IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN
DIVORCE AND MATRIMONIAL CAUSES REGISTRY

Cause No: FAM 0052/2010
Legal Aid No: 152/2010

BETWEEN:

MILDRED THERESA MENA-HEBBERT

PETITIONER

AND:

FRANCISCO MENA-HEBBERT

RESPONDENT/APPLICANT

Appearances:	**Ms. Laura Clemens of Bodden & Bodden for the Petitioner**
	Ms. Stacy Parke of Brooks & Brooks for the Respondent/Applicant
Before:	**The Hon. Mr. Justice Charles Quin**
Heard:	**25th February 2011**

JUDGMENT

1. The Respondent filed a Summons dated the 9th December 2010 for an Order that leave be granted to the Respondent to file his Answer and Cross Petition out of time and, under the further and other relief, the Respondent asked that the Order dated the 4th October 2010 proving the Petitioner's Petition, be set aside. The Respondent's Summons is grounded by his affidavit filed on the 16th February 2011.

Relevant Chronology

2. On the 16th February 1980 at Spot Bay, Cayman Brac, the Petitioner and the Respondent were married. Following the celebration of their marriage they lived and cohabited at 96 Ocean Villa Drive, Stake Bay, Cayman Brac, Cayman Islands.

3. There are three children of the marriage namely, Anastascio Falco Mena-Hebbert, born on the 18th June 1996, Andre Milton Mena-Hebbert, born on the 26th April 1999 and Antontia Theresa, born on the 8th March 2001.

4. The first years of the marriage were happy, but in the latter years the parties drifted apart. At paragraph 6 of the Petitioner's Petition she alleges that marital relations had ceased for two and a half (2 ½) years and, effectively, the parties lived separate and apart under the same roof.

5. The Petition stated that there was an irretrievable breakdown of the marriage, there was unreasonable behaviour on the part of the Respondent, and, that herself and the Respondent had lived separate and apart for 2 ½ years before the presentation of the Petition. The Petition averred that there was no prospect whatsoever of reconciliation between the parties.

6. On the 24th February 2010, the Petitioner filed her Verifying Affidavit confirming that there was an irretrievable breakdown of the marriage due to the Respondent's unreasonable behaviour, and the fact that the parties had lived separate and apart for 2 ½ years.

7. On the 1st March 2010 the Respondent was served with a copy of the Petition, and the Petitioner's Verifying Affidavit, by Lolita Bodden ("Ms. Bodden") at Ed's Place on Cayman Brac.

8. On the 30th July 2010 Ms. Bodden swore her affidavit of service, which was filed in the Grand Court on the 16th September 2010.

9. On the 21st September 2010 the Petitioner applied for an Order proving the Petition.

10. On the 4th October 2010 Henderson J., having read the Petitioner's Verifying Affidavit and the affidavit of service, and noting that no intention to defend the Petition had been filed, ordered that the Petition was proved, and the Petitioner obtained a decree nisi.

11. On the 3rd December 2010 Messrs. Brooks & Brooks filed a Notice of Appointment confirming that they had been instructed to act for the Respondent in this matter.

12. On the 9th December 2010 the Respondent filed his Summons for leave to file his Answer and Cross Petition out of time.

13. On the 9th February 2011 the Petitioner's attorneys wrote to the Respondent's attorneys pointing out that the Petitioner's Petition had already been proved and an Order granting the Petitioner a decree nisi had been granted, and that the Respondent's proper and only recourse, in the circumstances, was to appeal to the Court of Appeal. The Petitioner's letter also stated that the Respondent's draft answer and Cross Petition and Verifying Affidavit "simply go to issues" which her client says has led to the breakdown of the marriage, and do not appear to raise matters which are relevant to the resolution of the ancillary matters.

14. The Petitioner's attorneys also pointed out that as both parties were legally aided, it might be a better use of the Court's time if the Respondent's application for leave to file his Answer and Cross Petition out of time were withdrawn, so that both parties

could concentrate their efforts on resolving and obtaining a settlement of the ancillary issues.

15. On the 16th February 2011 the Respondent's attorneys wrote in reply stating that their client did not agree with the Petitioner's attorneys' understanding of the position, and further, stated that when ancillary matters are dealt with they would require a detailed affidavit of means from the Petitioner.

16. Also on the 16th February 2011 the Respondent filed his affidavit in support of his application for leave to file an answer and Cross Petition out of time. In his affidavit the Respondent also averred that the marriage had broken down irretrievably but not on the grounds as outlined in the Petition. The Respondent avers in his Draft Cross Petition that the marriage is irretrievably broken down without any chance of reconciliation and that the Petitioner has behaved in such an unreasonable manner towards the Respondent that he now finds it intolerable to live with the Petitioner.

The Respondent's Position

17. The Respondent takes the view that he is entitled to present his case contained in his draft Answer and draft Cross Petition. The Respondent does not accept the particulars of behaviour pleaded in the Petitioner's Petition and submits that his grounds are the proper grounds for proving the irretrievable breakdown of the marriage, and, that it was the Petitioner's unreasonable behaviour that caused the irretrievable breakdown of the marriage and not the Respondent's.

