

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

BVIHMT 2011/0030

BETWEEN:

IRVIN MOSES

Petitioner

V

LYNNE ELIZABETH MOSES

Respondent

Appearances:

Mr. Patrick Thompson of McW Todman & Co. for Petitioner
Ms. Tamara Cameron of Farara Kerins for Respondent

2012: September 26th

2012: October 15th

JUDGMENT

[1] **Ellis J:** By Petition filed on 20th May 2011, the Petitioner petitioned this Court for a decree absolute dissolving his marriage to the Respondent on ground that the marriage has broken down irretrievably because the Respondent has behaved in such a way that he cannot reasonably be expected to live with her.

[2] The particulars pleaded in the Petition are set out follows:

- i. "The Respondent has been mentally and verbally abusive to the Petitioner throughout the course of the marriage.
- ii. The Respondent has no interest in participating in sexual activity with the Petitioner.
- iii. The Respondent has a negative impact on the children of the marriage due to the Respondent's ill-tempered nature and tendency to destroy items in the course of our arguments.
- iv. Both parties have frequent arguments and disagreements and the Respondent is argumentative and unreasonable.
- v. The total effect of the Respondent's behaviour during the marriage is the Petitioner cannot be reasonably expected to live with the Respondent."

- [3] In her Amended Answer filed on 24th August 2011, the Respondent denies the Petitioner's allegations including the particulars of unreasonable behaviour pleaded. She states rather that;

“The Respondent would prefer that the parties make attempts to continue the marriage but does not oppose the grant of divorce as it is clear that the Petitioner no longer wants to be married to her. In any event the Respondent does not agree to a divorce on the basis of her behaviour.”

- [4] When the matter came up for directions before Olivetti J on 5th December 2011, the Parties were ordered to attend counselling. The Petitioner attended 2 out of the 3 prescribed counselling sessions. The Parties did not reconcile.
- [5] On the next occasion when the matter came up for hearing the Respondent indicated that she believed that the marriage can be salvaged and that she would oppose the Petition. The matter was set down for trial on 26th September 2012.

THE LAW

- [6] It is clear that under the Matrimonial Proceedings and Property Act, a Court cannot hold the marriage to have broken down irretrievably unless it is satisfied on a balance of probabilities that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.
- [7] The appropriate test to determine whether the Petitioner has established this fact is as adumbrated in the case of **Livingstone-Stallard v Livingstone-Stallard [1974] 3 W.L.R. 302** which has since been followed and applied in **O'Neill v O'Neill [1975] 1 W.L.R. 1118**, **Thurlow v Thurlow [1976] 3 W.L.R. 161** and **Bergin v Bergin [1983] 1 W.L.R. 279**.
- [8] The Court notes that the Court in **Livingstone-Stallard v Livingstone-Stallard** expressly did not follow the dicta in **Pheasant v Pheasant [1972] 2 W.L.R. 353** which was cited and relied on by Counsel for the Respondent in her submissions. Indeed, **Pheasant v Pheasant** has not been recently followed or applied.
- [9] In **Livingstone-Stallard v Livingstone-Stallard**, the petitioner filed for divorce relying on the ground that the marriage had irretrievably broken down within section 1 (2) (b) of the English Matrimonial Causes Act 1973. The Court found as a fact that although there had been major incidents, the Petitioner had been subjected to a constant atmosphere of criticism, disapproval and boorish behaviour by the Respondent. The Court held that the Petitioner was entitled to a decree nisi.
- [10] In considering the appropriate direction, Dunn J stated the test as follows:

“Would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him taking into account the whole of the circumstances and the characters and the personalities of the parties.”

