Case Notes

Ex parte Willis (1997) FLC 92 - 725

The recent decision of White J of the Family Court of Western Australia in *Ex parte Willis* (1997) FLC 92-725 raises, again, the issue of the age at which young people under the age of majority should be permitted to marry. It is provided, first, in s11 of the *Marriage Act* that, subject to s12, a person is of marriageable age if the person has attained the age of eighteen years. Section 12 (1) goes on to provide that a person who has attained the age of sixteen years but has not attained the age of eighteen years, "... may apply to a Judge or magistrate in a State or Territory for an order authorizing him or her to marry a particular person of marriageable age despite the fact that the applicant has not attained the age of 18 years." Section 12(2) empowers the judge or magistrate to hold an inquiry into the relevant facts and circumstances and may, in her or his discretion, grant the order sought if satisfied that, "(a) the applicant has attained the age of 16 years; and (b) the circumstances of the case are so exceptional and unusual as to justify the making of the order..."

In the *Willis* case, the applicant was aged seventeen, was pregnant and the evidence which had been placed before the magistrate was as follows: first, the applicant had left school in 1994 and had been working for two years. She had been in her present employment for ten months and had been offered further employment with the same employers after the birth of her child. The applicant was presently living with her mother. Second, the applicant's fiancé was aged 22, was employed by the same employer as the applicant and was currently acting in a managerial position. Third, the couple had been in a relationship for twelve months and were formally engaged; they planned to buy a particular unit and had saved almost sufficient for a deposit on it. They had already bought most of the furniture and household effects which they would need to set up home for themselves and their baby. Fourth, they had the support and

consent of both families, understood the commitments and responsibilities of marriage and wished to marry. Fifth, the parents of both consented to the marriage and believed that both were mature enough for the responsibility of marriage. Sixth, the wedding plans were at an advanced stage including deposits having been paid and caterers organised. The applicant had paid for her sister from New South Wales to attend. Finally, the applicant had bought a wedding dress which she had planned to wear at the wedding.

The magistrate had refused to make the order stating,[1] inter alia, that it had been held in earlier cases that, "... if the evidence is put during an inquiry which indicates that the marriage is likely to be a successful and happy marriage the magistrate or judge may be able say that it is out of the ordinary and that it is 'exceptional and unusual' as so may marriages of minors have been absolute failures. This is the group with which comparison is required to be made as part of considering the circumstances of the case." However, the magistrate seemed to regard that comparison as only being a part of the process as a whole and, having considered the totality of the circumstances, he concluded that they were not, notwithstanding the couple's love and affection for one another, *so*[2] exceptional and unusual as to justify the making of the order.

White J quashed the magistrate's order and remitted the matter for rehearing. The judge first (at 83, 783) referred to various decisions which related to s12 of the *Marriage Act*: *Re K* [1964] NSWR 746; *Re H (an infant)* [1964-5] NSWR 2004; *Re Z* (1970) 15 FLR 420 and *K v Cullen* (1994) 36 ALD 37. In all of those cases, the judge noted, the applicant was pregnant and it had been found that that fact did not justify a finding of exceptional and unusual circumstances as required by the legislation. The locus classicus of that view can be found in the judgment of Selby J in *Re K* [1964] NSWR 746 at 747 where he had stated that, "Any judge who has sat in the matrimonial causes jurisdiction of the court or in equity for the purposes of considering applications for orders of adoption must be well aware of the unfortunate fact that it cannot be regarded as exceptional or unusual to find that a 15 years old girl has become pregnant."

At the same time, in *Re K*, Selby J *ibid*, had commented that no guidance could be found in the Act as to what circumstances should be regarded as exceptional and unusual. That, of itself, though did not absolve courts from attempting to describe the meaning of those words. Hence, in *Re Z* [1970] 15 FLR 420 at 421, Joske J had said that, "... the legislation enables the judge to exercise his discretion in a case which appears to him to be 'out of the ordinary'. In considering whether a case appears to him to be 'out of the ordinary' it is proper to bear in mind that the object of giving the judge a discretion is to protect the institution of marriage so that it does not fall into disrepute and also to protect the

[1] Quoted by White J, (1997) FLC 92-725 at 83, 783.
[2] Author's italics.

particular parties who are seeking to marry, since the marriage of such young people is often subject to substantial pressures and frequently breaks down almost immediately or very soon after it takes place owing to these pressures." Joske J then continued by commenting that the legislation did not impose an absolute prohibition on such marriages and, therefore, if a judge is able to conclude, on the guidance, that the marriage is, "... likely to be a successful, happy marriage ..." then the judge is entitled to say that it is "out of the ordinary" and, hence, "exceptional and unusual". Those statements were adopted by Moore J of the Federal Court of Australia in *K* v *Cullen* (1994) 36 ALD 37 at 43.

