

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ST CHRISTOPHER AND NEVIS
(DIVORCE)
A.D.2009

SKBHMT2008/0052

Between:

HUBERT VERNICA HUTCHINSON

PETITIONER/
RESPONDENT

V

WILMA AVRIL HUTCHINSON

RESPONDENT/
CROSS-PETITIONER

Appearances: Mr. Vincent Warner for the Petitioner/Respondent
Mrs. Angela Inniss for the Respondent/ Cross-Petitioner

2009: July 3rd, 10th, 16th, 23rd
24th, 31st and
December 22nd

JUDGMENT

[1] **BELLE J.** On 2nd October 2008 Hubert Hutchinson ,the Petitioner, filed a divorce petition claiming that his marriage to the respondent had broken down irretrievably and praying that he should be granted a divorce on the grounds that the respondent had committed adultery and had treated him with mental cruelty that rendered the continued habitation between the parties, intolerable. He stated that he had not condoned the said cruelty and he pleaded particulars to

the effect that the respondent on November of 2006 admitted to him that she had a "lover", that the sex was good and she loved him dearly.

- [2] Mr. Hutchinson claimed that on occasions when he went to pick up his wife from work at her school she would be close up under her "lover" who taught at the same school as his wife. According to the pleadings she would leave the home from 7.00 a.m. and return after 9.00 p.m. with her "lover."
- [3] Mr. Hutchinson prayed for the marriage to be dissolved; that he be granted custody of the minor children of the marriage and that his wife be ordered to pay the costs of the Petition.
- [4] Mrs. Hutchinson filed a Cross-Petition on November 28th 2008 claiming inter alia that her husband had treated her with cruelty during the marriage. She went into great detail on this matter in the pleadings alleging that she had been beaten by Mr. Hutchinson on numerous occasions since the celebration of the marriage and physically abused by her husband. She had made reports to the Tabernacle police station over the years about these beatings and physical abuse, and she had not condoned this behaviour.
- [5] Mrs Hutchinson pleaded specifically that on 26th December, 2006 her husband Mr. Hutchinson assaulted her and threatened her life during a verbal altercation. As a consequence of the incident she feared for her life and fled from the matrimonial home and had not returned to live with her husband.
- [6] She concluded that she had become extremely fearful of her husband because of the violent temper he had exhibited during the incidents of violence. She said that she could no longer live with Mr. Hutchinson as her husband. The repeated incidents had made her anxious and unable to relate to him in a spirit of love and harmony.

[7] Mrs Hutchinson claimed that her husband had constructively deserted her for a period of upwards of one year from the date of filing the Cross-Petition. She pleaded particulars of constructive desertion based on the same allegations made above and prayed that the marriage be dissolved and that she be awarded (a) physical custody of the minor children of the marriage, (b) joint custody of the minor children of the along with Mr. Hutchinson and that he be allowed reasonable access and visitation to the minor children of the marriage.

[8] Mrs. Hutchinson also claimed maintenance for the minor children of the marriage who are in her custody. She asked for a property settlement between the parties ordered by the court. More importantly for the purpose of this decision Mrs Hutchinson asked the court to exercise its discretion in her favour to grant a decree notwithstanding the facts set out in the Discretion Statement which had been filed.

[9] This joinder of the facts pleaded by both parties gives rise to the following legal issues:

1. Was there cruelty during the marriage on the part of both the husband and wife against the respective spouse?
2. Is cruelty a sufficient ground on which to rely for the purposes of a divorce?
3. Was there a basis for pleading constructive desertion?
4. Did Mrs Hutchinson commit adultery? If so can she be excused for doing so on the ground that her husband drove her to seek refuge with the alleged lover?
5. Who is entitled to custody of the minor children in the circumstances?
6. If Mrs Hutchinson wins custody of the minor children would she also be entitled to maintenance for the children?

