

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA
(MATRIMONIAL)

DOMHMT2015/0074

BETWEEN:-

MYKE BREZHNEY HAMILTON

Petitioner

And

MARTINA HAMILTON NEE TOUSSAINT

Respondent

Appearances: Mr David Bruney for the Petitioner
Mrs Dawn Yearwood Stewart for the Respondent

2016: April 14
May 6, 20
November 21

JUDGMENT

- [1] **STEPHENSON J:** The sole ground for divorce in Dominica is the irretrievable breakdown of marriage but the court cannot make a finding of irretrievable breakdown unless it is satisfied as to one of the five facts set out in the s 1(2) of the Matrimonial Causes Act 1973.
- [2] Before the court is a contested application for decree nisi on a petition for divorce on the ground of the unreasonable behaviour of the Respondent. The respondent has answered the petition filed and asks the court to dismiss the petition filed herein. She has not cross petitioned. (*Emphasis mine*)

- [3] Every effort was made to encourage the parties to settle and to avoid a contested divorce hearing, not an unusual procedure in such cases and designed with the best intentions of saving time, cost and the unhappiness for the parties of a hotly defended divorce based on unreasonable behaviour.
- [4] On the 14th April 2016, the trial of the matter took place. The petitioner gave evidence and was cross examined by Counsel on behalf of the respondent and likewise the respondent gave evidence and was cross examined by Counsel for the Petitioner. Neither party called any witnesses to testify on their behalf. Thereafter the court ordered that closing submissions were to be filed for consideration by the court in its judgment. Those submissions were filed by the respondent on the 6th May 2016 and on the 20th May 2016 by the parties in compliance with the court order. These submissions were handed to the judge at the end of September 2016.
- [5] A court may find that a marriage has broken down irretrievably where the petitioner satisfies the court that the respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the respondent.¹

The Evidence

The Petitioner's case

- [6] The petitioner alleges that the marriage has broken down irretrievably on the ground that the wife has behaved in such a way that he cannot reasonably be expected to live with her. The petitioner filed a petition and affidavit in support of the petition verifying the facts as stated in his petition. He also gave viva voce evidence at the trial of the matter. He relied on the contents of his petition and affidavit in support. He was also cross examined by learned counsel for the respondent Mrs Dawn Yearwood Stewart.
- [7] The respondent filed an answer and cross prayer and in her pleadings she denied that the marriage has broken down irretrievably as alleged or at all. She also denies that she has behaved in such a way that the petitioner cannot be reasonably be expected to live with her. She gave viva voce evidence and was cross examined by learned counsel for the petitioner Mr David Bruney.

The Undisputed Facts

- [8] The parties herein were married on the 23rd day of July 2011 at the St Alphonsos Catholic Church in the Parish of St George in the Commonwealth of Dominica. There is one child of born to the parties herein prior to their marriage and she is now 10 years old.
- [9] The parties last lived together as husband and wife at Briton, Point Michel.

Case for the Petitioner

- [10] The petitioner's complaint is that respondent has withheld sex from him for a period of seven months and that he is fearful of requesting sex because on the last occasion he did so the respondent, he alleged telephoned one of his work colleagues and told that colleague of his request and the fact that she had refused his request. This, of course, was denied by the respondent.²
- [11] The petitioner also complained that he has been living outside the matrimonial home as a consequence of the perpetual verbal abuse and insults attacking his masculinity and that he had to

¹ Section 1(2)(b) *ibid*

² Paragraph 9 of the Petition filed on 23 November 2015

endure the perpetual nagging and arguments which he found intolerable. This too was denied by the respondent.³

