EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 169 OF THE FAMILY PROCEEDINGS ACT 1980, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT ROTORUA

FAM-2015-063-000301
[2016] NZFC 7294

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	MAXINE FULLER Applicant
AND	NICHOLAS DRAPER Respondent

Hearing: 24 August 2016

Appearances: Applicant appears in Person
No appearance by or for the Respondent
P McGuire as Counsel to Assist

Judgment: 24 August 2016

ORAL JUDGMENT OF JUDGE A E SOMERVILLE

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[1] The applicant seeks a declaration that the marriage which took place on 23 July 2006 between the applicant and the respondent is void ab initio. The application is made pursuant to s 31(1)(a)(ii) Family Proceedings Act 1980.

[2] The applicant is unrepresented but has a support person with her. She has filed three affidavits: one in August 2015 which included an affidavit in support of an application to dispense of service, and the other two affidavits on 23 October 2015 and 20 January 2016, in support of her application.

[3] Today, counsel to assist, Ms McGuire, appointed to support the Court and has asked questions in relation to the application.

[4] The respondent has filed a notice of defence in November 2015 and then he filed an affidavit in response on the same date. Also in support of the respondent is an affidavit by a Mylie Coal filed on 27 August 2015. Neither the respondent nor his witness have taken part in these proceedings because when the respondent did not engage on 10 August 2016, his defence was struck out for want of prosecution, and this matter was then adjourned to a 30 minute formal proof. However, the matter has taken the morning to hear.

[5] The background to the applicant seeking a declaration that her marriage to the respondent is declared void ab initio is that she says she was forced to go through a pretend marriage ceremony with the respondent who was in a relationship with her but also her employer, and this was to assist him in pleasing his sick mother. She argues that the marriage was carried out without the required witness and the marriage certificate was fraudulent because it falsely said one of the witnesses was present when she was not. She further states that the place of ceremony in the [overseas location deleted] had been deregistered and banned from practising in Nevada.

[6] She states in her affidavit that the pair were in [overseas location deleted] with the intention of having a pretend marriage ceremony to show photos to the respondent's mother. At the Love Chapel, she says a Ms Webster said it was silly to have a pretend wedding and the papers should be filled in. It was Ms Webster, the

applicant says, who insisted they fill out the papers and said there was no need to file them with the registry.

[7] The ceremony was carried out the next day and it is argued that Ms Webster was not present and the parties explained to another staff member that they were only having a pretend ceremony and the staff member confirmed this. This is the evidence of the applicant.

[8] The applicant received a marriage certificate attached to an affidavit sworn by the respondent on 12 August 2014. The applicant says that was the first time she became aware that the marriage certificate had been lodged. She also asserted that the respondent entered false answers on his application form saying he had been married twice before when he had actually been married three times.

[9] She argues that the grounds for declaring the marriage void are made out in s 29(a) and s 30 and s 31(1)(a)(i) and (ii) Family Proceedings Act on the grounds that:

(a) There was duress on behalf the respondent and the chapel owner to complete the application.

(b) There was deception on behalf of the respondent in approving the filing of the marriage certificate.

(c) The marriage certificate was not witnessed by the appropriate person whose stamp appears on the certificate of marriage who was not present at the time of ceremony nor had she signed the marriage certificate as required by the State of Nevada.

[10] In reply, the respondent states that he denies the allegation in the applicant's affidavit. He states that if her version of events is accepted, then the engagement and wedding rings which cost him a lot of money, were obtained under false pretences and should be returned to him. He also refers to the allegedly false answers in the application form and says that it was the applicant who filled out the form as he was

poor at reading and writing. He annexed an affidavit from Mylie Coal which says there was an engagement party between the couple before they left to go to [name of country deleted].

[11] The applicant then filed a further affidavit which disputed these allegations.

[12] The general principles in relation to declaring a marriage void is a prima facie presumption that consent has been given and the onus of the proof rests with the applicant seeking to impeach the marriage. Section 29 Family Proceedings Act 1980 states that an application for an order declaring a marriage void ab initio can be made only when the applicant or respondent is domiciled or resident in New Zealand or where the marriage was solemnised in New Zealand. The applicant and respondent are domiciled in New Zealand so there is jurisdiction for the Family Court under s 30 to hear and determine the application under s 9.

