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THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ST.CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
(CIVIL) A.D 2012

SUIT NO:NEVHMT2012/0004

BETWEEN:

EVAN ERNEST DAVIS

Petitioner

and

NICOLANDER DAVIS

Respondent

Appearances:

Mrs. M Walwyn for the Petitioner
Mrs. C Herbert for the Respondent

2012: October 2, 10

DECISION

[1] **WALLACE, J.**:These were contested proceedings for divorce. The Petitioner filed a divorce petition on the 12th day of April 2012 claiming that the marriage between himself and the Respondent celebrated on 16th March 2006 had broken down irretrievably. There is one child of the marriage.

BACKGROUND

[2] The particulars relied on by the Petitioner to support the contention that the marriage had broken down irretrievably are set out paragraph 8 of his Petition. He alleged that:

(1) Problem arose between the Petitioner and the Respondent shortly after the marriage as the Respondent constantly argued with the Petitioner over money. Though the Respondent at the time was a housewife and did not contribute anything towards the upkeep of the home as the Petitioner paid all bills associated with the home, the Respondent continually argued with the Petitioner and demanded that he brings his salary directly to her and which the Petitioner refused to do.

(2) On the 11th October 2007 the Respondent left the matrimonial home with the child of the marriage and returned two days after. The Petitioner was totally unaware of the Respondent's whereabouts and the Respondent refused to advise him as to where she had been. This act by the Respondent caused the Petitioner much emotional anguish and was an act of mental cruelty.

(3) On the 15th day of October 2007 the Respondent again and without notifying the Petitioner left the matrimonial home with the child of the marriage and returned to live in Guyana. She returned to the matrimonial home in Nevis sometime in April 2009. Again this act on the part of the Respondent caused the Petitioner much emotional anguish and was an act of mental cruelty.

(4) Since returning from Guyana the Respondent in a further act of mental cruelty has advised the Petitioner that she has no romantic feelings towards him whatsoever. The Petitioner is of the firm belief that the Respondent only married him so as to obtain citizenship of St. Kitts and Nevis.

(5) Since October 2007 when the Respondent left for Guyana the couple has not engaged in sexual relations and they now live totally separate lives.

(6) As a consequence of the foregoing the Petition (sic) is of the view that the Respondent's behaviour has been of such a kind as to render intolerable the continued habitation of the spouses. The Petitioner also says to this

Honorable Court that there is no hope of reconciliation between the parties.

[3] The Respondent filed an Answer to the Petition in which she denied the allegations made against her in the Petition. More particularly, she denied that the marriage had broken down irretrievably as alleged by the Petitioner or at all. She prayed for the Petition to be dismissed and for the Petitioner to pay the costs of the suit.

[4] She said that it was the Petitioner who put her, with the child of the marriage (and the Respondent's daughter from an earlier relationship) out of the matrimonial house twice towards the end of 2007. She alleged that the Petitioner knew her whereabouts at all time she was away from the matrimonial home. She alleged that when she was put out of the matrimonial home in December 2007, she went to Guyana for only one month and that the Petitioner communicated with her by telephone between 11th December 2007 and 11th January 2008 while she was in Guyana. Further, he visited her on numerous occasions at her brother Carlon's house between January 2008 (when she returned to Nevis) and April 2008. In any event, the parties resumed cohabitation in April 2008 and not April 2009 as alleged by the Petitioner and thereafter they lived as man and wife have had sexual relations up to 2010. She also stated that she still continues to have romantic feelings for the Petitioner. She believes there is a possibility of the parties reconciling.

[5] In the Petitioner's Reply to the Respondent's Answer he denied much of what she alleged and stated that those facts supported his contention that the marriage is at an end and has broken down irretrievably. He argued that it would be impractical for him to continue to live with the Respondent or the Respondent to continue to live with him and that she only slept at the matrimonial home. Additionally, he contended that in June 2011 the Respondent stabbed him and that the matter is pending in the Magistrates Court against the Respondent. Further, if the

Respondent returned to Nevis after only one month in Guyana, he was unaware as to her whereabouts as she only returned to the matrimonial home in April 2009.

ISSUE

[6] The issue presented in this matter is whether on the evidence presented in Court can support a finding that there has been an irretrievable breakdown of the marriage on the basis that since the celebration of the marriage the Respondent has treated the Petitioner with physical or mental cruelty or other behaviour of such a kind as to render intolerable the continued habitation of the spouses.