- [12] The petitioner further complained that the respondent showed no interest in helping him with anything and also refused to do anything with him which included the normal social activities that a married couple would indulge in.⁴
- [13] Under cross examination the petitioner was asked about proceedings in the Magistrate's court and an order made by the Magistrate⁵ for him to vacate the matrimonial home. The petitioner maintained that he was in receipt of such an order, but that there was also an order which permitted him to occupy the lower flat of the matrimonial home.
- [14] Learned Counsel Yearwood Stewart sought to put it to the petitioner that he had sexual relations with his wife after the magistrate court hearing, the petitioner denied this. It was also put to the petitioner that he breached the orders made by the Learned Magistrate and entered into the matrimonial home and harassed the respondent. This was denied by the petitioner.
- [15] Under cross examination the petitioner stated that his wife did not really go to parties but that there were occasions that she went out with him to hang out, that she hung out with her friends sometimes. He spoke of going out with her and her having words with him about persons saying hello to him. The petitioner also stated that the respondent refused to go out with him to normal social functions and that on many occasions he would come home from work to find the respondent babysitting the children of her sister and friends. He described the house being like a crèche. That on those occasions he would leave the home.
- [16] The petitioner denied under cross examination that he would sleep out of the matrimonial home. He said that he would go out and return home late.
- [17] Learned Counsel Yearwood Stewart questioned the petitioner about his relationship with someone called "Denia" the petitioner stated that she was his friend and that they went out together and that he cooked at her house. He also said that he took the child of the family to her house and also that he cuddled with "Denia" when they went out socially.
- [18] The petitioner under cross examination stated that he did not believe that his wife loved him.
- [19] In cross examination Learned Counsel Yearwood Stewart for the respondent sought to put it to the petitioner that in spite of what he was saying he had had sexual relations with his wife in recent times, he denied this. She also put to him that he asked the respondent to come back home and he responded that he may have done that on a couple of occasions. The petitioner also denied receiving sexual favours outside of the marriage and told this court that he never cheated on his wife.

The Respondent's case:

- [20] It is the respondent's case that the marriage has not broken down irretrievably as alleged or at all. She denied that she has behaved in such a way that the petitioner cannot be expected to live with her. In the answer filed on the 15th January 2016, the respondent denied each and every allegation of fact as stated by the petitioner in his petition and stated that she dearly loved her husband and that she felt that he loved her too and that she felt that with the counseling the marriage could have been saved.

³ Paragraphs 10 & 11 *ibid*

⁴ Paragraph 12 *ibid*

⁵ An interim protection order was made by Magistrate Sylvester on the 12 May 2015 prohibiting the petitioner from entering r remaining in the matrimonial home *inter alia*.

- [21] The respondent contended that everything the petitioner said are lies and that he was angry because she commenced proceedings in the Magistrate's Court, that is, Domestic Violence proceedings.
- [22] The respondent complained that the petitioner often stayed away from the matrimonial home and under cross examination she said that there were times he was never at home and that she suspected that he was having an affair with another woman. She also said that she thought that he committed adultery and in those circumstances, she was not prepared to stay in a marriage with a man who had committed adultery.
- [23] The respondent denied that she withheld sex from her husband as alleged by him. Under cross examination she said she did nag at him but that it was as a result of his behaviour that is, his being away from the home and going out and coming in in the early hours of the morning. It is noted that in her answer and cross prayer the respondent denied nagging the petitioner and said that it was the petitioner who accused her of nagging when she sought to speak to him about him coming home late at nights and in the early hour of the morning.
- [24] At the same time, the respondent sought to tell this court that even when he came in at those hours she was intimate with the petitioner. This, of course, was denied by the petitioner.
- [25] Under cross examination the respondent said that she does not believe her husband loves her and that she no longer loves him. She said that the marriage is a loveless one and that the only reason that she is seeking to stay in the loveless marriage is that she did not get married to get divorced and she is not prepared to get divorced.
- [26] The respondent said that she went to the Magistrate's Court and obtained an order for the petitioner to remove from the matrimonial home, however, she did want him out of her life only out of the matrimonial home.
- [27] The respondent admitted that she took the petitioner to the Magistrate's Court and obtained an order to have him leave the house and that when she did that she did not know where he was going to go, that she wanted him out of the matrimonial home. The respondent sought to tell this court that she still cared even when she sought the order for the petitioner to leave the home and that she did not know where he would go. I do not accept that as being the truth.
- [28] She says that she thought her husband wanted to move on with his life. She also said that all the reasons presented by the petitioner were lies. That the petitioner was upset because she went and got a domestic violence order which was based on the domestic violence that occurred so many times
- [29] All in all, the respondent maintained her denial of every allegation made by the petitioner and in fact maintained her accusations of infidelity on the part of the petitioner. She denied speaking to the petitioner's co-worker as alleged by the petitioner, she denied slashing his car tyres as alleged by the petitioner, she also denied withholding sex from her husband as he alleged she told this court of times she and her husband were intimate within the seven-month period he claims there was no sex.

