

CONSENT TO MARRY UNDER ENGLISH LAW

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ABOUT THE SPEAKER AND AUTHOR

David Hodson is a family law dispute resolution specialist. He is an English solicitor (1978 and accredited 1996), mediator (1997), family arbitrator (2002), Deputy District Judge at the Principal Registry of the Family Division, High Court, London (1995) and an Australian (NSW) solicitor (2003) and mediator. He deals with complex family law cases, and with an international element.

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He was joint founder in 1995 of probably the world's first metropolitan practice to combine family lawyers, mediators and counsellors and with an emphasis on a conciliatory and holistic approach. It was subsequently copied in many practices across the world. He is past chairman of the resolution/Solicitors Family Law Association's Financial Provision Reform Committee, Training Committee and Good Practice Committee and founder member of its International Committee. He is a member of The President's International Committee. He is past vice chair of the UK College of Family Mediators, the umbrella organisation for family mediation. He is a member of the Chartered Institute of Arbitrators. He is co-author of "Divorce Reform: a Guide for Lawyers and Mediators", "The Business of Family Law" "Guide to International Family Law" and consulting editor of "Family Law in Europe". He is an Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Fellow of the International Academy of Matrimonial Lawyers, a past trustee of Marriage Resource and member of the Family Law Section of the Law Council of Australia and a member of the Lawyers Christian Fellowship. He is chair of the Family Law Reform Group of the Centre for Social Justice

He has written and spoken extensively on family law including many conferences abroad. Some papers and articles can be found at his web site below.

He is the author of "A Practical Guide to International Family Law", (Jordans July 2008), probably the leading textbook on international family law, of which part of this is an extract.

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The International Family Law Group is a specialist law firm providing services to the international community as well as for purely national clients. iFLG has a special contract with the Legal Services Commission for child abduction work and is regularly instructed by the UK Government (Central Authority). It acts for international families, ex pats and others in respect of financial implications of relationship breakdown including forum shopping and international enforcement of orders. It receives instructions from foreign lawyers and, as accredited specialists, acts for clients of other law firms seeking their specialist experience.

iFLG is situated in Covent Garden near the Law Courts. Its mobile telephone accessible website includes valuable information, podcasts, a government approved child abduction questionnaire and formulae as a starting point for calculating fair financial settlements. It has emergency 24 hour contact arrangements. Contact at www.iflg.uk.com

CONSENT TO MARRY UNDER ENGLISH LAW

Marriage/Wedding law and practice

Each person marrying in England in an English civil law ceremony must give their consent.

English marriage law derives significantly from the dramatic changes made by Lord Hardwicke's Marriage Act 1754 which laid the foundation for much of English marriage (and wedding) law and practice. Previously there were clandestine marriages, fraudulent marriages, under age marriages (12 and under), quite bizarre rural and pagan traditions instead of any formal vows, unqualified (unfrocked or even defrocked) officiating clergy and undoubtedly many forced marriages. The Act created and regularised the system of Banns which in part were to ensure an orderly minimum period before the marriage and the giving of public notice of the wedding in order to allow any objections. Consent was found in the period of notice and the public element of notice and openness of the ceremony.

In 1763, the minimum age was raised to 16 where it has remained although if either party is 16 and under 18, certain consents e.g. from parents, are required, s3(1)(A) Marriage Act 1949. Marriage to a person under 16 is void, section 2 Marriage Act 1949.

Failure to give "valid consent" ... "*whether in consequence of duress, mistake, unsoundness of mind or otherwise*" will lead to grounds for nullity of the marriage. It is voidable, s12(c) Matrimonial Causes Act 1973

England will recognise marriages entered into abroad provided first, that the form of the marriage was in accordance with local law and secondly, that each party had capacity to enter into the marriage according to the law of their anti-nuptial domicile: Dicey and Morris "Conflicts of Law" (14th Edition 2007) Rule 67 (1), "*capacity to marry is governed by the law of each party's ante nuptial domicile*". Consent is a matter of capacity to marry, see r 68 of Dicey and Morris, "*no marriage is valid if, by the law of either party's domicile, he or she does not consent to marry the other*".