That approval notwithstanding, one can only be a little disturbed, not by the equation of exceptional and unusual with out of the ordinary, but by the assumption that youthful marriages, are ex hypothesi, doomed to failure. Nevertheless, in both *Z* and *K* v *Cullen*, the initial orders refusing permission were set aside, though the contemporary status of *Z* is likely to be reduced as Joske J laid considerable emphasis, [1970] 15 FLR 420 at 424, on the avoidance of the stigma of illegitimacy. On the other hand, in *K* v *Cullen*, a factor which Moore J took into particular account, (1994) 36 ALD 37 at 44, was that the applicant already had a child, of which the proposed spouse was the father. In so doing, his Honour had stated that,

> "One purpose of the provisions of the Act limited the rights of a minor to marry is to ensure that minors do not commit themselves to marriage at an age when they are not sufficiently mature to understand and appreciate the responsibilities and obligations they would assume by marrying. It must be accepted, in my opinion, that some of the responsibilities that are still accepted in the community as an aspect of marriage are those associated with having and rearing children if that is desired by the married couple ..."

That last comment is of interest in that it reflects s43(b) of the *Family Law Act* 1975 which requires courts, when exercising jurisdiction under the Act, to have, "... regard to the family as the fundamental group unit of society, particularly while it is responsible for the care and education of young children." Section 43, as a whole, has not been as productive of controversy as it might have been thought generally,[3] but it does reflect an outlook on family structure and life which is of questionable anthropological validity. Although the provision does not, of course, apply to proceedings under the *Marriage Act*, the form of words used by Moore J in *K* v *Cullen* does suggest a penumbral rule for the provision.

In *Ex parte Willis*, White J. was additionally critical of the Magistrate's interpretation of s11 of the *Marriage Act* which he had read as meaning that it was a matter of considered policy that eighteen years should be the minimum marriageable age and that any departure from that minimum

[3] For comment on the provision's effect, see F Bates, "Principle and the Family Law Act: The Uses and Abuses of Section 43" (1981) 55 *ALJ* 181.

must be justified by weighty reasons. White J pointed out, (1997) FLC 92-725 at 83, 784, that, in fact, the age had been changed by means of an amendment to the Commonwealth *Sex Discrimination Act* 1991, as, previously, the age had previously been eighteen in the case of males and sixteen in the case of females. The change, his Honour suggested, was motivated by a policy of avoiding discrimination on the grounds of sex. With respect, that view is surely more than a little naive; effectively all societies delineate the age at which young people may marry for the reason which have been canvassed in the cases earlier discussed. The issue of gender discrimination would be obviated if the age were fixed at, say, fourteen for both female and male. The legislature did not, however, do so and elected to fix the age at eighteen which, of itself, suggests that the Magistrate's view was probably correct.

White J then went on to comment on the decision of Crockett J of the Supreme Court of Victoria in *Re an Application by P and P* [1973] VR 533. There, the judge had rather altered the emphasis which will have been apparent from the preceding discussion when he commented, *id* at 541, that the test should be whether the circumstances involved in a particular case were,

> "... likely to arouse in a substantial number of those with knowledge of the marriage, were it to take place, feelings of indignation or revulsion or abhorrence. No doubt emotional reactions or the likelihood of them cannot, ex hypothesi, be measured by reference to rational concepts but the judgment to be made will be more meaningful if made both by reference to what are believed to be relevant current community standards and beliefs and with some knowledge of the historical background of the prohibition."

White J, (1997) FLC 92-725 at 83, 785, adopted that particular test and was of the view that none of the circumstances which have earlier been outlined could give rise to the kind of reaction which Crockett J described. That is extremely difficult to gainsay, but it is surely similarly difficult to conceive of many factual situations which could not be comprehended by other statutory prohibitions. Crockett J, in *P and P*, took the view that the circumstances which existed there could well do so. It appeared that the female applicant had been the wife of the male applicant's son, which the judge regarded, [1973] VR 533 at 543, as raising serious difficulties. In Crockett J's ipsissima verba:

> "However, the position of the former husband and his children does, I believe, raise serious difficulties. In the first place he was supplanted in the female applicant's affections by his own father. The opportunity for this to be done arose from the father's admission to, and use of, the matrimonial home simply because he bore the relationship he did to those who lived in the home. His taking advantage of that circumstance to seduce his son's wife and usurp the place of that son in the home and in the affection of his children is an example of conduct the prevention of which has been said by those seeking to

rationalize divine law in secular terms to be one of the sociological justifications for prohibiting the marriage of close relations. This is the argument that the prohibition aids in maintaining the sanctity of the home and integrity of the family by preventing the consequences of competition for sexual companionship between members of the same household or family."

