EASTERN CARIBBEAN SUPREME COURT
ST. CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHMT2012/0021

BETWEEN:

ANTHONY DERRICK MORGAN

Petitioner

And

VIOLET ELDORA MORGAN

Respondent

Appearances:

Mr Sylvester Anthony and Ms Angelina Gracy Sookoo of Sylvester Anthony Law Offices for the Petitioner
Ms Marsha Henderson of Henderson Legal Chambers for the Respondent

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2013: April 15th

2013: June 28th

JUDGMENT

[1] THOMAS J (AG) The matter before the court for determination is whether a divorce should be granted to the petitioner on the ground that the marriage has irretrievably broken down because the spouses have lived separate and apart for a period of at least five (5) years immediately preceding.

[2] The history of these proceedings is as follows. On the 13th March 2102 Anthony Derrick Morgan filed a Petition against his wife, Violet Eldora Morgan. The respondent was served by way of substituted service on 15th June 2012 and there was an Entry of Appearance for the respondent on 22nd July 2012. On 23rd July

2012 an Answer and Cross Petition was filed and served on the petitioner's counsel on 24th July 2012.

[3] On 22nd March 2013 upon the hearing of an application to strike out the Answer and Cross Petition, the court ordered that the Cross Petition be struck out, as being contrary to the Divorce Act 2005, and that the proceedings be heard as a contested divorce based on the Petition and Answer.

[4] In the Petition the prayer was for:

(1) That the marriage solemnised between the petitioner and the respondent on 19th July 1997 be dissolved.

(2) That the respondent be granted custody of the only child of the marriage who presently lives with the respondent.

(3) That the court grants such further relief or other relief as the court deems necessary.

[5] With the Cross Petition struck out the answer contained no prayer, however, at paragraphs 4 and 5 of the Answer the following is pleaded

> "(4) The respondent admits paragraph 7 of the Petition that the marriage was solemnized on the 19th July 1997 and further that there has been an irretrievable break-down of the marriage, but assents that this is as a result of the petitioner's conduct.
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> (5) Paragraph 8 of the Petition is denied in that the respondent and the petitioner have lived separate and apart firstly since January, 2005 and later resumed cohabitation in that we continued to be intimate and shared a relationship as husband and wife notwithstanding the fact that he lived within the Federation of Saint Christopher and Nevis and accordingly puts the petitioner to strict proof thereof".

[6] It is important to note that with the striking out of the Cross-Petition, the Answer was without a prayer. This will be put in context at a later stage.

Evidence in Summary

[7] Anthony Derrick Morgan, the petitioner, in his evidence in chief testified that he married the respondent on 19th July 1997 and there is one child of the marriage who was born on 22nd September 1997.

[8] It is the petitioner's evidence that he and the respondent began living apart from August 2004 as there were problems.

[9] In terms of residence the petitioner says that they first lived in New Jersey, USA and then he left for New York after he was ordered out of the house. According to him, his wife did not come to New York and that he lived in New York for two years without his wife and then he moved to Kansas City where he lived for three years by himself and returned to St. Kitts in August 2010. He stated further that his wife did not come to live with him in St. Kitts.

[10] In cross-examination the petitioner testified that he understood what separate and apart means and that he and his wife did not always live in different countries.

[11] With respect to his residence in New Jersey the petitioner said that he were there from St. Thomas and lived there for 3 to 4 months. He also said that he never lived with his wife in Orlando and only spent one week there on one visit. The evidence regarding his wife coming to New York while he was there is that, according to him, she did not come to live with him. The petitioner went on to testify that it is possible that the respondent came to New York in 2007 and they only co-habited as they had not made up. He stated further that his wife did not cook and wash for him.

[12] Regarding visits by his wife and the child of the marriage, the petitioner testified that they came from New Jersey to visit him but could not recall the frequency but on each occasion they spent a day or two. And in terms of his visits to Orlando the petitioner said that he on one occasion he stayed for one week and in total she made three visits while living in Kansas where he worked.

[13] With respect to St. Kitts it is the petitioner's evidence that his wife and his daughter came each year and that he picked them up from the airport in December 2011 but they did not stay at the house where he lived. Instead, they stayed in New Town. The petitioner also testified that the last time he and the respondent lived together as man and wife was in August 2004.

[14] In re-examination the petitioner re-stated his earlier evidence that August 2004 was the last time he and his wife lived together and that there was no time he lived with his wife for more than 3 months.