[10] The case turns on the facts and the question of the timing of the constructive desertion. The court has therefore to be cognizant of the credibility of the parties. In this regard, Mr. Hutchinson's evidence on the issue of his treatment of Mrs Hutchinson may be somewhat suspect. I believe that there was some cruel behaviour meted out by Mr Hutchinson against Mrs. Hutchinson. There is ample evidence to bear this out, including the evidence of three police officers

one of whom is Mrs Hutchinson's sister. A number of incidents of cruelty were reported to the Tabernacle Police Station during the course of the marriage, all of the reports pointing to the Petitioner as the perpetrator. I also believe that there was a violent incident on 26th December which caused Mrs Hutchinson to leave the matrimonial home. However, I also think that Mrs Hutchinson was not forthright in arguing that she treated this as constructive desertion. I will explain my reasons for these conclusions below.

The Evidence

- [11] Mr. Hutchinson gave evidence which was consistent with his pleadings, emphasising the fact that he had to experience days when Mrs Hutchinson spent a whole day with her alleged lover but had said that she had to go to classes at the UWI centre. On occasions when she said this she would be at the school with her lover. He insisted that she had said that she had a lover and the sex was good. He also gave evidence that he knew that his wife had given birth to a baby for the alleged lover.
- [12] Mrs. Hutchinson gave details of many acts of cruelty involving physical violence and sexual intercourse against her will. She put great emphasis on the incident of December 26th 2006 when she left the matrimonial home. She denied stating that she had a lover and the sex was good and denied that she had led her son Wilbert to believe that she was not anything more than a friend to the alleged lover. She was adamant that an incident related to the court by her son which allegedly ended with them crying on each others' shoulders did not take place as it had been reported.
- [13] The evidence of Wilbert Hutchinson, the couple's son, was challenged by Mrs Hutchinson's lawyer but I am of the view that he was deeply hurt by the fact that his mother never confided in him that she was seeing another man intimately and led him on into thinking that she was having problems which had nothing to do with any other man. He knew of no incident of cruelty by his father against

his mother. He and his mother remained close until he discovered that it was not true that the man she used to spend a lot of time with was not more than a friend.

[14] In her evidence, Nelyssa Hutchinson the couple's 18 year old daughter showed much resentment against her mother. Like her brother she refused to admit knowing of any cruelty committed by her father against her mother. She did give evidence of seeing her mother and her alleged lover spending a great deal of time together. But she did not know they were having an affair until her mother got pregnant for her lover. Mr. Dwight Joseph an instructor in social life skills with the "Yes" programme gave similar evidence of being a family friend on speaking terms of both parties and knowing of no incident between the two of them involving violence or threats by Mr. Hutchinson to do anything to Mrs Hutchinson. This sums up the evidence for the Petitioner.

[15] Two Police officers, Constable Elroy Wattleley and Sgt. Charles Smithen in particular gave evidence on the Cross-Petitioner's behalf which generally supported the Cross-Petitioner's position of experiencing incidents of cruelty. Sgt. Smithen even commendably tried to counsel Mr. Hutchinson on his position that the woman must submit to the man. But this was to no avail. Interestingly, none of the reports led to criminal charges being brought against Mr. Hutchinson.

[16] However the evidence of Anita Norford, also a police officer and the Cross-Petitioner's sister is instructive. Mrs. Norford speaks about making numerous interventions at her sister's home on the invitation of Mr. Hutchinson who would come and pick her up to go over to the Hutchinson's matrimonial home to settle arguments between the couple. She did not take sides but would try to assist. After a while because of a certain incident she stopped speaking to Mr. Hutchinson. She was of the view that the marriage was over long before an incident she spoke of which took place in 2003 after which she ceased all

communication with Mr. Hutchinson. This would mean that in her view the marriage was over long before the incident in 2006. She said between 2003 and 2006 there was more confusion than anything. She thought it was craziness for them to stay together.

