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 24th day of February 2021

1. This judgment concerns an appeal from a decision of Reynolds J. in the High Court whereby, by order made on 11th April 2019, she refused the petition of the appellant for a decree of nullity in respect of the marriage entered into by the parties on 5th July 1995.

2. The appellant, who represents herself in these proceedings, advances two grounds for the petition. The first is that the appellant claims that the respondent subjected her to duress to such an extent that their marriage took place without her full free and independent consent. While I explain later her grounds for this claim in more detail, in general terms she claims

that at the time that she married the respondent, she was under his control, and by reason of his manipulative behaviour, she had been left isolated from friends and family overseas ("OS"). The appellant's second ground for this petition is that at the time that they married, the respondent lacked the capacity to enter into and sustain a caring and considerate marital relationship by reason of the fact that he was and is in some way mentally unstable, and also by reason of the fact that he is or was either homosexual or bisexual.

3. The parties met OS in 1993, when they were living in the same apartment complex. The appellant says they met in December 1993, and that they became romantically involved from St. Stephen's Day, 1993. The respondent says they began going out in or about November of 1993, and they started living together in January 1994, when he moved in to the appellant's apartment. This was not denied by the appellant. In March /April of 1994, the respondent had to return home to Ireland (both parties are Irish nationals) in order to regularise his entitlement to live and reside OS. This took a little longer than expected, and while there is some disagreement between the parties in relation to the nature of the communications between them during this period, nothing turns on that for the purposes of these proceedings. The respondent returned to OS in or about May or June of 1994 and while there is also some disagreement regarding the precise circumstances in which he re-commenced living with the appellant following upon his return to OS (this is described at paras. 20-22 below), nothing of significance turns on that issue either. What is beyond any doubt is that not very long after the respondent returned to OS the parties were living together, as a couple, in the appellant's apartment OS.

4. In her grounding affidavit, the appellant claims that the respondent proposed marriage to her within two months of their meeting. The appellant claims that she declined his proposal at that point. In his replying affidavit, the respondent denies asking the appellant to marry him within that period, and on his version of events he claims that he asked the

respondent to marry him "sometime" in 1994 which on this version of events would have been prior to their return to Ireland for a summer holiday in 1994. The parties agree that they travelled together to Ireland for holidays during the course of which the respondent asked the appellant's father for her hand in marriage, to which he agreed (or, on the appellant's version of events, to which he replied that this was a matter for the appellant). In any case, what appears to be common ground is that the parties were engaged to be married, at the latest, from this time onwards, which was sometime in mid-1994. Following their engagement, the appellant and her family made all the wedding arrangements, and she also chose her own engagement ring.

5. The parties married in Ireland on 5th July 1995 and honeymooned in Ireland. There are two children of the marriage, A, a daughter born OS on 21st June 1997 and B, a son born in Ireland on 26th June 2002. The parties had returned to live in Ireland in 1998. Unfortunately, relations broke down over the years, and the parties separated in September 2008. In October 2009, the respondent instituted proceedings in the Circuit Court seeking a decree of judicial separation. The appellant, who was a litigant in person in these proceedings, at that time was represented by solicitors and counsel. Her solicitors entered an appearance and delivered a defence on her behalf, by which the appellant admitted the marriage. By order made on 13th July 2011, the Circuit Court granted a decree of judicial separation and, *inter alia,* ordered that the parties would have joint custody of the dependent children, and further ordered that the children should reside with the respondent, with the appellant to have access to the children as provided for by the order of the Circuit Court.

6. From the time of the parties' separation to the time that the order of the Circuit Court was made, the children had been residing with the appellant pursuant to an order of the District Court, with the respondent having access. There have also been several other proceedings between the parties arising out of the breakdown of the marriage. These include

an application brought by the appellant to have the children admitted to wardship, apparently on the basis that the appellant claimed that the respondent had told B to jump from a first floor window while he was staying with the appellant during holiday access, an allegation the respondent denies. This application was brought before the High Court on the same day that the appellant issued her petition for nullity. The High Court refused the application.

7. There are a few other matters that form part of the background that merit mention, although they are not directly relevant to the issues requiring determination. The first is that some years before the parties met, in 1987, the appellant's brother in law had been murdered OS. This tragedy obviously had a significant impact on the appellant's family, and although she did not mention it in either her grounding affidavit or her replying affidavit, the appellant claims, by way of submission, that it left her a vulnerable person. Secondly, the appellant made an attempt on her own life around 1991, before she went OS. It became a matter of some controversy in the proceedings how the respondent became aware of this event. The appellant maintains she herself told the respondent, and he claims he was told by her sister. This was the subject of a heated exchange with the trial judge to which I refer below. Finally, around April 2000, following their return to Ireland, the appellant was the victim of a bad assault, as a result of which she developed post-traumatic stress disorder, in respect of which she required counselling. The appellant also had a miscarriage around this time, which she blames on the assault, although the respondent says the medical advice at the time indicated otherwise. The appellant discovered quite late in life that she suffers from a learning disorder, but has learned to overcome it to the extent of being able to study for, and obtain, a law degree, following the breakdown of the marriage.

8. The appellant says that soon after the proceedings in the Circuit Court, she was advised by an academic lawyer that she might be eligible to obtain a decree of nullity on account of the circumstances surrounding her marriage. If she obtained a decree of nullity, then that

would, amongst other things, result in the order of the Circuit Court being set aside and this would enable her to make a fresh application to the courts in relation to the matters of custody and access to the children. It was for these reasons that the appellant brought forward these proceedings.

9. By the time that this appeal came on for hearing, the second of the parties' children was about to obtain the age of majority. Accordingly, the Court enquired of the appellant what she hoped to achieve through this appeal in circumstances where her prime motivation for bringing these proceedings was to bring about a change (in her favour) in the custody and access arrangements ordered by the Circuit Court, and that could no longer be achieved once both her children were over the age of majority. While acknowledging this to be the case, the appellant nonetheless expressed a wish to see her appeal through to conclusion, as is her entitlement.

Judgment of the High Court

10. The proceedings came on for hearing in the High Court, before Reynolds J., on 17th July 2018, and concluded, with some interruptions along the way, on 20th July. Reynolds J. handed down judgment on 29th March 2019.