It will be apparent from that forcefully expressed dictum that *P and P* was not concerned with the marriage of minors but with the marriage of affines (that is, people related through marriage) to which similar constraints once applied to those now affecting minors. Those provisions were, however, removed by reason of s51 of the *Family Law Act* 1975[4] and marriage is now only prohibited between people in a direct ascent/descent relationship or brother and sister. In the very unlikely event of the circumstances replicating themselves (the female applicant would have had to have made two applications to the court), in the present context, would that fulfill the test? There is even some doubt as to whether Crockett J, [1973] VR 533 at 543, even correctly applied his own test to the facts of *P and P* when he stated that, "The fact that the applicants have been treated as anything but social pariahs is, I think, strong indication that the interests of public morality would be done no disservice if the applicants married." Quite apart from any other consideration, the facts in *P and P* would seem to be innately "exceptional and unusual".

It is suggested, in relation to *Ex parte Willis*, that the "revulsion and abhorrence" test laid down in *P and P* is not appropriate to decisions involving the marriage of minors. There may be those who would feel those emotions in relation to the very idea of teenage pregnancy, a fact which seems common to most of the cases. The test is both unrealistic and misleading. It might not have been when marriage between affines was discouraged - after all marriage of affines was both the causa causans and causa sine qua non of the English Reformation![5]

However, that was not to be the end of the relevance of *P and P* to the *Willis case*; later in the judgment, [1973] VR 533 at 538, Crocket J addressed the meaning of the word *so* as it applied to "exceptional and unusual". In *Re Z*, (1970) 15 F.L.R. 420 at 421, Joske J had said of that construction, "It is to my mind clear that the Judge must satisfy himself that the circumstances are exceptional and unusual so as to justify the making of the order." Crockett J was critical of that interpretation which, he considered, required no more than a finding that the circumstances were exceptional and unusual. His Honour noted that the word *so* was placed before "exceptional and unusual" which, he thought, qualified the formula "The plain meaning," he said, " of the individual words themselves offers little

[4] See presently Marriage Act 1961 s23(2). For comment, see H A Finlay, "Farewell to Affinity and the Calculus of Kinship" (1975) 5 *U Tas LR* 16.

[5] See GR Elton, *England Under the Tudors* (1955) ch V. For comment on affinity and its general legal context, see ES Turner, *Roads to Ruin : The Shocking History of Social Reform* (1950) ch V.

difficulty. To be exceptional the circumstances must be other than commonplace, that is out of the ordinary course ... But additionally ... the circumstances must be 'very' exceptional or 'extremely' exceptional ... Therefore are such that they are exceptional to such a degree as to allow a departure from the normal rule."

White J, (1997) FLC 92-725 at 83,785, took a strictly formalistic view in criticising Crockett J's interpretation of the formula : she considered that it would be ungrammatical to read the provision as meaning, "... the circumstances of the case are very (or extremely) exceptional and unusual as to justify the making of the order." On the other hand, one could substitute the word "sufficiently" without damaging the sense or grammar of the provision. It followed that the Magistrate had applied too strict a test.

On one level, *Ex parte Willis* seems to bear out Finlay's view[6] that, rather than giving the provision its literal meaning (whatever that may be), courts are permitting the marriage of minors when it seemed, all in all to make sense. But it is submitted that there is more to the *Willis* decision than an examination of the word "so" or, indeed, the test for applying the "exceptional and unusual" formula. There are issues which arise from *Willis* which are more fundamental to the notion of marriage than those, important as they doubtless were to the applicant.

The first matter which arises from the facts of the case is, given the socio-legal situation as it presently exists, why was the applicant so enthusiastic to marry? In *Re Z*, above, it will be remembered that Joske J had laid great emphasis on the stigma of illegitimacy. Such stigma, legally at least, no longer exists, and the issue certainly was not raised in *Willis* itself. Again, problems which once attached to extra-marital cohabitation have been evaded. In some respects, the attitude of the applicant in *Willis* seems to demonstrate a heartening attitude towards marriage itself. The English commentator Kennedy[7], some years ago, had written that,

> "Marriage developed in Western Society a complex overlay of social connotations. These involve the intangible yet very real personal and spiritual qualities the institution has come to represent. For it has come to pass that through marriage certain feelings are communicated by the partners to each other and, more important, to society at large. By going through a particular formality a qualitatively different posture is presented by the parties. They represent to the world that theirs is a relationship based on strong human emotions, exclusive commitment to each other and performance. Put another way, they wish to say and indeed advertise that there is nothing transient, superficial or casual in the way they view each other and wish to be viewed. The world is invited to see their's is a relationship in a very special way".