[13] Section 31 sets out the grounds for declaring a marriage void ab initio. It states that it can only be void where:

(a) At the time of the solemnisation of the marriage either party was already married. That is not the situation because both parties had their marriages dissolved.

(b) By reason of duress, mistake or insanity or any other reason, there was at the time of the marriage an absence of consent by either party to the marriage to the other party, or that the parties to the marriage are within the prohibited degrees of relationship set out in Schedule 2. That does not apply here.

[14] So the main issue for this applicant is the issue of duress.

[15] The further ground under s 31(1)(b) is in the case of a marriage, the parties knowingly or wilfully married without a marriage licence or in the absence of a marriage celebrant or registrar of marriages in contravention of the Marriage Act 1955.

[16] The onus of proof based on the balance of probabilities, rests on the applicant seeking to impeach the marriage and she has been cross-examined in relation to this matter. There is no specific case law in such a case as this but the case law, and I refer to *SS v SK* [2011] NZFLR 1030, the criteria under s 31(1)(a)(ii), three factors must be present:

(a) A reason advanced in support of the application to declare the marriage void ab initio.

(b) The reason must be in existence at the time of the marriage.

(c) The reason must have resulted in the absence of consent by either party to the marriage.

[17] There are a number of cases which have been analysed and considered so that there are principles that have emerged:

(a) The emotional commitment to a marriage is not a precondition in law for the marriage to be valid.

(b) The party may have an underlying motive for marriage which is not disclosed to the other. Unless that motive has the effect of overriding the other party's will, it will not meet the high threshold required.

(c) The absence of consent must exist at the date of marriage not arise later.

(d) The weight of case law in situations where immigration status is the driver does not support a finding the marriage should be annulled.

(e) An allegation that the marriage is a sham will not be sufficient to declare the marriage void ab initio if the parties knew they were taking part in a marriage ceremony intended to marry each other and understood what was involved in the ceremony.

(f) People marry for a variety of reasons and there may be underlying and different expectations for either party. Consent for those expectations is not necessarily a prerequisite to marriage. An understanding of the ceremony and consent to the marriage is.

[18] So there are a number of principles that I am referring to as guidance in the matter of this application.

Background

[19] The background of the parties' relationship is indicative as to whether the applicant understood that this was to be a real marriage or a pretend marriage.

[20] The parties have known each other since 2004. There was some confusion in the evidence of the applicant as to when the relationship began. She said in her affidavit evidence that the relationship began in 2006 but that evidence was contradicted in her cross-examination evidence today which showed that the relationship began in 2005.

[21] It was identified that the parties were in a relationship by an agreement which was signed by the parties in relation to a relationship property agreement. That agreement was made on 19 June 2006. In the background in the agreement it was noted the parties had been in a relationship for 16 months and they were to commence living together from 16 July 2006 at the property at [address deleted], Christchurch.

[22] It is now accepted by the applicant that they had been in a relationship from the beginning of 2005 which was 16 months prior to the signing of the agreement. Although the applicant said they were in a friendship relationship only, the fact that they had entered into a relationship property agreement, which clearly set out they had been in a relationship for 16 months, goes against that evidence. There has been no application to Court to set aside that agreement and that agreement has been used as a basis for discussions in relation to relationship property. The relationship

property between the parties has now been settled, so there is documentary evidence to say that the parties were in a relationship.

[23] It was also accepted by the applicant that by 30 June 2006 the parties were engaged. It is accepted that on 17 June the respondent proposed and the applicant accepted that proposal and by 19 June 2006 they had executed their property-sharing agreement.

[24] The parties arranged to travel overseas to [name of country deleted] to see the respondent's son. The applicant says that while they were away, they arranged to go to [overseas location deleted and to have a pretend wedding, and that was in order for there to be photographs for the respondent's mother.