Courts considerations and conclusion

- [30] As was stated previously the petitioner in the case at bar seeks to have his marriage dissolved on the ground that respondent has behaved in such a way that he cannot reasonably be expected to live with her.

- [31] On a petition for divorce, it is the duty of the court to inquire, so far as it reasonably can, into the facts alleged by the petitioner or applicant and into any facts alleged by the respondent⁶.
- [32] The court must reach a conclusion based on the whole of the evidence as it exists at the date of the hearing⁷. I ask myself the question; would any right-thinking person come to the conclusion that this respondent has behaved in such a way that this petitioner cannot reasonably be expected to live with her, taking into account the whole of the circumstances and the characters and personalities of the parties? It is on that basis that I approach the evidence in this case.
- [33] In **Katz –v- Katz**⁸ Sir George Baker in reviewing the then new concept of unreasonable behaviour in the law had this to say:
- “Behaviour in this context is action or conduct by the one which affects the other. Such conduct may take either acts or the form of an act or omission or may be a course of conduct and, in my view, it must have some reference to the marriage. Then the question is what is the standard of the behaviour? The standard is that he must behave ‘in such a way that the petitioner cannot reasonably be expected to live with the respondent’. That is the test. It is for the judge, not the petitioner alone, to decide whether the behaviour is sufficiently grave to fulfill that test, that is, to make it unreasonable to expect the petitioner to endure it, to live with the respondent. Also it is for the judge to say whether the marriage has irretrievably broken down. It is behaviour that causes the court to come to the conclusion that it is of such gravity that the wife cannot reasonably be expected to live with him.”*⁹
- [34] In the case of **Birch –v- Birch**¹⁰ the test was held to be subjective. In the case of **Welfare v Welfare**¹¹ it stated that the behaviour of the respondent must be looked at in the light of all the surrounding circumstances, including the degree of provocation.
- [35] The court in matter such as these is mandated to look at the totality of the evidence, the matrimonial history must be considered. The outcome will depend on whether the cumulative conduct was sufficiently serious to say that from a reasonable person’s point of view whether the conduct was such that the petitioner ought not to be called on to endure it. This approach was approved in the case of **Stevens –v- Stevens**¹² by Sheldon J.
- [36] I find the learning in **Butterworths Family Law Service** offers the following assistance and guidance on the approach to be adopted by the court when dealing with a contested application for divorce on the ground that the respondent has behaved in such a way that the petitioner cannot be reasonable expected to live with her.

⁶ Section 1(3) of the Matrimonial Causes Act op cit

⁷ *Ash v Ash* [1972] Fam 135, [1972] 1 All ER 582, per Bagnall J.

⁸ [1972] 3 All ER 219

⁹ Ibid at 223 c e and h and p 224 a to c

¹⁰ [1992] 1 FLR 564, CA.