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6 HA Finlay, "The Unexceptional Exception" (1970) 1 *ACLR* 81 at 85.

7 I M Kennedy, "Transsexualism and the Single-Sex Marriage" (1973) 2 *Anglo Am L R* 112 at 129.

That it is suggested, is an important statement which holds as good today as it did when it was originally written. Its value is further emphasised by the continuing urge of couples to whom marriage is presently denied - such as gay men and lesbian women - to have their relationships formalised.

The issue of the extension of the nation of "family" in law has been taken up with some enthusiasm by Nicholson CJ of the Family Court of Australia in a recent address.[8] Hitherto, there has been a definition of marriage accepted in both case law (see *Hyde* v *Hyde and Woodmansee* (1866) LR 1 P & D 135) and statute (see *Family Law Act* 1975 s43 (a)) but there is no generally accepted description of "family"[9] In the context of the *Family Law Act*, the furthest one can go , hitherto, is Nygh J's comment in In the *Marriage of Mehmet (No 2)* (1987) FLC 91-801 at 76, 064 that the word was, "... clearly a reference to what has been described as the nuclear family." Traditionally, the nuclear family has been described as being represented by, "... a married man and woman with their offspring, although in individual cases one or more additional persons may reside with them." Hence, the applicant's very application in Willis would seem to represent a strong adherence to the traditional model.

Another adherent of the traditional model is Maley,[10] who, though, approaches the matter from a very different perspective. The benefit of marriage, he seems to suggest,[11] lies in the presumption of its permanence and include,

> "... continuity of exclusive sexual enjoyment, constant companionship, mutual care, a jointly supported household, the advantages of some division of labour, children, cooperative and stable rearing of children, and joint endeavours to advance their interests. None of this is possible without emotional commitments and joint investments of time, effort and money. One partner's investments can be rendered nugatory by failures of performance, or the active hostility, of the other partner. Such risk may be reduced, if not eliminated, by marriage vows carrying enforceable penalties or compensation for non-performance."

Maley does elaborate on the latter part of that statement at a later stage in the book which, broadly, reaches the conclusion[12] that marriage , with a presumption of permanence and its public exchange of promises of mutual care and service, must be taken seriously as a contract and behaviour which breaches that contract must be effectively penalised.

It is hard to say whether Maley's model would be especially attractive

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8 Nicholson C J, "The Changing Concept of Family" (1997) 11 *Aust J Fam L* 13.

9 See F Bates, "Does the Family Have Legal Functions?" (1975) 1 *Canadian J Fam L* 455; A Dickey, "The Notion of 'Family' in Law" (1982) 14 *U W A L R* 417.

10 B Maley, *Marriage, Divorce and Family Justice* (1992).

11 *Id* at 19.

12 *Id* at 51.

to people generally and it is certain that the prospect of marriage, as such, was more attractive to the applicant in *Willis* than was cohabitation, even with much of the stigma removed. It should also be remembered that, in Western Australia, there is no specific law which deals with property distribution on the breakdown of a de facto relationship (cf the New South Wales, *De Facto Relationships Act* 1984) with the result that determination is made on the basis of property law and equitable principals. This factor might help to ensure litigation in the event of a breakdown and reduce predictability. That, surely, cannot have been a factor in the applicant's decision! The reality of the situation was wisely and appositely stated by Diplock LJ, as he then was, in *Ulrich v Ulrich* [1968] 1 WLR 180 at 188,

> "When ... young people pool their savings to buy and equip a home or in acquiring any other family asset, they do not think of this as an 'ante-nuptial' or 'post-nuptial' settlement, or give their minds to legalistic technicalities of 'advancement' and 'resulting trusts'. Nor do they normally agree explicitly what their equitable interest in the family asset shall be if death, divorce or separation parts them."

Is that as it ought to be? It is so clear as not to need documentation that marriage is a social institution which gives rise to considerable expectations and it may be that one reason why the rate of marriage failure is sadly high may lie, as Reed has suggested,[13] in the very failure of those expectations.

In the end, what *Willis* tells us is not merely that, perhaps, courts are adopting a less inflexible attitude to the provisions of the *Marriage Act* which relate to the marriage of minors, but that formal marriage remains a dynamic institution. As such, it needs to be continually thought about in all of its socio-legal facets - just as the applicant in *Willis* was doing.

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[13] A Reed, *The Woman on the Verge of Divorce* (1970) at 8.