Who is the true wife ? The recognition of overseas marriage and divorce.

In *Uchechukwu-Onwukibo v Onwukibo and others* [2023] EWHC 2812 (Fam) the Family Division of the High Court had to determine whether the applicant (Mrs Ezinine Uchechukwu-Onwukibo) or the first respondent (Mrs Ihedinma Onwubiko) was the ‘true wife’ of Mr Onwukibo who was found dead on 21st September 2021. The parties and the deceased originated from Nigeria, where both marriages were celebrated, but as all three were habitually resident in England and Wales when Mr Onwubiko died, the matter was brought before the High Court. This article examines the facts and judgment of the case and highlights the implications for the women concerned.

Facts

The first respondent had married Mr Onwukibo in Nigeria in September 1993: she was his second wife. They were married ‘according to the native law and customs of Isingwu Community in Umuahia North Local Government Area of Abia State’ in Nigeria (para [26]) i.e. it was a valid customary marriage, rather than a civil or statutory marriage which is formed in accordance with the Marriage Act 1990 (Nigeria). The second and third respondents are the daughters of the deceased and his second wife. The respondents were granted leave to enter the UK as dependents of the deceased in June 1999. By mid-2000 the relationship had broken down and the deceased did not see his children for many years.

The applicant married Mr Onwukibo in 2009 ‘under the civil and traditional laws of Nigeria’ (para [24]): she was his fifth wife. According to the applicant, the deceased had assured her that he had divorced his four previous wives before they wed in 2009 (para [24]). Indeed, Mr Onwukibo could not have married her under the civil law of Nigeria (S 35 Marriage Act 1990 and s 3(1(a) Matrimonial Causes Act 2004) if any of his previous marriages were subsisting at the time (para [131]). The deceased informed the British High Commission that he was divorced in order to secure the fifth wife’s entry into the UK in 2010 (para [61]). He had also previously sent a variety of documents to the Home Office, which indicated that he had divorced his second wife, as he was keen to prevent the latter from remaining in the UK (para [117]). Mrs Justice Arbuthnot accepted that the fifth wife genuinely believed that ‘she had been lawfully married to the deceased’ (para [57]).

The fifth wife and the deceased separated in 2018, divorce proceedings were commenced, and the applicant obtained a decree nisi. Mr Onwukibo did not dispute the validity of his marriage to the fifth wife at any stage of the proceedings. A financial remedy hearing was scheduled to take place in October 2021, but Mr Onwukibo died on 21st September. On 8th October 2021 the second wife informed the Coroner’s Office that the fifth wife was not the deceased’s next of kin because his second marriage had never been dissolved.

The fifth wife requested a declaration from the Family Division of the High Court that her marriage was valid; that the marriage to the second wife (the first respondent) was not subsisting when Mr Onwukibo died and that she (the fifth wife) was the surviving spouse and next of kin. The respondents applied to the Chancery Division of the High Court for an interim order permitting them to act as next of kin and requested a declaration that the second wife was the only widow. These proceedings were transferred to the Family Division of the High Court. The final hearing took place on 26th and 27th May 2022 and a draft judgment, declaring the second wife to be the ‘true wife’ was sent to the parties on 28th June 2022. Shortly after, the fifth wife successfully applied to reopen proceedings as new evidence had come to light, including a purported judgment from the Nkwoegwu Customary Court dissolving the second marriage.

In essence, the applicant argued that the marriage between the deceased and the second wife was lawfully dissolved in Nigeria. The first respondent refuted this and further asserted that the deceased’s marriage to the applicant was dissolved in 2019. The case was complex as, according to Mrs Justice Arbuthnot, there was ‘little reliable evidence to go on’ (para [97]). ‘With each new piece of evidence produced by one party, the other party alleged forgery and corruption. It was increasingly difficult to get to the truth’ (para [144]). However, the burden of proof rested on the applicant to prove on the balance of probabilities that the marriage of the deceased and second wife had ended by valid divorce (para [31]).