[25] The parties then flew to Los Angeles during their holiday overseas and on the first day they signed an application and an affidavit which specifically referred to an affidavit for application for a marriage licence. That was signed on 22 July 2006, and it is accepted by the applicant that she signed that together with the respondent.

[26] The affidavit of application sets out the names of the parties, their residence, their dates of birth, their state of birth, their marital status and refers to marriages previously. It seems that both parties said that this was their second marriage although it is accepted that the evidence from the applicant is that the respondent had been married twice before. That does not seem to be an issue in terms of the application. The application also says the affidavit which was witnessed by a county clerk, that:

> We, the bride and groom named above, each respectively state that the foregoing information is correct to the best of our knowledge and belief and that no legal objection to the marriage nor the issuance of a licence to authorise the same, is known to us.

[27] And the affidavit was sworn.

[28] It is the evidence of the applicant that she did not consider that that was a true application and it was still the pretend matter. However, previously I note that the applicant has been married and she would have filled in a New Zealand marriage

certificate which also would have set out the full names, the profession, the residential address and if there was other information in relation to previous marriages.

[29] The applicant has also signed a number of affidavits in relation to applications before the Court and there is no reason for me to believe she does not understand what an affidavit is and how serious that matter is.

[30] Because the parties had arranged this marriage, they were originally collected from their hotel and transported to the chapel, they filled out the application and then they were collected and transported again the next day. Although the applicant says she was reassured that this was a pretend wedding, clearly she should have been concerned that she had signed this affidavit which set out that it was for a marriage. The next day, the parties went through the ceremony. There was an issue about the witness who was not there at the time. However, there has also been case law in relation to that, whether the marriage ceremony was considered to be official namely *H v V* [2007] NZFLR 428.

[31] In *H v V*, it was noted that the fraud must be which goes to the heart of consent for the marriage to be declared void. In that case, the husband had taken a false name and that was not considered sufficient fraud as it did not go to the heart of consent.

[32] There is clearly confusion about the background of the relationship and that was made clear about the evidence of the applicant in her reply when she was confused when the relationship began. She has not provided any evidence to the Court of the details of the trip to support her argument that this was an issue which was a pretend wedding and that was the reason they went to [overseas location deleted]. The question was put to her why did she not just hire a costume rather than go through the ceremony. There is nothing to suggest to this Court that the applicant understood that this was a so-called pretend ceremony.

[33] So there is no evidence on what the specific plans were for the trip. There is no evidence of any tickets or itinerary. The only evidence I have before me is the

evidence of the applicant which is not supported. The onus of proof is on her. This Court has no evidence that it was pretend wedding and should be void ab initio to support the applicant's arguments. It has now been shown that she accepts her evidence has at times been wrong in her affidavit evidence after cross-examination.

[34] Prior to travelling overseas there was affidavit evidence of an engagement party although the applicant refers to this as a farewell party and says that that engagement party was when she returned, not beforehand. However, there is no evidence from her friends or family to support this.

[35] The applicant argues that the respondent lied, that his affidavit witness lied and that any of the respondent's evidence before the Court is untrue. I am unable to test the respondent's evidence because he has not taken part in this proceedings and his defence was struck out. I am told by the applicant that she is not happy about the relationship property agreement and the result of negotiations she alleges the respondent filed false application and she intends to make a complaint to the police about the respondent and his solicitors. She did not file any information in relation to these arguments.

[36] The applicant was in a relationship with the respondent and I do not accept that the relationship was just that of a friend. They made the trip overseas together. There is no evidence for me to declare that the marriage should be void ab initio. There is not sufficient evidence for the test to be met on the balance of probabilities. I consider that the applicant did consent and that consent is not vitiated and there was a ceremony that the parties went through. It is only retrospectively that the applicant has wanted to find reason for that to be made void and that is in relation to the issues around relationship property and the issues around her clear disappointment about the relationship and so today the application is dismissed.

A E Somerville
Family Court Judge

ADDENDUM:

Following my oral decision the applicant made an oral application to have the marriage dissolved. I found the grounds were made out and made a minute to that effect. The dissolution was granted.