Violet Eldora Morgan

[15] The respondent, Viola Eldora Morgan in her evidence in chief stated that her answer in paragraph 8 denied of the petition which alleged that she and the petitioner lived separate and apart since 2005.

[16] In further testimony, the respondent said that she and the petitioner did not live apart from August 2004 and also denied that she threw him out of the house. According to her, they last lived in January 2005 in New Jersey under the same roof.

[17] In later testimony the respondent admitted that she asked the petitioner to leave in January 2005 at which time he took his things but that he came back in February of the same year and they lived as husband and wife until August 2005 cooking, sleeping, eating and being intimate.

[18] It is the respondent's further testimony that when between September to December 2005 the petitioner came to New Jersey every weekend. She said that he came to Orlando but denied that they did not live as husband and wife. According to her, the petitioner first came in January 2007 and spent three weeks with "us" at my residence.

[19] With respect to 2011 the respondent testified that she did not stay with him, and that they were intimate but they did not have sex.

[20] Finally, the respondent gave evidence that all the visits to the petitioner were for more than three months. Further, that they last lived as husband and wife in February 2011 and that it was in December 2011 when the marriage fell apart completely.

[21] In cross-examination the respondent said that she and the petitioner last had sex in February 2011; and conceded that the marriage had broken down irretrievable. She however testified that she wanted the divorce on her terms. Regarding her visits to St. Kitts the respondent testified that she and her daughter were picked up at the airport by the petitioner and that she and her daughter stayed in New Town. She added that the petitioner lives in Half Way Tree.

[22] In the end the respondent agreed that they have lived apart since August 2004 and that they have never lived or resided in St. Kitts and Nevis since 19th July 1997.

ISSUE

[23] The issue for determination is whether the divorce should be granted by virtue of the irretrievable break-down of the marriage because the petitioner and respondent have lived separate and apart for a period of at least five years immediately preceding the filing of the petition.

[24] Section 7 of the Divorce Act 2005 prescribes the ground upon which a divorce may be granted. It is that there has been an irretrievable breakdown of the marriage. And this is established if one of several matters is proved. In this case the petitioner is relying on section 7(2)(b): "that the spouses have lived separate and apart for at least five years preceding the commencement of the divorce proceedings...".

Submissions

[25] Despite the order of the court that final submissions should be filed and exchanged on or before 7th May, 2013, only submissions on behalf of the petitioner were so filed.

[26] The following represent the salient aspects of the submissions. The submissions begin with a reference to paragraph 9.62 of Rayden & Jackson on Divorce and Family Matters[1] as to how the court should treat spouses living apart. Reliance is also placed on Grenfell v Grenfell[2].

> "(13) It is our respectful submission that the facts adduced in this case prove that the parties have lived separate and apart from each other for approximately seven years prior to the filing of this Petition in March, 2012. The facts of this case, we submit revealed that the parties have been living separate and apart and in different jurisdictions since August, 2004 and not as husband and wife. Accordingly, the Court ought, we respectfully submit to grant the Petition and dissolve the marriage between the parties.
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> (14) We further submit that there is no defence filed or proved by the Respondent to dispute that the marriage has in fact irretrievably broken down. The Respondent by her own admission in paragraph 4 of her Answer agrees that the marriage was in fact irretrievably broken down. Accordingly and in keeping with the purpose of Parliament as legislated in the Divorce Act, we submit that the Court ought to grant the Petition and dissolve the marriage on the basis that the parties have lived continuously for approximately seven years immediately prior to the filing of this Petition.
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> (16) The Court of Appeal in the case of Grenfell made the following important pronouncement which we repeat herein for ease of reference
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> '... it is necessary to remind ourselves what the Divorce Reform Act in fact did. There is one ground, and one ground only now, upon which the Court has power to dissolve a marriage, and that is ... the marriage has broken down irretrievably. Parliament then went on to prescribe five separate facts, one of which has to be established to prove that the marriage has broken irretrievably ... which would raise ... a presumption that the marriage had broken down – Parliament provided that the Court shall grant a decree of divorce unless it is satisfied on all the evidence that the

[1] 18th edition
[2] [1978] Fam 128; [1978] 1 All ER 561

marriage has not broken down irretrievably ... the omus is quite plainly on the party who is asserting that the marriage has not irretrievably broken down to satisfy the Court by evidence that the presumption should be treated as rebutted. It is not therefore an adversary proceedings...

... once the Reply was struck, there was an admission by the wife that the marriage had irretrievably broken down and that the parties had been separate and apart for five years... The wife would not be in a position to rebut the presumption of irretrievably breakdown...