¹¹ (1977) 8 Fam Law 55

¹² [1979] 1 WLR 885

*"In assessing whether the petitioner can reasonably be expected to live with the respondent the court will test the matter by evaluating the conduct of the respondent and its effect on the petitioner having regard to the history of the marriage¹. (**Buffery v Buffery**[1988] FCR 465, [1988] 2 FLR 365, CA and see **Balraj v Balraj**(1980) 11 Fam Law 110, CA and **Hadjimilitis (Tsavlis) v Tsavlis**[2002] All ER (D) 32 (Jul).)*

This is really a three stage process namely:

- (a) *an examination of the respondent's conduct;*
- (b) *an examination of its effect on the petitioner; and*
- (c) *an assessment by the court in the light of the examination and of the evidence available as to the history of the marriage.*

*There is an element of objectivity in the approach which the court should make It must read the minds of the parties to the marriage and examine their respective temperaments and personalities². (See **O'Neill v O'Neill**[1975] 3 All ER 289, [1975] 1 WLR 1118, CA.) Only when it has done so and has looked at the history of the relationship of the parties can it make an assessment as to whether this petitioner can reasonably be expected to live with this respondent.*

*The capacity of the petitioner to endure the respondent's conduct, the provocation offered by the petitioner, acquiescence for a lengthy period in the respondent's behaviour, similar conduct by the petitioner towards the respondent, must all be very important considerations in making any assessment of the respondent's behaviour³. (See eg **Ash v Ash**[1972] Fam 135, [1972] 1 All ER 582.)¹³"*

[37] I cannot, of course, dissolve this marriage unless I am satisfied that the respondent has behaved in such a way that the husband can no longer be expected to live with her.

[38] In examining all the circumstances of this case I have taken into account the pleadings filed by both of the parties, their viva voce evidence, the application filed by the respondent on the 22 January 2016 for an injunction order against the petitioner in the divorce proceedings *inter alia* and the affidavit in support sworn by the applicant. (emphasis mine)

[39] In her affidavit, in support of her application for injunctive relief, the respondent gave the court her version of the facts as it related to that situation. The salient points of her averments are as follows:

- i. That on the 21 May 2015 she brought domestic violence proceedings against the petitioner and orders were made in her favour including that the petitioner was ordered to leave the matrimonial home;
- ii. That on the 30th July 2015 the said order was varied allowing him to return to the matrimonial home. That the petitioner never returned to the matrimonial home in spite of the variation. It is noted that in his viva voce evidence before the court in

¹³Butterworths Family Law Service/Relationships and their Breakdown/1A Narrative/Chapter 5 Grounds for proceedings in divorce and judicial separation/A Divorce

the divorce trial the petitioner told this court that he was permitted to return to occupy the downstairs of the matrimonial home;

- iii. The petitioner was ordered by the Honourable Magistrate to desist from physically or verbally abusing the respondent, to pay maintenance and pay utility bills.
- iv. That after and in spite of this order the petitioner frequently entered the matrimonial home and he told her he missed her and wanted to come back to the matrimonial home and that he was embarrassed by her having taken him to court.
- v. That the petitioner was removing things from the home and he continued to verbally abuse her and he told her that the contents of her answer and cross petition was a "bunch of crap";
- vi. That he continued to go to the matrimonial home and removed things there from, he abused her and damaged things in the house and that she complained to the police but to no avail.
- vii. That she was living in fear of the petitioner and did not know when he would return to the matrimonial home and what he would do next.
- viii. That his behaviour was disturbing and distressing the minor child of the family.

[40] Upon the ex parte application an injunction order was made against the petitioner. The petitioner filed an affidavit in response to the injunctive proceedings against him. In essence he had this to say:

- ix. That the affidavit sworn by the respondent was full of truths and half truths;
- x. That the Honourable Magistrate's order permitted him to occupy the apartment in the lower part of the matrimonial home. He further averred that the magistrate after conducting a hearing of the matter got a good grasp of the matter and by allowing him to occupy the lower part of the home found that he was no danger to the respondent as alleged;
- xi. That he did remove things from the matrimonial home to the lower flat in order to enable him to live there and that he did not damage the wardrobe in the respondent's home as alleged;
- xii. That he removed utensils from the matrimonial home that allowed him to continue his catering business;
- xiii. He denied verbally abusing the respondent as she alleged and did admit that he told her that the contents of her answer and cross prayer was a "bunch of crap" but he did not consider that to amount to verbal abuse.