Relevant law

The applicant’s case was based on the assertion that the deceased had divorced his second wife in Nigeria in 2002: s 45 of the Family Law Act 1986 (FLA), which provides for the recognition of overseas divorce, was thus relevant. The grounds for recognition are set out in s 46. Section 46(1) states that a divorce obtained by proceedings shall be recognised if it is effective under the law of the country in which it was obtained and at the relevant date, either party to the marriage was habitually resident in the country in which the divorce was obtained or domiciled in that country or a national of that country. In this case, the deceased and his second wife were nationals of Nigeria ‘at the time of any possible divorce’ (para [28]). If it was established that a valid divorce by proceedings (i.e. a judicial divorce) had taken place, it would therefore be possible for the High Court to recognise the divorce under s 46(1).

Under s 46(2) FLA a divorce, otherwise than by proceedings, shall be recognised if it is effective under the law of the country in which it was obtained and at the relevant date, each party to the marriage was domiciled in the country in which it was obtained or either party was domiciled in that country and the other was domiciled in a country that would recognise such a divorce as valid and neither party to the marriage was habitually resident in the UK throughout the period of one year immediately preceding the date of the divorce. As indicated earlier, the deceased married the first respondent in accordance with customary law. Mr Nsugbe KC (the single joint expert appointed to the case) explained that the customary marriage could be dissolved judicially (through the Customary Courts) or non-judicially (unilaterally or by mutual agreement provided that the dowry was returned) (para [82]). If the marriage between the deceased and his second wife was dissolved by non-judicial means, the divorce could not be recognised under s 46(2) FLA as both parties were habitually resident in the UK at the relevant time (para [28]).

If the applicant was not able to establish on the balance of probabilities, that the marriage to the first respondent had been lawfully dissolved, her marriage to the deceased would be void under s 11 of the Matrimonial Causes Act 1973 (MCA). Section 11(b) provides that a marriage is void if at the time of the marriage, either party was already lawfully married or a civil partner. Section 11(d) MCA (inserted by the Private International Law (Miscellaneous Provisions) Act 1995) goes on to state that in the case of a polygamous marriage entered into outside England and Wales, a marriage is void if either party was at the time of the marriage domiciled in England and Wales. Polygamy is lawful in Nigeria under customary law, but as the deceased was domiciled in England and Wales when he married the applicant, the marriage would be void under s 11(d), even if it was valid in Nigeria.

The judgment

Having carefully considered the evidence presented, Mrs Justice Arbuthnot concluded that the fifth wife had ‘not discharged the burden of proving that there was a divorce between the deceased and his second wife’ (para [169]), because ‘no certificate of divorce had been found in the deceased’s records, nor was there a clear reference to a divorce having taken place’ (para [143]). Had there been a judicial divorce through the Customary Courts, the deceased would have been able to produce evidence of this (para [168]). The following declarations were therefore made: ‘The marriage of the deceased and the second wife never ended in a divorce. The marriage of the deceased and the fifth wife was not a valid marriage. The second wife is therefore the surviving spouse and the next of kin of the deceased’ (para [175]).

Implications for the second and fifth wife

The High Court indicated that being declared the deceased’s surviving spouse and next of kin ‘would lead to the grant of a Letter of Administration in respect of the estate of the deceased, an entitlement to act as the deceased’s next of kin and to take custody of the deceased’ body for burial and power to decide on funeral arrangements’ (para [4]). The term ‘next of kin’ has no legal basis and is not utilised in legislation concerning the administration of estates on death. It is often used to refer to a person’s closest relatives, which is assumed to be their spouse or civil partner. Indeed, legislation concerning inheritance and the administration of estates places the spouse or civil partner at the top of the hierarchy of relatives.

Rule 22(1) of the Non-Contentious Probate Rules 1987 entitles the deceased’s relatives to apply for a grant of administration if he or she died wholly intestate (i.e. without leaving a valid will), with thesurviving spouse (or civil partner) taking priority. Although more than one person can apply for a grant and there may be more than one person in a class of potential applicants (e.g. the children of the deceased), the judgment in *Uchechukwu-Onwukibo v Onwukibo and others* suggests that there can only be ‘one true wife’ for the purpose of obtaining a grant of a Letter of Administration: in this case, the second wife. The position is different if a polygamous marriage is valid in the place of celebration and according to the law of the parties’ country of domicile. In *Kelly-Lambo v Lambo* [2022] EWHC 2672 (Ch) the Chancery Division of the High Court indicated that it was possible to grant Letters of Administration to two surviving polygamous spouses but in this instance, the court exercised its power to pass over the first wife’s claim and make a sole grant to the second wife, with whom the deceased was living at the time of his death.