11. In his answer to the petition herein, delivered on 22nd July 2014, the respondent denies subjecting the appellant to duress, denies that he lacked capacity to enter into the marriage and raises, by way of defence, the following matters of law:

1) That the appellant has ratified, approbated and condoned the marriage by her conduct, and in particular by accepting the validity of the marriage in the judicial separation proceedings;
2) By reason of the foregoing, the appellant is estopped from denying the validity of the marriage; and

3) That the appellant has delayed in bringing these proceedings such that it would be unjust and inequitable to grant the decree of nullity.

12. As far as each of the above matters of law are concerned, the learned High Court judge in effect held in favour of the appellant, and then proceeded in her judgment to consider and determine the petition by reference to the evidence before the court. While I address her decision in more detail below, it suffices to say at this point that Reynolds J. held that there was a significant evidential shortfall in the appellant's case, such that she had no hesitation in concluding that the appellant had fallen well short of establishing that she had entered into the marriage under duress, or that the respondent lacked capacity to enter into the marriage for any reason. Although in her grounds of appeal the appellant purports to raise issues that she considers to be relevant arising out of the decisions of Reynolds J. on these matters of law, she is misguided in doing so because the manner in which the court dealt with these issues was favourable to the appellant. For his part, the respondent did not cross appeal the decision of Reynolds J. on any of these issues. Accordingly, this appeal falls to be determined not on the basis of the decision of the learned trial judge on any of those matters of law, but rather on the basis of the facts as found by the High Court judge and the application of the law to those facts. Additionally, it is necessary to consider complaints raised by the appellant in her grounds of appeal that the trial judge was biased in the manner in which she conducted the hearing in the court below and did not accord the appellant a fair trial.

Grounds of Appeal

13. The appellant advances 18 grounds of appeal. Eight of these concern allegations that the trial judge, in one way or another, did not afford the appellant a fair trial. These are ground numbers i, ii, iii, iv, v, xi, xvi and xvii. In these grounds, the appellant claims, *inter alia*, that the trial judge displayed hostility and bias towards the appellant by interrupting

her, by refusing to allow the appellant to adduce evidence of certain matters and by making comments critical of the appellant for bringing these proceedings. Three of the grounds are concerned with interactions that the respondent had with the medical examiner appointed by the High Court to examine the parties, and his initial refusal to attend for examination (ground numbers: vii, viii and ix). Two of the grounds are concerned with complaints the appellant has about the conduct of the respondent in procedural matters leading up to the hearing of the petition (ground numbers: xii and xiii). In ground number vi, the appellant claims that the trial judge failed to give adequate reasons for distinguishing these proceedings from cases relied upon by the appellant. In ground number x, the appellant complains that the judge involved herself in ancillary relief matters, which form no part of a nullity application. Two of her grounds, xiv and xv, relate to errors of fact in the judgment of the trial judge. In ground number xviii, the appellant claims that the trial judge erred in her interpretation of the motivations of the parties in the proceedings.

14. Nowhere in her grounds of appeal does the appellant expressly claim that the trial judge erred in fact in failing to find, on the evidence before her, that the appellant was under duress at the time she married. Nor does she make this point in her submissions. Perhaps this is because the appellant is a lay litigant, and she considers that in some way this issue is incorporated into the grounds she has relied upon, but I do not believe that this is so. However, I think it is probably correct to say that the focus of the appeal was for the most part on the facts relied upon by the appellant, and it is on that basis that I will approach this decision, i.e. by considering whether or not the decision of the court below was justified on the evidence, having regard, of course, to the principles in *Hay v. O'Grady* [1992] 1 IR 210. I will, also, of course, address the appellant's specific grounds of appeal, as appropriate.

The Evidence

15. The following personnel gave evidence before the High Court: the appellant herself; her sister, M; a friend of the appellant, a Mr. S; the medical examiner appointed by the court (on the application of the appellant) to consider the capacity of the respondent to enter into marriage, and the respondent. The appellant swore two substantive affidavits, her grounding affidavit of 27th August 2013 and her replying affidavit of 12th August 2014, in support of the petition, and the respondent swore a single substantive affidavit dated 22nd July 2014 in reply to the appellant's grounding affidavit.

Evidence of Duress

16. The trial judge addresses evidence of duress at paras. 22-25 of her judgement, as follows:

> "22. The [appellant's] evidence was that she felt under considerable pressure to marry the respondent after he had pursued her vigorously and sought to isolate her from her family and friends during their courtship. She contends that he has a very forceful personality and that she was easily manipulated and outwitted by him.
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> 23. The parties became engaged in 1994, some nine months after they had commenced their relationship. The [appellant] maintains that she felt pressurised by the respondent into agreeing to his proposal. Further, she maintains that after the ceremony of marriage on the 5th July, 1995, she was approached by one of the respondent's friends who allegedly intimated to her that his friends had always assumed that he was homosexual. She contends that whilst she was astounded by this remark, she now believes that it in fact may be true, or 'that he is, rather, bisexual'.
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> 24. In addition to these allegations, the [appellant] maintains that the respondent was violent and volatile during the course of the marriage and suggests that the respondent had a 'very disturbed childhood'.

25. She makes numerous allegations of mental, emotional and physical abuse which allegedly occurred post the birth of the parties' daughter in 1997 and continued up to 2008 when the parties separated. It is clear from her evidence that she is aggrieved by the fact that the respondent secured custody of the dependent children of the marriage in the course of the judicial separation proceedings."

17. Having dealt with other matters at paras. 26 and 27, the trial judge came back at para. 28 to evidence of duress before the marriage:

"28. The [appellant] called her sister as a witness in the proceedings to give evidence of an incident which occurred in 1994 involving a dispute between the parties herein, the witness and her husband. There is no issue between the parties but that this was a very heated dispute which got out of hand culminating in the involvement of the [OS] Police Department. When it was suggested to the [appellant] in cross-examination that both she and the respondent were subsequently prosecuted and thereafter bound to the peace, she indicated that she had no recollection in that regard and did not appear to be in a position to refute this."