...in the nature of things, on the facts in this case, there are no other relevant facts, other than the fact that the parties have been apart for five years and that the wife herself has asked for a decree and has herself admitted that the marriage was irretrievably broken down.

...The purpose of Parliament was to ensure that where a marriage has irretrievably broken down, it shall be dissolved as quickly and as painlessly as possible under the Act...(Emphasis ours)

(17) It is important to note that the Court ruled that there was no point to conduct an inquiry of the Respondent's behaviour as pleaded in the wife's petition as this was counter the policy of the Divorce Reform Act. The Court ruled that having been notified that the parties lived separately for five continuous years and that there was proof that the marriage had broken down irretrievably the decree should be granted on that basis without going further.

(18) It is our respectful submissions that there is no defence to the fact that the marriage has broken down irretrievably. This is an agreed fact between the parties. The Petitioner, we submit has adduced the requisite evidence to prove as a fact that the marriage has broken down irretrievably and that the parties have lived separate lives and in separate jurisdictions for at least seven years prior to the presentation of the Petition.

(19) We further submit that if the Court is satisfied that the marriage has broken down irretrievably and that the parties have live separate for at least five years prior to the filing of the Petition, the Court need not inquire any further, but ought, in keeping with the intention of Parliament and Grenfell grant the dissolution of the subject marriage as prayed in the Petition".

Conclusion

[27] It has already been indicated that the respondent was left with a mere answer after the Cross-Petition was struck out by this court. Added to that, the answer did not contain a prayer (as the Cross-Petition did) so that the answer came down to a number of details and an assertion of adultery on the part of the Petitioner.

[28] On the central issue of the irretrievable breakdown of the marriage the petitioner led evidence to show that the parties lived separate and apart for a period commencing in August 2004. But in her evidence the respondent testified that they only lived separate and apart from January 2005. This is frustrated by the respondent asking the petitioner to leave the home and with various visits on both sides during the relevant period.

[29] On the whole the court accepts the evidence of the petitioner as being credible that the parties did live separate and apart since August 2004 having lived in various parts of the United States of America and when there were visits by the petitioner with the daughter of the marriage. The court accepts the petitioner's evidence that these visits were short and in some instances the respondent did not cook or wash for the petitioner. And even when the parties were together in St. Kitts they lived under separate roofs in Half Way Tree and New Town.

[30] In any event, in the end the respondent agreed that the marriage had broken down irretrievably. And by implication this would have been fuelled by the petitioner's admission of his fathering of a child outside of the marriage.

[31] The foregoing let in a passage of learning from Rayden and Jackson on Divorce and Family Matters relied on by learned counsel for the Petitioner. It reads thus:

> "The court is not in the first instance concerned, when considering irretrievable breakdown in these circumstances, with the question who is responsible for the separation, but may have to investigate this when considering finance or a defence of hardship: subject to these consideration, there is no question of inquiry into fault in these cases. It is not open to a respondent in a five year case to pray for rejection where it is not disputed that the parties have lived separate for the five year period...Where the respondent to a petition founded on adultery or behaviour or desertion alleges five years' separation when the petitioner admits...the court should first determine whether the five years' separation is established and, if so, grant a decree on the facts".

[32] It is already a finding of fact by the court that the marriage has broken down on account of living separate and apart for at least five years preceding the commencement of these proceedings. But while the respondent agrees and

concedes this fact she wants the divorce on her terms being adultery by the petitioner. That is old and forbidden ground and it is the point 'Rayden and Jackson[3] are espousing. This also bring into the equation the dictum from in Grenfell v Grenfell that once the marriage has broken down irretrievably it should be dissolved as quickly and as painlessly under the law.

[33] In this regard, as noted before, the petitioner filed his petition on 13th March 2012 which was served on the respondent overseas on the 15th June 2012 with an Entry of Appearance and Answer and Cross-Petition filed on2nd July 2012 and 23rd July 2012, respectively.

[34] And the fact that the respondent and the child of the marriage came to St. Kitts sometimes in December and certainly in 2011, coupled with her concession of the breakdown of the marriage and her desire to place 'fault' on the petitioner point to inertia on her part.

[35] Having regard to the evidence and the law the divorce is granted as prayed by the petitioner as it has been established that the marriage between the parties has broken down irretrievably by virtue of the fact that the parties have lived separate and apart for at least 5 years prior to the commencement of the instant proceedings. Order accordingly.

Costs

[36] In the circumstances of the case the respondent must pay the petitioner costs of $1500.00.

Errol L Thomas
High Court Judge [Ag]

[3] Op Cit