THE EVIDENCE

[7] Both parties gave *viva voce* evidence. Carlon Thomas, the brother of the Respondent, also gave evidence in support of the Respondent's case. I shall refer to the evidence further in my findings at paragraphs [15]to [30].

COUNSEL'S SUBMISSIONS

[8] Learned Counsel for the Petitioner, Mrs. Walwyn, submitted that the Petitioner has brought his petition on the basis of his wife's mental cruelty. However, the Respondent has resisted the application on the basis that the marriage has not broken down irretrievably and there is a possibility of reconciliation between the parties. She submitted that even if the Court accepts the Respondent's view that it was only from 2010 that the parties had issues, namely that they live in separate rooms, the Respondent does not cook for the Petitioner, they quarrel a lot and are at the police station frequently, then the Court should still find that the marriage has broken down irretrievably.

[9] Learned Counsel for the Petitioner urged the Court to consider also the fact that the Petitioner was very emphatic that the last time they had sexual intercourse was 2007 and even if the Court believes the Respondent version that it was in

2010 and that the acts complained of in 2007 were known by then, then by virtue of the provisions of Section 10 subsection 2(c) of the Act, the Court ought still to grant the prayer in the Petition.

[10] Learned Counsel for the Respondent Mrs. Herbert submitted that by virtue of Section 7(2)(c)(ii) of the Act the Petitioner not only has to prove that the marriage had broken down irretrievably, but also that the Respondent has since the celebration of the marriage treated the Petitioner with cruelty or other behaviour of such a kind as to render intolerable the continued habitation of the spouses and that such behaviour has not been condoned.

[11] Mrs. Herbert's submission was essentially that on the evidence adduced (1) the marriage had not broken down irretrievably since the Respondent still loved the Petitioner and believed that it can still work (2) In any event, the Respondent was not guilty of the behaviour as alleged or at all (3) it was the behaviour of the Petitioner and not that of the Respondent that caused the separation complained about and (4) even if the Court was to find that the Respondent was guilty of the behaviour complained about, the Petitioner condoned that behaviour when he allowed the Petitioner back into the home and parties resumed cohabitation and lived as husband and wife.Therefore the Petition should be rejected.

THE LAW

[12] The grounds for divorce and divorce procedure are laid out in PART III of the Divorce Act, 2005 (hereinafter "the Act")[1].

[13] Section 7 of the Act provides:

> 7. (1) The Court may, upon application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been an irretrievable breakdown of their marriage.

[1] No 32 of 2005

(2) For the purpose of subsection (1) irretrievable breakdown in marriage shall be established if the following is proved, that is to say,

(a) that the spouses have lived separate and apart for at least two year immediately preceding the commencement of the divorce proceeding and both spouses have made a statement that each of them believe that the marriage has broken down;

(b) that the spouses have lived separate and apart for at least five years immediately preceding the commencement of the divorce proceedings.

(c) that the spouse against whom the divorce proceedings are brought has since the celebration of the marriage,

(i) committed adultery,

(ii) treated the other spouse with physical or mental cruelty or other behaviour of such a kind as to render intolerable the continued cohabitation of the spouses; or

(iii) deserted the other spouse without cause for a period of one year or more.

[14] The Court's approach to a contested divorce proceeding in these circumstances was stated quite correctly by Georges, J (Ag) in the case of **Malaykhan v Malaykhan**[2]. The learned judge said:

> Although the sole ground under the **Divorce Act 1973** "the Act' on which a marriage may be dissolved is that the said marriage has broken down irretrievably the Court will not pronounce a decree of dissolution unless it is satisfied that the marriage has broken down irretrievably by reason of the facts set out in one or other of Sections 4(1)(a) -(d) of the Act.

[15] The statutory provisions of the Saint Lucia Divorce Act 1973 are worded similar to the Act. The burden is on the Petitioner to prove that the marriage has broken down irretrievably by proving facts that support one of the matters set out in section 7.2 of the Act.

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[2]SLUHMT 2009/0106, unreported (Saint Lucia) at page 2.

[16] The Petitioner gave evidence of the actions and behaviour of the Respondent which he alleged caused him much emotional anguish and were acts of mental cruelty. He claimed he found the behaviour such a kind as to render intolerable the continued habitation of the spouses and that there was no hope of reconciliation.

FINDINGS

[17] I have reviewed the evidence that was adduced and given deliberate consideration to the submissions of learned counsel for the parties. Both counsel accepted that much of this case turns on the credibility of the evidence that was adduced in the trial. In that regard, I will now look at the particulars of the Respondent behaviour relied on by the Petitioner, as set out at paragraph [2] above.