18. Before proceeding further, I should mention that this last paragraph gave rise to an objection by the appellant that it contains an inaccuracy. Firstly, in ground of objection no. 3(xiv), which she elaborated upon in her submissions, the appellant says that it was apparent from her grounding affidavit that she was arrested on this occasion. Furthermore, she says (correctly) that, when cross examined about this matter, and specifically when it was put to her that she and the respondent had both been bound to the peace as a result of this altercation, she replied: "I believe so" and did not say that she had no recollection in this regard. The appellant is clearly correct in this observation also.

19. In ground of objection no. 3(xv), the appellant also criticises the trial judge in respect of an error in her initial draft of the judgment, which was corrected at the request of the

appellant at a hearing (convened for the purposes of considering redactions) following upon the circulation of the initial draft. At para. 68 of the draft, the trial judge had stated that the appellant's sister M was at the parties' wedding. In fact she had not been in attendance, because of the rift that opened in the relationship between the appellant and M after the incident referred to in para. 17 above. The trial judge accepted the correction, and so the error does not appear in the judgment as delivered, but the appellant says that this was a fundamental error of fact of the part of the trial judge, and indicates a failure on the part of the trial judge to understand fully the seriousness of this incident.

20. These corrections aside, the summary of the trial judge set out above (as to evidence of duress) is accurate, if very brief. However, for the purposes of this judgment, it is helpful to provide some further details of those matters relied upon by the appellant. Firstly, the appellant claims that the respondent proposed to her within two months of meeting the respondent. This is denied by the respondent. In any case, the appellant says that she declined this offer.

21. As mentioned above, the appellant claims that she first met the respondent in December of 1993 and that they started going out on St. Stephen's Day. She claims that the respondent had to return to Ireland to regularise his visa arrangements, and that while he was back in Ireland he made "innumerable" phone calls to her and became upset when she would not fly back to Ireland to join him. She says that the respondent told lies to her two female flat mates in order to undermine her relationship with them, and so that he could move in with her. She claims that she agreed to this arrangement because she could not pay the full rent herself, thereby, by implication, suggesting that this arrangement had nothing to do with the fact that they were at the time going out with each other. The appellant avers that she was not expecting the respondent to move into her bedroom, but that he did this when she

was not in the apartment and she avers that she "reluctantly went along with it". She explains this by saying that:

> "The respondent was a very forceful person and I was not. I was easily manipulated and outwitted. He always managed to get me to go along with his ideas even when I did not agree with him. In effect he wore me down into submitting to his will, and I no longer had friends or family in [OS] to discuss my decisions with who might get me to see the dangers and disadvantage of the things I was agreeing to".

22. The appellant avers that while the respondent was in Ireland, a male friend moved in to her apartment, as a flatmate and not as a boyfriend. He resided with her and shared the rent. He moved out because the respondent did not want him there. The respondent says they resumed living together when this man left. The appellant avers that by September of 1994, the respondent had isolated her totally from her family and friends and that he was very possessive and controlling of her.

23. The respondent denies this version of events, and specifically denies causing the appellant's flatmates to move out, and he says he moved in with the appellant because they were very much in love, and also because it made sense. He also denies making innumerable phone calls to the appellant while he was in Ireland. There are many other points of disagreement between the parties as to the events around this time, and for that matter, throughout their relationship, but these conflicts do not require to be resolved for the purpose of these proceedings.

24. The appellant says that she eventually agreed to marry the respondent in September of 1994, and that she did so because she feared that if she did not, he would leave her alone and isolated OS. She also avers that she feared that he would become emotionally unstable if she did not agree to become his wife. She felt she could not discuss the matter with family or friends.

25. The appellant claims that the respondent wanted the marriage to take place as soon as possible, and they set the date for her birthday, the 5th of July the following year, although she wanted to marry later in the year.

26. The appellant refers to an incident, which the respondent agrees took place, in which the respondent became embroiled in a row, which resulted in blows, with the appellant's brother in law. This is the incident referred to at paras. 17 and 18 above. As a result of this row, both the appellant and the respondent were bound to the peace. The appellant claims that this row arose because the respondent "fabricated lies" about the appellant's brother in law, claiming that the latter had made disparaging and insulting remarks about the appellant, in order to isolate the appellant from her sister and brother in law. This altercation occurred in September of 1994.

27. I pause here now to mention that this is the extent of the appellant's evidence in relation to the issue of duress. At least that is the extent of her evidence in support of that heading of claim. As against that, at para. 13 of her grounding affidavit she avers:

> "When we finally agreed to marry, it is true that I was happy even though I had reservations that it was happening too quickly."

In the same paragraph, she goes on to say that she had grounds for suspecting that the respondent would become emotionally unstable if she did not go through with the wedding, because she had previously witnessed him standing in the rain outside her bedroom window crying when she had previously broken off their relationship (the respondent denies this claim).

28. At the hearing of this appeal, the appellant, in response to a direct question from the Court, confirmed that when she got married, she believed that she was validly married. However, she qualified this answer by saying that at the time, she did not know any better,

by which I understand her to mean that, had she known that duress may invalidate consent to marriage, she might not have considered herself validly married at the time.

29. In both her affidavits grounding the petition, and again in her oral testimony, the appellant made a series of other serious allegations against the respondent, all of which, except one which I address below, are denied. However, the appellant's claims go much further than this, and, at para. 36 of her grounding affidavit she sets out 29 bullet points in which she claims, *inter alia*, that the respondent has:

1) Assaulted her by hitting her in the face, punching her, dragging her, kicking her and shoving her;
2) Threatened to kill the appellant;
3) Threatened to shoot the appellant;
4) Threatened to "hunt [the appellant] down like a dog" and shoot her if anything happened to the children while they were on holiday with the appellant;
5) Threatened to kill the appellant with his bare hands;
6) Punched holes in the bedroom wall;
7) Behaved in a manner that forced her to obtain a barring order against him;
8) Controlled and mentally manipulated the appellant to the point of brain washing her and turning the children against her;
9) Called the appellant disparaging names in front of the children;
10) Tried to isolate the appellant from her friends in Ireland.