The surviving spouse also takes priority under s 46 of the Administration of Estates Act 1925 (AEA) which deals with intestate succession. If the deceased is survived by a spouse or civil partner, but no children or grandchildren, the spouse or civil partner inherits the residuary estate (s 46(1) AEA). If the deceased is survived by a spouse or civil partner and children, as in this case, the spouse or civil partner takes any personal items (chattels), a statutory legacy (£270,000 since the Administration of Estates Act 1925 (Fixed Net Sum) Order 2020 No.33) and half of any remaining sum. The other half is inherited by the children (s 46(2)). In *Official Solicitor to the Senior Courts v Yemoh* [2010] EWHC 3727 (Ch) Benjamin Yemoh, domiciled in Ghana, died intestate leaving property and bank accounts in the UK. He was survived by eight widows whose marriages were recognised under Ghanian customary law and many children. Because the deceased married in Ghana in accordance with the law of his domicile, the Chancery Division held that all wives were surviving spouses for the purpose of s 46 AEA. The surviving wives would share the ‘single statutory legacy’ (para [21]) (See Gaffney-Rhys, 2011 ‘The Legal Response to Polygamous Marriages in England and Wales’, *IFL*, November 319-322 for discussion). *Yemoh* would not apply to Mr Onwukibo’s situation because the latter was not domiciled in Nigeria when he married the fifth wife. The judgment indicates that the deceased’s estate consisted mainly of a flat (para [1]), the value of which is not specified. It is likely that the second wife will inherit the bulk, if not all, of the deceased’s estate. As Mrs Justice Arbuthnot pointed out, ‘the loser in this was the fifth wife’ (para [174]): her financial position would have been considerably better if Mr Onwukibo was domiciled in Nigeria at the time of their marriage.

The question that follows is whether the fifth wife would be eligible to make a claim under the Inheritance (Provision for Family and Dependents) Act 1975 (IPFDA). This legislation enables family members and dependents to make a claim against the deceased’s estate if his or her will or the law of intestacy has not made reasonable financial provision for them. The first relative on the list is the surviving ‘spouse or civil partner of the deceased’ (s 1(1)(a) IPFDA). Section 25(4) indicates that ‘any reference to a spouse, wife or husband shall be treated as including a person who in good faith entered into a void marriage with the deceased’ unless the marriage was dissolved or annulled during the deceased’s lifetime, which would seem to cover the fifth wife as she genuinely believed her marriage to be valid. The Law Commission Report that preceded the legislation confirms that the effect of the provision is ‘that in some cases, (for example, in the case of a bigamous marriage by the deceased) two or more persons may be eligible to claim reasonable financial provision from the estate and that an award made to the “spouse” of a void marriage might reduce the amount available for the actual spouse and children’ (*Second Report on Family Property: Family Provision on Death,* Law Com No. 61 para [29]). The fifth wife should, therefore, be able to submit an application as ‘a surviving spouse’, which is preferable to claiming as a person who lived with the deceased for a period of two years prior to the death (s 1(1A)) or a person who was being maintained by the deceased immediately before death (s 1(1)(e)). A surviving spouse will receive an award based on what is ‘reasonable in all the circumstances for a husband or wife to receive, whether or not that provision is required for his or her maintenance’ (s 1(2)(a)), whereas other successful applicants will be awarded ‘such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance’ (s 1(2)(b)). Although this is good news for the fifth wife, the factors that the court must consider under s 3(1) when hearing an application for financial provision may limit the award. This includes the financial resources and needs of any beneficiary of the estate (s 3(1)(c)) i.e. the second wife (and possibly her daughters) and the size and nature of the net estate (s 3(1)(e)). The judgment suggests that neither the fifth nor second wife were wealthy, describing their resources as ‘small’ (para [143]). The deceased’s property consisted mainly of one flat: the size of his estate does not therefore appear to be significant. Based on this, provision for the fifth wife is unlikely to be considerable, but will improve her financial position and importantly, recognise her as ‘a surviving spouse’ (albeit one whose marriage is void). The fifth wife should also be advised that an application must be submitted within six months of the Grant of Administration (s 4).

What if Mr Onwukibo had not died before the conclusion of divorce proceedings ?