[17] She was of the view that the marriage was over for a long time but her sister wanted it to work. The fact that her sister had a child for another man while married did not sit well with her. Nevertheless she insisted that she respected the fact that her sister wanted the marriage to work.

[18] But this is not all. The Cross- Petitioner said that she came to the conclusion that her marriage had broken down irretrievably in July 2007 when her husband turned to her and called her a whore and a bitch at a shop. He had come to the shop and she had wanted to give him a birthday cake but he did not want to take it from her. Indeed at first he refused. After he called her a whore and a bitch she asked him how long he felt like this. He replied that he felt that way for a long time. She said she did not feel that way about him up to then. But everything came to a halt right there.

[19] I note that this was some time after December 26th 2006 when the last act of cruelty had occurred causing her to move out. This is the date being referred to as confirmation of constructive desertion. But the evidence of the Cross-Petitioner's feelings changing after the incident at the shop casts doubt on her attitude towards the cruelty and the marriage. The position seems to be that up to that point she wanted the marriage to continue in spite of the cruelty.

[20] During the cross examination of Mrs Hutchinson, Counsel also objected that counsel for Mr. Hutchinson should not question her client on certain facts related to the alleged adultery because she had filed a discretion statement. I did not agree that the discretion statement had this effect in this case. The discretion statement prevented the disclosure of certain facts contained therein. But I

thought that the issues which arose on the evidence in relation to the adultery could not be suppressed in this way.

- [21] Counsel appeared to rely on section 28 (5) of the Matrimonial Causes Rules to support her submission. This rule states:

“Neither the fact that a discretion statement has been lodged nor the fact that the said notice has been given nor the contents of the discretion statement or notice shall be given as evidence against the party lodging or giving the same in any matrimonial cause or matter except when that party has put in evidence in open Court the discretion statement or the said notice or the contents thereof.”

- [22] The fact is that there was evidence of the Cross-Petitioner and the adulterous partner spending a great deal of time together. Although denied, there was the evidence that she had said that she had a “lover” and the sex was good and she loved her lover. On a balance of probabilities I believe that this statement was made, even if in the heat of a quarrel. The statement was also specifically pleaded. Finally indeed, the evidence that she bore a child for this lover was irrefutable proof of adultery.

- [23] Based on the evidence I find that both sides committed acts of cruelty against their respective spouses. I also find that the Petitioner husband was a cruel and abusive husband. However Mrs. Hutchinson condoned this behaviour by failing to seek a divorce immediately after the December 2006 incident when she had left the matrimonial home. It is not clear whether she entered into the adulterous relationship before the date when she claimed that she had been constructively deserted. But she got pregnant for this man before she filed a cross-petition on the grounds of constructive desertion.

[24] Counsel submitted that based on the authority **Lang v Lang** [1954] 3 All ER 571, I should find that constructive desertion was proved. The authority cited is not helpful based on the factual matrix in this case because in **Lang v Lang** the Petitioner filed for divorce after being forced to leave the matrimonial home and refused invitations to return. In the case at Bar the Cross –Petitioner condoned her husband's cruelty and did nothing until some time after she had borne a child for another man while still being married to the Petitioner Mr. Hutchinson. She gave evidence of a Petition being prepared before this. But this cannot be seen as anything other than self serving at this stage. Consequently her claim of constructive desertion is not convincing. Neither is her discretion statement. The fact is that she had committed adultery prior to any claim being made of cruelty and abuse.

[25] I therefore find in favour of the Petitioner that:

- (1) the marriage has irretrievably broken down and
- (2) the marriage is dissolved on the ground of the Cross-Petitioner's Adultery.
- (3) the Cross-Petition is dismissed;
- (4) the Petitioner is granted joint custody of the minor children of the marriage and should continue to enjoy reasonable access to them.

[26] In the circumstances the parties should pay their own costs.

[27] Ancillary matters are adjourned to Chambers.

Francis H V Belle
High Court Judge