30. All of the events referred to by the appellant above are alleged by her to have occurred after the birth of A in 1997. In his replying affidavit the respondent denies that he has mentally, emotionally or physically abused the appellant. He denies threatening to shoot or kill her and denies assaulting her. He admits to having had a very heated argument on one occasion in the family home during the course of which he slapped her because at the time

he was using a heavy sander on a floor and the appellant tried to take it from him. The respondent says that the appellant responded by striking him with a yard brush across his shoulder, breaking the brush in the process. He says they reconciled later that day. He also agrees that he did say he would "hunt [the appellant] down like a dog if she harmed the children" in the context of being afraid that the children might come to harm while with appellant on a holiday. He says the appellant refused to allow him to go on this holiday with the family. This incident appears to have occurred at a time when relations between the parties had already broken down. All of the other allegations the respondent denies.

31. Even if all of these allegations were true however, it is very difficult to see their relevance to the petition now before the Court. They may well have been relevant in the context of the other family law proceedings between the parties, or, had the appellant made complaints of assault to the Gardaí, in any prosecution that might have followed such a complaint. However, so far as this petition is concerned, all of these events post-date the marriage of the parties by two years or more. The appellant says that her purpose in introducing this evidence is to paint a picture of the respondent's personality i.e. as being manipulative and domineering, so as, in effect, to bolster her evidence that she was under duress when she agreed to and married the respondent in July of 1995. However, it is not difficult to see why the trial judge concluded, as she did, at para. 68 of her judgement that:

> "[T]here is simply no plausible evidence upon which this Court could conclude that the respondent subjected [the appellant] to duress to the extent that their marriage took place without consent on her part. The reality of the matter is that [the appellant] was living as an independent young woman working in [OS] when she commenced her relationship with the respondent. The relationship evolved in circumstances where the parties were living together and thereafter became engaged before returning to Ireland to celebrate their wedding day with friends and family."

These last two sentences reflect undisputed matters of fact. The trial judge then continued, at para. 69:

> "There was a paucity of evidence in respect of [the appellant's] assertion that she lacked the requisite consent to enter into the contract of marriage and the court is satisfied that [the appellant's] evidence in this regard is coloured by the subsequent deterioration and demise in the parties' marital relationship."

32. On the evidence before her, the trial judge was, in my opinion, entitled to conclude that there was a paucity of evidence to support the appellant's claim that her consent to marriage was given under duress. All the court had before it in this regard was the opinion of the appellant, formed years later and with hindsight (regardless as to the reasons for that hindsight) that the respondent had behaved in a manipulative manner in order to persuade the appellant to agree to marriage. There was absolutely no objective evidence that this was the case. The altercation in which the respondent became involved with the appellant's brother in law is not evidence, in and of itself, of either manipulative behaviour (towards the appellant) or of the exercise of duress on the part of the respondent towards the appellant. The appellant claims that the respondent orchestrated this row in order to drive a wedge between the appellant and her sister and brother in law, but there was insufficient evidence for the court to draw such a conclusion.

33. The evidence that the trial judge had as regards the state of mind of the appellant from the time that she met the respondent up to the time that they married, in my opinion was ample to justify the conclusion that the trial judge reached. The evidence was that, as stated by the trial judge in the passage quoted above, the appellant was living and working as an independent young woman OS at that time that she met the respondent. The appellant gave evidence that she did not accept the respondent's first proposal of marriage. None of this suggests a person of timid disposition – on the contrary, as the trial judge found. Then there

is the statement in her affidavit, referred to above, in which the appellant avers that when she finally agreed to marry, she was happy, even though she had reservations that "it" was happening too quickly.

34. In my opinion, the findings of fact by the learned trial judge at paras. 68 and 69 of her judgment were supported by credible evidence, and cannot be disturbed by this Court on appeal, per *Hay v. O'Grady* [1992] 1 IR 210. Those therefore are the facts that fell to be considered by the court below in deciding whether or not to grant the appellant the relief that she seeks.

35. It follows from this that the appellant failed to establish that she was under duress when she gave her consent to marry, and subsequently married the respondent. It is therefore unnecessary for this Court to enter into a consideration of the authorities as to the applicable test i.e. must the appellant establish that there was duress on the balance of probabilities, or is a higher standard of proof applicable? The appellant referred the Court to a number of relevant authorities in relation to the applicable test, but since it is abundantly clear that she has not even discharged the balance of probability test, so far as the ground of duress is concerned, it is unnecessary to consider those authorities. I would go so far as to say that the appellant did not even get as far as making out a *prima facie* case of duress.

36. The appellant also opened authorities to the Court as regards whether or not the applicable test is subjective or objective. In particular, she referred to the decision of McMahon J. in the case of *C O'K v. WP* [1985] IR 279. The appellant cites the following passage from the judgment of McMahon J. in that case:

> "[T]he subjective test must be applied when considering the effect of pressure on the mind of the petitioner. Any degree of duress which in fact causes a person to agree to a marriage to which he or she would not otherwise have agreed invalidates

> the marriage… The Court is not concerned with the effect which might have been produced on a person of greater firmness of mind."

37. The appellant also relies upon the decision of the Supreme Court in the case of *N (Otherwise K) v. K.* [1986] IR 733 as authority for the proposition that the test of duress is entirely subjective. She cites the following passage from the decision of Henchy J. in the Supreme Court:

> "For the appraisal of the wife's claim in this case, I am prepared to assume that the test for duress is entirely subjective and that the source or nature of the duress is not of consequence provided that the coercive matters relied on by the wife are such as either to have affected her mind to the point of making her incapable of understanding what she was doing, or, even if she did so understand, of overbearing her power of volition to the extent that it could not be said that she really consented to the marriage."