[18] With respect to (a), in which the Petitioner alleged that problems arose shortly after the marriage as the Respondent constantly argued with the Petitioner over money etc. and that he felt bad about this as he thought she really loved him but all she seemed to be after was his money. I will not put much weight on this part of the evidence. No evidence was adduced as to the frequency of such arguments. I do not find that this in and of itself to be so grave as to satisfy the standard to be considered "cruel" or "intolerable".

[19] With regard to paragraphs 8(b) and 8(c) of the Petition, the Petitioner complained that the Respondent left the matrimonial home with the child of the marriage twice in 2007 without informing him where she was going and on the second occasion (15th October 2007) she left to live in Guyana. She did not return to the matrimonial home until April 2009. In the witness box he stated categorically that he had not seen her or spoken to her for the period October 2007 to April 2009. He went as far as to say that he did not know the area code for Guyana and so did not and could not have called her. This act by the Respondent caused him mental anguish. He said he felt bad.

[20] The Respondent's testimony was that she did not leave the matrimonial home in October at all. She said that she was put out by the Petitioner "around the end of 2007" after a quarrel with the Petitioner over 'Pampers' for their son.

[21] While I am uncertain as to whom to believe regarding the precise date that the Respondent left the matrimonial home, and notwithstanding the inconsistency between the statement in the Respondent's Answer that the quarrel was about the Petitioner coming in late and her testimony in the witness box that it was about 'Pampers', I prefer the testimony of the Respondent as opposed to that of the Petitioner that her departure was as a result of a quarrel and she was put out of the house by the Petitioner and I so find.

[22] The Respondent testified that she left for Guyana on December 11th, 2007 and stayed for only one month. During the period she was in Guyana, she communicated several times by phone with the Petitioner. He called her a number of times as well. Further, she tendered proof that she returned to Nevis in or about January 2008.

[23] I am afraid that I do not find the Petitioner's evidence reliable when he said he was totally unaware of the Respondent's whereabouts between October 2007 and April 2009 and that this act by the Respondent caused him much emotional anguish and was an act of mental cruelty.The evidence showed and the Court accepts as a fact that the Respondent was out of the jurisdiction for only a month, and not for the period alleged by the Petitioner.

[24] In cross examination the Petitioner denied visiting the Respondent at her brother's house between the period January and April 2008. He stuck fast to his story that he was unaware that she was even in Nevis until she showed up at the matrimonial home in April 2009. In relation to this portion of the evidence, I accept the Respondent and her witness Carlan Thomas' version. All the witnesses stated

in examination in chief or admitted in cross examination that the matrimonial home and Carlan's house are just two streets apart and 5 to 6 minutes away if walking. They are both in the same community of Ransbury Site. I take judicial notice that the community is relatively small. Therefore, while he may not have been aware of the precise date that the Respondent returned, I do not accept that the Petitioner was unaware that the Respondent had returned to Nevis until April 2009. The Court accepts as a fact that within days of her return to Nevis the Petitioner started visiting her at her brother's house which was a few streets away from the matrimonial home where the Petitioner resides.

[25 I reject the Petitioner's testimony in terms of the date that the Respondent returned to the matrimonial home. I accept as a matter of fact that the Respondent moved back into the matrimonial home with the urging and agreement of the Petitioner in April 2008 and they resumed cohabitation as a normal couple trying to make their marriage work.

[26] The Petitioner complained at 8.d) of his Petition that since returning from Guyana, the Respondent, in a further act of mental cruelty, advised him that she had no romantic feelings towards him whatsoever. The Respondent denies these assertions. She said she is still in love with her husband and she believes that the parties can reconcile. Even if I believed the Petitioner that the Respondent said she had no romantic feelings towards him (which I do not), I do not accept that this caused him mental anguish as he alleges. Had that been the case, the Petitioner most likely would have acted sooner to bring the marriage to an end.

[27] Another factor the Petitioner stated in proof that the marriage has broken down irretrievably is that since October 2007 when the Respondent left for Guyana the couple had not engaged in sexual relations and they now live totally separate lives. This was denied by the Respondent. Both the Respondent and her witness said in evidence that the marriage was once again "wonderful" after the Respondent returned to the matrimonial home in 2008. The Respondent said the

love making was good, they would go to the beach and take trips to St. Kitts together. Things were so good that she even became pregnant for the Respondent in August of 2008. Although she later suffered a miscarriage, the parties did not stop having sex until 2010. She reiterated that she still loves her husband and believe that the marriage has not broken down irretrievably. She believes that they can be reconciled.