[41] On the 1st February 2016 there was a hearing in chambers where both parties appeared with their respective counsel and I made an order after extensive discussion with the parties.

[42] I have reviewed the evidence of both parties and the submissions of both counsel in this matter.

[43] I have had the opportunity to observe the parties as they gave evidence and I am not entirely convinced that either of the parties were totally witnesses of truth. I am however inclined to accept the evidence of the petitioner as being more probable.

[44] As it regards the respondent's contentions that they may have been incidents of sexual intercourse between these parties since they have been living separate and apart, if that is true I am empowered by virtue of section 2 (3) of the Matrimonial Proceedings Act to disregard this¹⁴.

¹⁴Section 2 (2) states

(3) Where in any proceedings for divorce the petitioner alleges that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him,

[45] It is clear from the authorities that I must have regard to both the petitioner and respondent in assessing what is reasonable. In Buffery v Buffery¹⁵ it was said that the correct test to be applied is whether a right thinking person looking at the particular husband and wife would ask whether the one could reasonably be expected to live with the other taking into account all the circumstances of the case and the respective character and personality of the two parties concerned.

[46] In approaching the facts of this case it is necessary to bear in mind *inter alia* the following points and to have regard to the cumulative facts in the matter: –

- i. There is a minor child of the marriage and this court is concerned primarily about her welfare and the negative effects constant bickering and arguing parents can have on her;
- ii. That the parties to the marriage have clearly fallen out of love with each other;
- iii. That the respondent has caused the petitioner to remove from the home by obtaining an order for him so to do before filing of the divorce petition;
- iv. That the respondent who happens to be contesting the divorce has also moved this court as currently constituted for injunctive relief prohibiting the petitioner from coming to the matrimonial home;
- v. That the respondent has stated that the only reason she is contesting the divorce is because of the lies that she alleges the petitioner has said about her, that she knew that she did not do anything. This is to be weighed against the fact that she has taken proceedings out against the husband in the Magistrate's Court and filed for a domestic injunction in this court.

[47] Having regard to the recent history of this marriage and the behaviour of the parties herein, I find that the respondent's evidence, in fact, corroborates the husband's petition that the marriage has broken down irretrievably. In fact, I would go further and say that the respondent's evidence and actions have provided this court with evidence of an irretrievable breakdown of the marriage which she is seeking to deny.

[48] The respondent some months before the presentation of the petition six months to be exact obtained an order from the Magistrate's court for the respondent to remove from the matrimonial home, now clearly she initiated proceedings against the petitioner the result being that she was denying him access to her as a husband to a wife.

[49] I am quite satisfied that the marriage has broken down irretrievably. The respondent under cross examination said that she no longer loves her husband and that she did not believe her husband love her and at the same time agreeing that love was the cornerstone of a marriage

[50] Applying the test as stated earlier in my judgment to the facts as I have found them and taking all the circumstances into consideration including the welfare of the minor child of the marriage which is a priority with this court, I think that any right thinking person would conclude that this marriage has broken down irretrievably and the petitioner in all the circumstances of this case cannot be expected to live with her.

[51] Accordingly, the decree nisi is granted herein on the ground that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with her. Decree Nisi to be

but the parties to the marriage have lived with each other for a period or periods after the date of the occurrence of the final incident relied on by the petitioner and held by the court to support his allegation, that fact shall be disregarded in determining for the purposes of section 1(2)(b) above whether 'the petitioner cannot reasonably be expected to live with the respondent if the length of that period or of those periods together was six months or less.

¹⁵[1988] 2 FLR 365

made absolute in six weeks unless there is intervention. Ancillary matters are adjourned to chambers.

[52] Each party shall bear their own costs.

M E Birnie Stephenson

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M E Birnie Stephenson
High Court Judge