38. The judgment of Henchy J. was a dissenting judgement, and, on the facts, he held against the petitioner in that case, notwithstanding the application of a subjective test. The majority however held in favour of the petitioner, with Griffin and McCarthy JJ. expressly stating that the test is subjective. However, even on the application of a subjective test, it is not enough for a petitioner merely to assert duress. A petitioner must satisfy the court, on the evidence, that at the time of the marriage, there was pressure or duress such as to "overbear the will of the particular petitioner" (per Griffin J., p. 751, in *N (Otherwise K) v. K*). It is necessary for the court to consider all of the evidence to see if the claim of duress is supported by the evidence. On p. 746 of his judgment, Henchy J. stated: "I consider that one of the prime tests to determine whether an apparent contractual consent was vitiated by duress is to see if, when the coercion relied on ceased or became spent, the person whose volitional powers are said to have been overborne renounced the contract, or at least

complained of the duress, as soon as reasonably possible." Although Henchy J. was in the minority in that case, these comments are, nonetheless, instructive. In this case, it might reasonably be said that the latest the appellant could claim she remained under duress was up to the time the marriage broke down, and the parties separated. In considering her approach to the ensuing judicial separation proceedings, it was open to the appellant, if she really believed she married under duress from the respondent, to raise that issue in the judicial separation proceedings. The fact that she may have been under the impression that nullity was no longer available after divorce is immaterial. The appellant was legally represented at that stage, and her defence and counterclaim were prepared with the benefit of legal advice. I should make it clear that in making these observations I am not suggesting that the appellant was precluded by delay from bringing these proceedings. The trial judge determined that she was not precluded by delay and that part of her decision is not under appeal. However, the delay in raising the issue of duress, and in particular in not raising it at the time of the judicial separation proceedings (absent any indication that she was not in a position to do so), must weigh to some degree against her in relation the court's consideration of the appellant's claim that she felt under duress to enter into the marriage.

39. The trial judge was, in my opinion, entitled to conclude on the evidence before her that the appellant's evidence as to duress was coloured by the subsequent deterioration of the marital relationship and to conclude further, as she did, that:

> "Even at the height of [the appellant's] case, there was simply no sustainable evidence of duress before this Court and certainly no convincing evidence to discharge the burden of proof required."

40. This is a mixed finding of fact and law. Insofar as it is a finding of fact, it is one with which this Court cannot and should not interfere, being justified as it was, in my view, on the evidence before the trial judge. I also agree fully with the application of the law by the

trial judge to the facts as found by her, and can find no error in her conclusion under this heading.

Capacity

41. I turn next to consider the appellant's second ground for bringing this petition i.e. that the respondent lacked the capacity to enter into and sustain a caring and considerate marital relationship. At para. 25 of her grounding affidavit, the appellant claims that the respondent came from a violent and disturbed family background, where mental instability was prevalent, and that he lacked the capacity to enter into a sustain a caring and considerate marital relationship. At para. 38 of her affidavit, the appellant avers that she believes that the respondent is suffering from a severe personality disorder, if not a mental illness. At para. 14 of her affidavit she avers that on the day of her wedding, one of the respondent's friends said to her that she was delighted that the respondent had married the appellant because she and all of his friends had until then assumed and believed that the respondent was homosexual. The respondent denies all of these allegations

42. In other parts of her affidavit she provides more details of these allegations. In relation to the respondent's sexuality, she avers that she believes that the respondent has an intimate relationship with a named individual, who has been a very close friend of the respondent for many years. While she provides a certain amount of information on which her suspicions are grounded, none of this information constitutes evidence. She did provide the Court with a photograph of the respondent and this named individual taken many years ago, probably when both were still teenagers. Both are posing for the photograph, which is taken against the backdrop of sports playing fields, and each has his arm around the other in what can only be described as a gesture of friendship, and no reasonable person looking at this photograph alone would draw any conclusions from the photograph as to the sexuality of the subjects. Of course the appellant says that she has other reasons for believing that the respondent is

either homosexual or bisexual, but these other reasons are not grounded on evidence of any kind, never mind evidence that would come close to substantiating those suspicions.

43. The same may be said of the allegation of mental illness. The appellant claims that the respondent's father and brother are both disturbed. She believes that the respondent's father may have suffered from post-traumatic stress disorder and that his brother previously threatened to take his own life in the presence of his wife and children. She endeavours to portray a picture of mental instability in the respondent's family, but without any evidence of any kind to support her claims in this regard.

44. I pause at this juncture to mention that, in an effort to obtain evidence regarding the mental health of the respondent, the appellant wrote, on 19th August 2013, the week before she issued the within petition, to the respondent's previous public service employer requesting access to the respondent's records from his time in that employment, before he met the appellant. In order to demonstrate her need for access to these records, the appellant made allegations of the most serious kind, e.g. she stated that the respondent had threatened to kill her with his bare hands and had also threatened to shoot her. She also said he had threatened to kill himself, and that he had allowed their son, when aged 8, to handle a weapon in his possession. She also made allegations about the respondent's brother, who was then in the same employment. She expressed concern that the respondent "could become one of those fathers who murder their own children, and then commit suicide". The respondent exhibited a copy of this letter in his replying affidavit, in which he also states that the appellant made other complaints about him to the Gardaí, resulting in a HSE /CFA investigation. The appellant accepts she wrote these letters, motivated out of her concerns for the safety of both herself and the children.

45. In her submissions to this Court, the appellant accepted that the evidence that she has available as regards the sexuality of the respondent is not as strong as in reported cases

involving nullity petitions upon which she relies. However, in her written submissions she makes the point that she is entitled to her belief as to the sexuality of the respondent and submits that there have been many cases before the courts where homosexual men have denied their sexual orientation and she relies on the case of *F v. F* [1990] 1 IR 348 and cites the following passage from the decision of Barron J. in that case:

> "I am also satisfied that the respondent deliberately set out to bind the petitioner to him emotionally and that he succeeded in this design. His so-called revelation of a one time homosexual tendency and his other total denials of any such disposition had and were intended to have this effect. I am satisfied that the petitioner was totally taken in and would not have married the respondent had she even known a part of his true nature. For this reason, I have no doubt that her consent to the marriage was apparent only and was not a true consent."

However, the facts of *F v. F* are completely different to the facts of this case. In *F v. F*, the evidence, which was not contested, established beyond any doubt that the respondent husband was an active homosexual. Shortly before the marriage, he had written to the petitioner, informing her that he had had "male encounters" and he wanted to discuss this with her. However, when she telephoned him to do so, he had then recanted and expressly assured the petitioner that he was not homosexual, and she had accepted that assurance. In other words the court found that he had lied about his sexual orientation, before the marriage, to the petitioner, thereby deceiving her into marrying him. In this case, there is no evidence at all that the respondent is homosexual, other than the opinion of the appellant, which she seems to have formed years after the marriage, and without any reasonable basis. The trial judge, in my opinion, was not just correct to hold against the appellant on this point; she had no choice, on the evidence before her, but to arrive at the conclusion that she did.