The effect of this rule is that a marriage between two parties with different pre-marriage (ante nuptial) domiciles celebrated in a foreign country will be void (and not recognised) where the law of the ante nuptial domicile of one of them denies the individual the requisite capacity to marry, (Sottomayor (otherwise De Barros) v De Barros (No. 1) [1877] LR 3 PD 1). A marriage is normally invalid when either of the parties lacks, according to the law of his or her pre marital domicile, the capacity to marry the other.

Case law decisions

In Hussein (1938) P 159, it was found that the free will of the woman had been undermined by the repeated threats to kill her by the husband if she did not agree to the marriage.

In Buckland (1967) (1967) 2 AER 300, it was found that the man had only agreed to marriage due to his reasonably held fear of imprisonment in Malta if he had not gone ahead with the marriage.

Justifiable reasons for non-consent had to be very serious and invariably some threat of violence. Emotional distress was not enough. In Szechter (1971) P 286 the court said that it was "*insufficient to invalidate an otherwise good marriage that a party entered into it in order to escape from a disagreeable situation*". *The only ground for nullity was when the will of one of the parties was "overborne by genuine and reasonably held fear caused by threat of imminent danger ... to life, limb or liberty"*.

In Singh (1971) 2 AER 828 the court found that a 17-year-old girl who went through a arranged marriage out of respect for her parents and religion would have been willing to continue with the marriage had the man in question been, as promised, handsome and educated. Instead when she saw him for the first

time “*she did not like what she saw*” and therefore changed her mind. It was accepted as a marriage based on free consent.

The major change occurred in Hirani (1983) 4 FLR 232 where a 19-year-old Hindu girl entered into a marriage with a man previously unknown to her and she left him and the marriage unconsummated after six weeks. The appeal court held that the restrictive definition of duress no longer revolved around threats of physical violence. Her age and financial dependence on parents were relevant factors. The test was not only fear of life and liberty but “*whether the mind of the applicant victim has in fact been overborne, howsoever that was caused*”.

Other cases followed in England and Scotland such as Mahmood (1993) SLT 599 and Mahmud (1994) SLT 599, the latter being a 30-year-old man living apart from his family and not financially dependent upon them could still have his consent vitiated by pressure amounting to force, in this case that his persistent refusal to marry had brought about his father’s death and was bringing shame and degradation on his family.

Forced marriage legislation

S63A of the Family Law Act 1996, containing the forced marriage legislation introduced in 2007, provides as follows: (4) *For the purposes of this Part a person (“A”) is forced into a marriage if another person (“B”) forces A to enter into a marriage (whether with B or another person) without A’s free and full consent.*

This expression “free and full consent” derives from the Universal Declaration of Human Rights: “*Marriage shall be entered into only with the free and full consent of the intending spouses*”.

S63A(6) *In this Part—*

- “force” includes coerce by threats or other psychological means (and related expressions are to be read accordingly);

The legislation applies to marriages in England or abroad

Capacity

Consent is also an issue in the context of capacity to enter into a marriage. In KC v City of Westminster Social and Community Services Department (2008) EWCA 198, it was held that a 26 year old man with the mental capacity of a 3 year old was incapable of entering into a marriage conducted over a speaker telephone by him in England with the other party in Bangladesh at the time. The court said it had a duty to protect the man. This was despite the “marriage” having already taken place and it being valid under both Sharia law and Bangladeshi law. The marriage would have enabled the new wife to obtain a UK visa.

Arranged marriages

The courts have been quick to demonstrate an awareness of the difference between forced marriage without consent and arranged marriage with consent, even though at times the distinction may be a fine one. In Re SK (Proposed Plaintiff) (An Adult by way of her litigation friend) (2005) 2 FLR 230, Singer J said “ *there is a spectrum of forced marriage, from physical force or fear of injury or death in the most literal form, through to the undue imposition of emotional pressure which is at the other end of the forced marriage range, and that a grey area than separates unacceptable forced marriage from marriages arranged traditionally which are in no way to be condemned but rather supported as a conventional concept in many societies. Social expectations can of themselves impose emotional pressure and the grey area to which I had been referred is one way where one may slip into the other.*”

arranged may become forced but forced is always different from arranged”.