As explained above, Mr Onwukibo did not dispute the validity of his fifth marriage at any point during the divorce proceedings. Had he not died in September 2021, proceedings may have been concluded with a fair financial settlement to the fifth wife. If Mr Onwukibo *did* raise the matter, a nullity of marriage order may have been granted under s 11(d) of the Matrimonial Causes Act 1973. *Padero-Mernagh v Mernagh* [2020] EWFC 27 is a recent example of the validity of marriage being raised by a husband during divorce proceedings. Since the Matrimonial Proceedings (Polygamous Marriages) Act 1972, any party to a polygamous marriage can claim financial provision in the English courts (provided that the court has jurisdiction to hear the case). The court would consider all the circumstances (s 25(1) MCA) and the factors listed in s 25(2) MCA including, the parties’ financial needs and resources, Mr Onwukibo’s financial obligations to the second wife and possibly his conduct. Reported cases concerning the relevance of bigamy in the context of a financial provision application tend to focus on whether a bigamist can apply for financial provision. For example, in a recent judgment (*PF v QF* [2024] EWFC 10(B)) the Family Court refused to strike out a ‘wife’s’ application for financial provision on the ground of her bigamy (based on *Whiston v Whiston* [1995] Fam. 198). The judge indicated that ‘such conduct will fall to be considered, *if at all*, under s25(2)(g)’ (para [93]). Whether the courts would be more generous than they would otherwise be, towards a woman who believes that she is lawfully married, is unclear. However, Lowe et al suggest that it is preferable to use the criminal law or where appropriate, immigration rules, to penalise those who knowingly enter bigamous marriages, rather than family law (Bromley’s Family Law, 2021, OUP, p 59).

The criminal law

If the circumstances of Mr Onwukibo’s marriages had come to light during his lifetime, the matter may have been reported to the police, because bigamy is a criminal offence under s 57 of the Offences Against the Person Act 1861. An offence is committed even if the second marriage takes place overseas, but not if the first spouse has been continually absent for seven years and was not known to be living during that time. Although s 57 makes no reference to mens rea, it is accepted that knowledge or intention is required. For example, in *R v King* [1964] 1 QB 285 the Court of Appeal stated that an honest and reasonable mistake that the first marriage was void negated the mens rea requirement under s 57 and was therefore a valid defence to a bigamy charge. In *PF v QF* the Family Court accepted that the wife believed that she was divorced and thus declared that she did not ‘commit bigamy, (an offence which requires mens rea/intent)’ (para [16]). Mr Onwukibo may have genuinely believed that his second marriage had been dissolved, as his father had sworn an affidavit that a divorce had been obtained in Nigeria. However, he presented the Home Office with a forged decree absolute, which would have operated against him. It should be noted that prosecutions for bigamy are rare: as Cox explains, it is ‘an uncommon crime, no longer regarded as a major threat to the institution of marriage (Trying to get a good one: bigamy offences in England and Wales, 1850-1950, 2012 *Plymouth Law and Criminal Justice Review* p1). In 2021, 58 crimes of bigamy were recorded by the police in England and Wales, but very few resulted in a prosecution, often because it was not in the public interest to pursue the matter (FOI Request, T. Mack, 2022. <https://www.leicestermercury.co.uk/news/leicester-news/police-reveal-how-many-cases-7250225>). A recent example of a successful criminal prosecution occurred in 2023: Jason Hayter pleaded guilty to bigamy and received an eight-week suspended sentence having ‘comprehensively deceived’ two ‘wives’ and five children. He travelled between the UK and Germany, where the two families were based, each unaware of the existence of the other (<https://www.bbc.co.uk/news/uk-england-norfolk-67566859>). His cruel and deceptive behaviour justified a criminal prosecution. Mr Onwukibo’s conduct was, arguably, not as grave.

Conclusion

*Uchechukwu-Onwukibo v Onwukibo and others* illustrates the complex nature of international family law cases, particularly those involving marriages celebrated in countries that permit polygamy and the non-judicial dissolution of customary marriages. The outcome of the case was that the marriage between the deceased and his second wife never ended in divorce and the marriage to the fifth wife was not valid. But that is not the end of the matter: the fifth wife may pursue a claim under the Inheritance (Provision for Family and Dependents) Act 1975. The discussion has demonstrated that the fifth wife’s position would have been different if Mr Onwukibo had been domiciled in Nigeria when he married or if he had survived beyond the conclusion of divorce or nullity proceedings. The rights of a polygamous wife are therefore dependent on a variety of factors, beyond her control.