46. Many of the appellant's grounds of appeal relate to the manner in which the trial judge conducted the trial. The appellant feels that she was cut short by the trial judge and did not receive a fair trial. I address these objections generally below, but I mention it now because one of her grounds of objection is that she felt that her evidence in chief was cut short by the trial judge. She does not say in her submissions however what additional evidence she would have brought before the court, if any, in relation to the capacity of the respondent to marry, had her evidence in chief not been cut short (as alleged). In her grounds of appeal and in her written submissions she also makes complaints about the interactions that the respondent had with the medical examiner. To the extent that these interactions occurred at all, she may have some ground for complaint, but as a matter of substance, the complaint is without merit.

Opinion of Medical Examiner as to Respondent's Capacity

47. By order dated 12th December 2014 (O'Hanlon J.) the High Court ordered that Dr. J H, Consultant Psychiatrist, be appointed as medical inspector to carry out a psychiatric rather than a physical examination of the appellant and also of the respondent in respect of the issues identified in the order. The issues identified were:

a) Whether the respondent at any time before or on the 5th July 1995 the date of the alleged marriage the subject of these nullity proceedings subjected the appellant to duress to the extent that she lacked consent to the said marriage, not having exercised a full, free and independent will on her part;

b) Whether the respondent at the time of and subsequent to the said marriage lacked the capacity to enter into and sustain a caring and considerate marital relationship;

c) Whether the appellant gave true consent to the alleged marriage of the respondent and,

d) Whether there is collusion or connivance between the respondent and the appellant in the presentation of the petition.

48. I think it must be said that of the four matters identified, the only function the medical examiner could have in the proceedings was to examine the capacity of the parties to enter into the marriage. The matters identified at paras. (a), (c) and (d) are matters of fact to be determined by the court at the hearing of the petition. The respondent identified this problem and wrote to the medical examiner to inform her that she had no role in assessing whether or not the appellant was under duress at the time of the marriage. He also wrote, on 24th March 2015, to a registrar of the High Court informing her that this was the case.

49. Dr. H met with the appellant on 22nd January 2015. She had also intended to see the respondent on this date, but he did not attend. It is only fair to point out that, on being informed by the appellant of this appointment, he wrote back to her to inform her that he would not be attending for this examination. In any case, the result was that Dr. H met only with the appellant for the purpose of an examination on 22nd January 2015. On the basis of the appellant's account of the history of the relations between the parties, Dr. H concluded that "there was duress when it came to agreeing to the marriage. There was duress at all stages of the relationship." And, in the final sentence of her report of 10th February 2015 states:

> "In my opinion there was undue duress and possible issues of [the respondent's] inability to engage in the contract of marriage. There was no evidence of any current psychiatric illness when I saw [the appellant]."

50. However, the respondent subsequently agreed to meet with Dr. H for the purpose of examination and this gave rise to the issue of a second report by Dr. H dated 7th July 2015. Having heard the respondent's account of the history of the relationship between the parties, she now concluded:

> "In my opinion there was no evidence of psychiatric illness when I saw [the respondent]. He admits to no past history of psychiatric illness. He entered into the relationship for life as he thought and now he says that all he wants is whatever offers the most security for his children. … Clearly the relationship was stormy from the outset and blame rests with both parties for much of the strife. … [The respondent's] version of events would not support the notion of coercion. I see no evidence that he was not able to engage fully in a marital relationship despite the fact that it was turbulent and volatile."

51. Dr. H gave evidence at the hearing of the petition. She explained to the court that her initial opinion was formed having met with the appellant alone, and that having had the benefit of interviewing the respondent subsequently, she changed her opinion. She concluded that the respondent "appeared to have a good understanding of what was involved in a marriage" and she saw no reason to believe that he was not capable of partaking in a full marital relationship. She was asked to elaborate on this by the trial judge and she then gave the following evidence:

> "There was a great deal of disagreement in the reports on every issue that was submitted to me. I suppose what I did take out of it was there had been, it appeared to me, agreement to get married. Indeed, [the appellant] had said to me that initially things were ok, that there was an intimate relationship, there had been an agreement to buy an engagement ring. [The appellant] had, in fact, chosen the engagement ring."

Later on, she continued:

> "There were so many stories I ended up not knowing what to believe with regard to some of them but certainly [the respondent] took responsibility for some issues in the relationship, but was clear that some issues, in his opinion, had never happened and I was left feeling that I couldn't stand over the notion that there was duress. I was

impressed that [the respondent] had provided a sustained environment for his children as evidenced by the fact that they had appeared to improve in school under his care…"

52. The appellant asked Dr. H about communications she had with the respondent, and in particular about documents that had been sent to her by the respondent. She confirmed that she had received certain reports, which (although she may not have known it) were reports obtained, pursuant to s.47 of the Family Law Act, 1995, for the purpose of the judicial separation proceedings. The appellant asked her whether or not these reports might have influenced her findings as regards her assessment of the respondent and Dr. H replied that her findings were primarily based on her meeting with the respondent, although she could not say for certain that the reports had no influence at all. She did say however that if they had any influence, it was minimal.

53. Dr. H was asked if she had spoken directly with the respondent, other than when she met him for the purpose of examination, but she could not recall. However, she did confirm that she received, after her assessment, a letter from the respondent stating that she had no role in assessing the issue of duress. Her evidence in relation to this letter however was that she disregarded it because she had an understanding that she was preparing reports for the court, as distinct from the parties. She said that she did not think it was for the respondent to define the scope of her report.

54. It is apparent from the transcript of the proceedings in the court below, that the appellant, in her submissions to the court, objected to the fact that the medical examiner had received the s.47 reports and also objected to such other communications as had taken place between the medical examiner and the respondent. She further submitted to the trial judge that she was disadvantaged by reason of the fact that the medical examiner had not previously had experience of preparing a report of this kind i.e. in connection with a nullity petition.