[28] The Petitioner denied all of this in his version of the facts. He maintained that the parties have not had sexual relations since 2007 and that if indeed the Respondent was pregnant, it was not for him. He stated that although the parties currently occupy the matrimonial home, they lived separate lives. They do not sleep in the same room, the Respondent doesn't cook for him or wash his clothes. They do not speak normally although they quarreled a lot and the Police have had to be called on many occasions to quell disturbances between them. In fact, he alleged in his Reply, that the Respondent had stabbed him and the matter was now before the Magistrates Court.

[29] This would be a serious act of cruelty, if true. Interestingly, no evidence was adduced by the Petitioner in his examination in chief in support of this contention. The issue was raised in cross-examination. This seemed to have been an afterthought of the Petitioner and given that no cogent evidence was adduced to prove those allegations, I will have no regard to that aspect of the Petitioner's case.

[30] With respect to the absence of sexual relations, both parties gave conflicting evidence as to the date of cessation of such activities. The Petitioner claimed that it was since 2007 while the Respondent claimed it was since 2010. I do not think that I have to make a finding as to which date is the operative date. At a minimum, it is accepted that since 2010, some 2 years now, the parties have not had sexual relations with each other. This is a significant factor when one is considering whether in fact a marriage has broken down irretrievably.The parties also had

different recollection as to which one was at fault for this. Both parties blamed the other for this state of affairs. In much of his testimony I did not find the Petitioner to be credible. Where there is a discrepancy between both, I preferred the testimony of the Respondent. On this issue I find that it was the Petitioner who withdrew his affection from the Respondent.

[31] I do agree the marriage is now but a shell and I accept the Petitioner's evidence that there is no chance of reconciliation between himself and the Respondent. "I don't love her anymore", he said in the witness box. However, that does not really end the matter, because by virtue of Section 7(2)(c)(ii) of the Act I am required to also be satisfied that it is the act(s) or behaviour of the Respondent and its effect on the Petitioner that has resulted in the marriage being broken down irretrievably.

[32] I am of the considered view that I must follow the approach set out in **Malaykhan v Malaykhan**[3] and determine whether on a balance of probability, the Petitioner has satisfied the Court of any of the facts set out in section 7(2)(c)(ii) of the Act. Without being satisfied, the Court cannot therefore hold that his marriage has broken down irretrievably.

[33] That section of the Act provides in part as follows:

> (2) For the purpose of subsection (1) irretrievable breakdown in marriage shall be established if the following is proved, that is to say,
>
> (a) ...;
>
> (b) ...
>
> (c) that **the spouse against whom the divorce proceedings arebrought has since the celebration of the marriage,**
>
> (i) committed adultery,
>
> (ii) **treated the other spouse with physical or mental cruelty or other behaviour of such a kind as to render intolerable the continued cohabitation of the spouses** (emphasis added).

[3] *Ibid.*

[34] The word 'intolerable' was considered in the English case of **Goodrich v Goodrich**[4]. Although in that case, the court was considering the issue of adultery under the Divorce Act Divorce Reform Act 1969, s 2(1)(a), the learned trial judge agreeing with the authors of Rayden's on Divorce[5] found that *prima facie,* the approach is a subjective one as between *this* petitioner and *this* respondent. However, it is not sufficient only to find that the Petitioner was genuine in his assertion but also that it was the cruelty or behaviour of the Respondent that has led to the Petitioner finding it intolerable to live with the Respondent.

CONCLUSION

[35] The substantial issue remains whether the Petitioner has established the essential fact prescribed by Section 7(2)(c)(ii). Having taken into account the statutory provisions and applying those to the evidence adduced, I can only conclude that the Petitioner has failed to satisfy me that since the celebration of the marriage the Respondent has treated him with physical or mental cruelty or has behaved in such a way that he cannot reasonably be expected to continue to live with her. Accordingly, my duty is to dismiss the Petition. The Petition is dismissed with no order as to costs.

[36 As an aside, it is expected that fresh proceedings maybe instituted under 7(2)(a) or other appropriate section of the Act that will 'enable the empty legal shell to be destroyed with the maximum of fairness, and the minimum bitterness, distress and humiliation'[6].

Yvette A. Wallace
High Court Judge (Ag)

[4] [1971] 2 All ER 1340
[5] 11th Edn, 1971, at p 175, para 5
[6] See Ash v Ash [1972] 2 WLR at 35, at page 586