- [11] The Court accepts that this correctly states the test to be applied. The words “reasonably be expected” prima facie suggest an objective test. Nevertheless, in considering what is reasonable, the Court will have regard to the history of the marriage and to the individual spouses before it. The Court must therefore consider *this* petitioner and *this* respondent in assessing what is reasonable. Having regard to all the circumstances of this case it must consider whether this particular Petitioner can or cannot be expected to live with this particular Respondent.
- [12] The English Court of Appeal in **O’Neill v O’Neill** affirmed this approach and also stressed that no other extraneous concepts should be imported into the test, such as that the behaviour should be ‘grave and weighty’. The appropriate approach, therefore, is primarily concerned with assessing any conduct which is not utterly trivial and in looking at that conduct objectively, in the light of its effects on this Petitioner.
- [13] The Court accepts that it is unrealistic to take each individual act in isolation; rather the whole context involved and their knowledge of each other, cause and effect must be examined bearing in mind the personalities of the parties.

THE PARTIES’ EVIDENCE

- [14] The Petitioner’s evidence is that his marriage has deteriorated over time. In his witness statement he stated that as the marriage has progressed he noted that whenever he argued with the Respondent she would seek to belittle him. He attributes this to the fact she is a qualified accountant and therefore earns significantly more than he does. He indicated that the Respondent constantly reminded him of this fact and that she insisted on maintaining separate bank accounts. In addition she was quick to remind him of what property belonged to her. He stated that this demeaning and belittling attitude continued throughout the marriage.
- [15] Under cross examination, the Petitioner stated that because of the disparity in their earning capacities, his wife pays for practically everything in the household. He stated that when he makes any suggestion for purchases, she would respond dismissively indicating that he would have to pay for it himself. Ultimately, all major financial decisions were taken by the Respondent because she controlled the purse strings. He stated that as a result, he was made to feel like a “nobody” in the front of his children. He admitted that many of their arguments arose out of what he terms the “money issue”.

- [16] Although the Respondent denies that she was at any time mentally and verbally abusive to the Petitioner, her evidence on this matter did not directly contradict the specific evidence of the Petitioner. Rather it was during the cross examination of the Petitioner that the Respondent's counsel sought to suggest that it was the Petitioner's difficulty in keeping within the agreed budget which was the source of contention between the Parties.
- [17] The Petitioner also gave evidence that earlier in the marriage he has suggested that they attend marital counselling. He testified that his suggestion was abruptly rebuffed by the Respondent who refused to attend the sessions suggesting that it was Petitioner (and not her) who had the problem. This evidence was also not contradicted by the Respondent in her evidence.
- [18] The Petitioner also claims that following the birth of their first child, the Respondent began to display less and less interest in their physical relationship. He claims that this situation worsened after the birth of their second child. In his witness statement he indicates that they would go for long periods from 1 month to 6 weeks without physical relations and without any plausible explanation or excuse from the Respondent.
- [19] Under cross examination the Petitioner freely admitted that this has been a constant complaint throughout his marriage. Although he conceded that there were times when his wife would initiate intimate relations he stated that these were seldom. He testified that he considered it intolerable to have to make an appointment when he wanted to be intimate with his wife. The Petitioner concedes that he has regularly brought up his dissatisfaction with their physical relationship and that it has often led to arguments.
- [20] The Respondent denies that she has no interest in a physical relationship with the Petitioner. In support of this she stated that in or about July/August 2010 while on a family trip she had consensual relations with the Petitioner on more than one occasion with at least two incidents being initiated by her. She describes their sex life prior to the filing of the Petition as active. She further indicated that since the filing of the Petition, they have had sexual encounters once, on 23rd October 2011 and again 9th March 2012.
- [21] Under cross examination, the Respondent has testified that on several occasions she has yielded to the sexual demands of the Petitioner when she did not want to. She indicated that at times she felt sexually degraded and ill-treated by the Petitioner. It also clearly concerns her that the Petitioner constantly criticised her for what she termed "her inadequacies" in the presence of the children.
- [22] Both the Petitioner and the Respondent admit that these differences led to many arguments between them. The Respondent however testified that she is a peaceful and tolerant person and that these arguments were usually instigated by the Petitioner. During cross examination, the Respondent admitted that there were times that she became so upset that she would throw and

destroy household items. Her evidence is that the first of these incidents took place in 2009 and that her reaction was provoked by the Petitioner who would deliberately say hurtful things to her.