55. In her judgment, at para. 32, the trial judge addressed these matters pithily as follows:

> "I do not propose to regurgitate the basis upon which [the medical examiner] reached her conclusions as they are clearly set out in her detailed report. Suffice to say that she was satisfied that neither party suffered from any psychiatric illness and there was no evidence of the respondent's alleged inability to enter into and sustain a normal marital relationship."

56. From all of the above, it is clear that not only does the appellant not have any evidence to support her claims that the respondent lacked the capacity, for any reason, to enter into the marriage, but the medical inspector appointed by the court to enquire into the issue concluded that there was nothing at all to indicate that the respondent lacked capacity. While the appellant takes issue with the fact that the respondent sent Dr. H the s.47 reports, and had other correspondence or interactions with Dr. H, Dr. H confirmed to the court that she formed her conclusions based on her assessment/examination of the respondent, and not on the basis of the s.47 reports or any other information. The court was quite entitled to accept the evidence of Dr. H in this regard and indeed it is difficult to see how the court could have done otherwise.

57. While the appellant, in her grounds of appeal, makes complaint about the interactions between the respondent and Dr. H, it does not appear as though she made any applications to the court arising out of those interactions, or that there is any specific ruling of the court under appeal in this regard. Accordingly, any grounds of appeal based on the communication between the respondent and the medical examiner, or the trial judge's conclusions as to the capacity of the respondent to enter the marriage must be rejected.

58. While the appellant made very wide ranging allegations about the mental health of the respondent and his family, she failed to advance to the court below any or any credible basis for these claims and, in particular her claim that the respondent lacked capacity to enter the

marriage. Moreover, it must be said, to the extent that she had fears about the health, welfare and safety of the children, those fears appear to have been proven by the passage of time to have been baseless. All of that being the case, the trial judge was correct, beyond any doubt, to dismiss this ground of petition also.

Fair Trial Rights

59. A very considerable number of the appellant's grounds of appeal fall under the general category of fair trial rights. The appellant claims that her rights under Articles 38.1 and 40.1 of the Constitution as well as Article 6 of the European Convention on Human Rights and Fundamental Freedoms and more generally the principles of natural justice have all been violated by the manner in which the trial judge conducted the proceedings. She accused the trial judge of hostility, bias, and unreasonableness in the conduct of the trial and, so far as the decision of the trial judge is concerned, she claims that the trial judge has failed to give adequate reasons, failed to follow precedent and made errors of fact.

60. In her written submissions, the appellant claims (at para. 15) that her evidence in chief was cut short by the trial judge leaving her with twelve pages (of the transcript) as compared with almost twenty-two pages of evidence given by the respondent. She says that the trial judge interrupted her thirteen times in twelve pages and only twice interrupted the respondent in his twenty-two pages of evidence in chief.

61. A number of observations may be made as regards these complaints. Firstly, no objective analysis of the transcript could give rise to a conclusion that the appellant was cut short in her evidence. On the second day of the hearing (18th July 2018), page 52, line 28 of the transcript, the judge asks the appellant "Is that your evidence? …. That's all of your witnesses as such?", to which the appellant replies "Yes judge". This exchange continues as follows:

"Judge: Yes. So I take it you're aware now that I have read your affidavits.

Appellant: Yes judge.

Judge: But there are other matters – effectively your case is based on the affidavits, but there are other matters that you wish to give evidence of at this stage?

Appellant: No, I believe judge, that everything as can be made clear, the fact that you have read all the affidavits –

Judge: Yes.

Appellant: – tells me that you know what I am trying to get across all the time. I do want to cross examine [the respondent] though.

Judge: Oh I understand that. But you understand now that I have heard all the witnesses that you have called?

Appellant: Yes judge."

62. Shortly afterwards, the trial judge summarised the appellant's position at that stage as being that she had no further evidence that she wished to adduce, but that she would want to address the court by way of submissions and to cross examine the respondent, and the appellant confirmed that to be the case. The appellant confirmed that that was her position.

63. None of this could possibly give rise to any complaint. On 20th July, the fourth day of the trial (which it must be emphasised was a trial punctuated by interruptions, but one of those interruptions was specifically to accommodate the appellant so that she could prepare herself to cross examine the respondent the following day) the judge complimented the appellant on her presentation to the court as a lay litigant stating that "for a lay litigant matters have been very professionally put before the court".

64. In their written submissions, counsel for the respondent conducted an analysis of the interventions by the trial judge in the appellant's cross examination of the respondent. They noted that the appellant asked 151 questions in cross examination and the interventions of the trial judge comprised three interventions by way of clarification, three interventions

whereby the trial judge asked the appellant to put matters to the respondent rather than simply reading parts of his affidavit to him, seven rulings, such as on the admissibility of a photograph (ruled in favour of the appellant, with the agreement of the respondent) and requests for the appellant to move on with her questioning on grounds of relevance of the questions being asked and a certain number of comments and remarks. It is unnecessary to set out this analysis in full here, or even to summarise it any further, because the appellant herself agreed, at the hearing of this appeal, that the summary of the interventions by the trial judge during the course of her cross examination, as appearing in the written submissions of the respondent, are accurate. In no way could any of the interventions of the trial judge in the cross examination of the respondent by the appellant be said to be unfair or indicative of bias. They were, in my opinion, necessary for the efficient and orderly conduct of the trial.

65. The appellant took particular exception to some comments made by the trial judge which she found upsetting and considered to be indicative of bias. In her written submissions she refers to an exchange with the trial judge in the course of her cross examination of the respondent about her attempt to take her own life before the marriage and before she commenced any relationship with the respondent. The appellant was putting it to the respondent that it was she who had told him about this event, and he disagreed. How the respondent became aware of this was an issue of concern to the appellant. However, the trial judge, correctly in my view, did not consider the issue itself to be particularly relevant, and even if it was, the trial judge said that it was not relevant to the appellant's petition how the respondent came to know of this event. It is apparent from the transcript that at this point the trial judge lost her patience with the appellant, stating that she was trying to seek sympathy from the court in circumstances where she herself had made scurrilous allegations about the respondent, which were unfounded. The trial judge then stated that however the

respondent came to know of the appellant's suicide attempt was of no interest to her and that just because the appellant might have a vendetta in relation to it did not mean it had any relevance to the proceedings. She asked the appellant to move on with her cross examination. The appellant persisted and stated that it was relevant because she maintained that his answer to the question that she had put to the respondent showed that he was lying to the court, and so it was relevant as regards his credibility.