In NS v MI (2007) 1 FLR 444, Munby J described arranged marriages as “*perfectly lawful ... not merely to be supported but respected*” and “*a conventional concept in many societies*”. In contrast in respect of forced marriages where at least one does not consent to the marriage, he stated that such practice is “*intolerable ... an abomination ... the court must not hesitate to use every weapon in its protective arsenal if faced with what is or appears to be a case of forced marriage*”

Recent case law

In B v I (2009) (published under ref FD09F05012) the High Court held there was no consent when a young intelligent English girl of 16 was taken to Bangladesh and in effect kept prisoner in a bedroom by her family, dressed in formal clothing and made to go through a ceremony she thought was a betrothal. In fact under local law, it was a wedding. The court held that nullity was not available due to lapse of time. However on the evidence it was clear the bride did not consent so it was not capable of recognition.

In this case three years had elapsed before the application was brought before the court and therefore the opportunity for a petition of nullity had elapsed. Nevertheless the High Court granted a declaration under its inherent jurisdiction that the ceremony had not given rise to a marriage capable of recognition in the jurisdiction of England and Wales. It was said that the court had a duty to act fairly and to make declarations when they were fit to be made. The authorities establish that inherent jurisdiction was a flexible tool enabling the court to assist parties where statute law failed. The declaration in this form did not violate section 58 Family Law Act 1986 which prohibited a declaration under that Act or otherwise that a marriage was at its inception void.

In SH v NB (2009) EWHC 3274 a man born in Pakistan and a woman born in England of Pakistani origins went through a ceremony of marriage in Pakistan in 2001 when the man was 27 and the woman just 16. She returned to England a month later. The circumstances concerning the marriage were heavily disputed. She said she had been forced into the marriage against her will and without consent. She alleged physical violence by the father, emotional blackmail, pressure and death threats. A DVD of the ceremony showed her weeping copiously. The man however asserted that she had willingly and freely consented to the marriage and that they had lived as a happily married couple afterwards. Extensive evidence was given by the parties and other witnesses. The jointly instructed expert gave evidence that under Hanafi Islamic law, as well as under the applicable family law in Pakistan, a lawful marriage could only take place with the complete and absolute consent of both parties, free from any form of coercion or pressure whether physical, emotional or psychological.

The High Court decided that the question was whether the consent was real or was the result of threats, pressure or other means by which the will of the individual is overborne. It decided the woman was a more credible witness than the man on central issues and considerable weight to be given to her evidence. The independent evidence was strongly corroborative of her case. The woman had satisfied the court on the civil standard of proof that she had not validly consented to the marriage in that her free will had been overborne as a result of the pressure exerted on her.

Again there was no opportunity for a decree of nullity as more than three years had elapsed. It was said that section 58 of the Family Law Act 1986 prohibited the court from making a declaration that the marriage was void at its inception. It did not prohibit the court from making a declaration under section 55 of the Act that there was no marriage between the parties which was entitled to recognition as a valid marriage in England and Wales.

The case law on consent to marry will continue to develop, perhaps increasingly so with the context

of forced marriages. There is a wide spectrum between free, volunteered consent and violent force. Towards its extremes, lack of consent is easy to identify. However beyond the extreme cases, identifying lack of consent can be an issue and especially where it is strongly affected by family and community pressure. Whether consent has been overridden may depend on specific facts, although may have to be seen in the context of upbringing and family relationships. Alleging lack of consent several years after the marriage may not be fatal to a claim, especially if the person was young and unable to have their voice heard initially. Nevertheless outside the protective provisions of the forced marriage legislation and the more extreme cases, the courts will continue to be wary in finding a person did not really consent to their actions. More important is public education and awareness of marriage being a relationship freely and voluntarily entered into, within the context of community and the wider family

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