- [23] The Respondent also freely admitted that following one such disagreement, she threw out the Petitioner's clothing from the matrimonial home. When questioned by the Petitioner's attorney, the Respondent conceded that when she did this she fully expected that he would leave the home.
- [24] The Petitioner stated that he did in fact leave the home within 2 – 3 months of presenting the Petition and has never recommenced residence. He indicated that since then, he has resided with his mother and his brother and also with a woman with whom he admits to having an intimate relationship.

ANALYSIS

- [25] The Respondent stated in her witness statement that the real reason that the Petitioner wants a divorce is to pursue an adulterous relationship. The Petitioner has admitted that he is currently involved in an extra marital relationship; however he indicates that this is not the reason why he wants a divorce. He asserts that their relationship has worsened over time and that he is tired of the years of arguments, the constant accusations, criticisms and denigration.
- [26] In direct contrast, the Respondent indicated that there has been no significant deterioration in the relationship over the course of the marriage. In her words, the marriage was "constantly on the same page". She described the difficulties experienced in the marriage as being part of the normal vicissitudes of married life and not sufficient to warrant the dissolution of the marriage.
- [27] The Court finds it impossible to accept this contention. The Court does not condone the Petitioner's pursuit of an extra-marital affair and there is no doubt that in so doing he is partly to blame for the breakdown of the marriage. However, the Respondent has not filed a cross prayer on the basis of the Petitioner's behaviour and on the authority of **Birch v Birch [1977] 7 Fam. Law 172** the Court cannot refuse the Petition on the basis of the Petitioner's behaviour alone.
- [28] In any event having reviewed the unchallenged evidence in this case and the admissions made by the Respondent, the Court finds that Petitioner has behaved in such a way that the husband cannot reasonably be expected to continue to live with her. The Parties' emotional and physical relationship has deteriorated and that the Parties marriage has irretrievably broken down.
- [29] Both parties confirmed that there have been several arguments about a number of issues pertaining to the marriage. Some of these arguments appear to have taken place in the presence of the children of the marriage. The Respondent has admitted to somewhat intense altercations with the Petitioner. Although the Petition did not disclose this, the Court accepts the Petitioner's

oral evidence that on occasion, the Parties disagreements have turned physical albeit with minor “pushing and tugging”.

- [30] The Respondent admits to throwing and destroying items during arguments. She also admits that she threw the Petitioner’s belongings out of the matrimonial home and that when she did so she expected him to leave.
- [31] The Petitioner’s evidence that he felt humiliated and belittled by the Respondent was not traversed during the trial. The Petitioner indicated that the Respondent’s cumulative behaviour has impacted him negatively. He gave evidence that he has been constantly criticised and moreover that the Respondent has indicated that she is sick and tired of him and has on occasion asked him to leave. The Petitioner has reacted to this by leaving the matrimonial home.
- [32] There is no doubt from the evidence of both Parties that there has been significant discordancy in their physical relationship and while this alone would not have been sufficient to ground this petition it is apparent that it has not assisted. Despite the fact that they have had at least two sexual encounters since the filing of the Petition, all attempts at reconciliation have proven fruitless, no doubt because the Petitioner finds it intolerable to continue with the marriage. The Parties have lived apart for over 1 year and they acknowledge that recently their only real communication appears to be in connection with their children.
- [33] Applying the test to the facts of this case, the Court finds that a decree nisi of divorce should be granted to the Petitioner.
- [34] **It is therefore ordered as follows:**
- i. **The said marriage be dissolved unless sufficient cause be shown to the Court within 2 months from the making of this decree why such decree should not be made absolute.**
 - ii. **Ancillary matters are adjourned to Chambers to a date to be fixed by the Court Administrator on application by either party.**
 - iii. **No order as to costs.**

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Vicki Ann Ellis
High Court Judge