66. The appellant then finished her cross examination of the respondent. After a brief adjournment, the appellant submitted to the trial judge that there had been an inequality of arms at the hearing which was widened by the manner in which she had been impeded by the trial judge. The trial judge responded by saying that she had intervened during the course of the appellant's cross examination in order to limit it to matters of relevance. The trial judge pointed out that the proceedings had exceeded their projected duration. The trial judge then went on to say to the appellant that if she felt that she had been hampered in her cross examination or that there were any other issues of relevance that she wished to raise with the respondent, then she would be allowed to do so.

67. There was then an exchange as to how long the trial was taking. While the trial judge had said that the case was now in its fourth day, the appellant pointed out that there had been interruptions for other matters, and the trial judge agreed. But the trial judge stressed that she was trying to focus on issues of relevance so as to bring the proceedings to a conclusion. However, the appellant persisted and referred back to a date exactly one year previously when there was a discussion (at a "for mention" hearing) about how long the case would take, and the appellant said that on that occasion the trial judge "bit [her] head off". The trial judge said she would not be drawn into an argument. She said:

> "You have called all of your witnesses. You were in no way hurried in that regard. I simply asked you during the cross examination of [the respondent] to limit

it to matters that are relevant. That is where we are at. So you needn't complain about what has gone on up until now. You called all of your witnesses. I heard all of your evidence. As I understand it you are now complaining that I asked you to focus on issues in relation to your cross examination of [the respondent] and if you felt hurried in that regard well then that's regretful but you do now have an opportunity to address me on your submissions or anything further you wish to add."

68. In response to a question from the appellant, the trial judge confirmed that she had read the submissions of the appellant and that it was a matter for the appellant if she wished to highlight any particular matters.

69. Although the appellant in her submissions portrays herself as being a vulnerable lay litigant, it is apparent from the transcript that she was well able to hold her own and raise robust objections with the trial judge. It is also apparent that she was accommodated in the manner that the trial judge indicated. As counsel for the respondent submitted, the appellant was allowed to call in evidence witnesses who had sworn no affidavits and in respect of whom no advance notification had been given to the other side. The trial judge rose early on 19th July so that the appellant could prepare her examination of the respondent. She accommodated the appellant by allowing her to introduce a photograph into evidence, without formal proof.

70. The appellant also relies, as regards her criticisms of the trial judge, on certain conclusions of the trial judge in her written judgment. In particular, she refers to para. 71 of the judgment of the trial judge in which she states:

"The wholly unsubstantiated claims by [the appellant] in respect of the respondent's sexual orientation are utterly reprehensible. Further, the allegations pursued by [the appellant] against him with the HSE, Garda Ombudsman and other State bodies were malicious and vindictive and proved to be unfounded. [The

appellant] has maintained a sustainedly vengeful and vitriolic campaign against the respondent since she lost custody of the dependent children of the marriage and her actions in that regard are regrettable to say the least. Her motivation in pursuing these proceedings was further fuelled by her religious beliefs and her understanding that the relief, if obtained, would assist her in pursuing a church annulment."

71. The appellant, in her written submissions, submits that these statements show a high level of *enmity bias*, and she submits that the trial judge was biased against her as far back as the "for mention" hearing in July 2017, and that nothing that she could do after that hearing would have cured that problem. However, if the appellant felt that the trial judge was biased against her before the trial even began, she should have made an application to the trial judge to recuse herself. Whether or not she would have succeeded with such an application is another matter, but she can hardly rely on a bias that she says has its origins in a hearing that took place a year before the trial, if she took no steps to address that concern.

72. Insofar as she may say that her worst fears were only realised during the course of the trial and upon delivery of the judgment, I do not consider that the manner in which the trial was conducted by the trial judge indicates any bias or hostility towards the appellant on the part of the trial judge. In my view the transcript indicates that the trial judge did her best to guide and accommodate the appellant, whose case was, in any event, already on affidavit. The trial judge has a duty to ensure fairness to both parties in proceedings and therefore to ensure that the rules of evidence are reasonably applied, that the evidence does not stray into irrelevancies and that the trial itself takes no longer than is reasonably necessary. This is in the interests not just of the parties to the proceedings concerned, but also in the interests of other parties who have cases scheduled for hearing, and whose hearings have to be re-scheduled when cases over run. Indeed, the trial judge referred, in the course of an exchange

with the appellant, to the fact that another case had to be adjourned to facilitate these proceedings.

73. As to the comments made by the trial judge at para. 71 of her judgment, they are undoubtedly strongly worded. While judges will vary as to how they choose to address serious allegations in proceedings that they have found to be unproven, a litigant can hardly be surprised if a trial judge makes trenchant criticisms in relation to serious allegations made by one party to litigation against another, which the judge has found to be completely unfounded, and advanced (as they must inevitably be) for ulterior motives.

74. I have considered fully the comprehensive and detailed submissions of the appellant. The fact that I have not referred to every point advanced by her in these submissions, does not mean that the point has not been considered. Ultimately, the decision in this appeal has been arrived at on the basis of evidential shortcomings in the appellant's case. She advanced two grounds for her petition, duress and capacity, but she did not have sufficient evidence to establish even a *prima facie* case under either heading. In my view, the conclusions that the trial judge reached on the evidence were not just correct, but inevitable, and she was correct to dismiss the petition. It follows from these conclusions, that this appeal too must be dismissed.

75. As the respondent has been entirely successful in this appeal, my provisional view is that he is entitled to his costs both in this Court and the High Court. If the appellant wishes to contend for an alternative form of order, she shall have liberty to apply to the Court of Appeal Office within fourteen days for a brief supplemental hearing on the issue of costs. If such a hearing is requested and results in an order in the terms already proposed by the Court, the appellant may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.

76. Since this decision is being delivered electronically, Costello and Haughton JJ. have indicated their agreement with the decision.