18. The Respondent accepts that he received the envelope from Ms. Bodden containing the Petition and the Petitioner's Verifying Affidavit but said that he never picked up or opened the envelope, or read the documents contained therein.

The Petitioner's Position

19. The Petitioner avers to the fact that the Respondent told her that he had received her Petition and Verifying Affidavit, but had thrown them away.

20. The Petitioner submits that the Court lacks the requisite jurisdiction to grant the Respondent's request because the decree nisi has already been granted. The Petitioner further submits that pursuant to s.5 and s.6(f)(iii) of the Court of Appeal Law, and s.24 and s.25 of the Matrimonial Causes Law, the Respondent's recourse was an appeal to the Court of Appeal to rescind or vary the decree nisi.

21. The Petitioner further submits that pursuant to r.15 of the Matrimonial Causes Rules, in granting the decree nisi, the Court has already determined that:

i. The Petition has been duly served;

ii. The Petition is an undefended Petition;

iii. The Verifying Affidavit is sufficient to prove the Petition in accordance with the requirements of the law;

iv. The ancillary matters are to be adjourned to chambers.

22. The Petitioner submits that even if this Court does have jurisdiction, the Court should not grant the Respondent's application because, pursuant to r.17 of the Matrimonial Causes Rules, the failure of the Respondent to acknowledge service

and file an answer in time does not preclude the Respondent from participating in the determination of the ancillary issues still outstanding between the parties.

23. The Petitioner submits that the Respondent does not allege in his draft Answer and Cross Petition that the marriage has not irretrievably broken down, or that the Court should not otherwise grant a Decree of Dissolution. Simply put, the Respondent avers that it was the unreasonable behaviour of the Petitioner, rather than his own unreasonable behaviour which caused the breakdown of the marriage.

24. The Petitioner argues with some force that it would be a waste of the Court's time, and the Legal Aid funds, for the parties to litigate over the question of whose unreasonable behaviour was responsible for the breakdown of the marriage, when the time and funds would be better spent in resolving the outstanding ancillary issues between the parties. The Petitioner also submits that she will be greatly prejudiced because her Legal Aid fund, unlike the Respondent's fund, has been capped, and therefore the Petitioner is exposed to further costs, which will be detrimental to her position.

Analysis & Conclusion

25. On the 4th October 2010 Henderson J., having read the Petitioner's Verifying Affidavit filed on the 23rd February 2010, and the Affidavit of Service sworn by Ms. Bodden, dated the 30th July 2010 and, with no notice of intention to defend the Petition having been filed by the Respondent, ordered that the facts stated in the Petition filed on the 24th February 2010 were proved.

26. The Respondent has put forward no evidence or valid argument relating to why Henderson J's Order should be struck out. Pursuant to s.24 of the Matrimonial

Causes Law it was open to the Respondent to appeal to the Court of Appeal against Henderson J's order, provided that the written notice of appeal was lodged within 21 days of its pronouncement. If the Respondent had filed such an appeal, it was open to him, under s.25 of the Matrimonial Causes Law to ask the Court of Appeal to confirm, rescind and or vary Henderson J's Order. In fact, the Court of Appeal Law deals specifically with a decree nisi, such as Henderson J's Order, and s.6(f)(iii) reads:

> "*No appeals shall lie without the leave of the Grand Court, or of the Court, from an interlocutory Judgment made or given by a Judge of the Grand Court except in the case of a decree nisi in a matrimonial cause…"*

27. Under s.6 of the Court of Appeal Law a party has an absolute right to appeal against a decree nisi and does not need the leave of the Grand Court, or of the Court of Appeal, to file such appeal. The Respondent has failed to take this step, and accordingly, I find that this Court does not have the jurisdiction to strike out the Order of Henderson J. dated the 4th October 2010.

28. I turn now to the final issue before this Court, namely, whether leave should be granted to the Respondent to file his Answer and Cross Petition out of time.

29. In his affidavit of February 2011 in support of his application, the Respondent avers that he adamantly disagrees with the content of the Petition on the grounds as laid out by the Petitioner. The Respondent avers that he "*verily believes the marriage has broken down irretrievably without any chance of reconciliation*." However, he goes on to add, "…*but not on the grounds as outlined by the Petition*."

The Respondent alleges that it was the Petitioner's unreasonable behaviour, and not his, that caused the irretrievable breakdown of the marriage.

30. Counsel for both parties referred me to the case of ***B (E.M.) v. B (J.)*** [1994-95] CILR 332 and the Judgment of the then Chief Justice Harre. Like this case, the Respondent applied to the Grand Court for leave to file an Answer and Cross Petition out of time. However in ***B (E.M.) v. B (J.)*** the application for leave to file an answer and cross petition out of time was in reply to the wife's Petition for divorce, and, it would appear from Harre CJ's Judgment, before any decree nisi was granted. Harre C.J. reviewed the English authorities which also provide considerable assistance to this Court. Harre C.J., referred to the All England Law Report headnote in the English Court of Appeal decision of ***Collins v. Collins*** [1972] 2 All E. R. 658, which stated:

> "*If the wife were to file an answer and obtain a decree, or a cross decree, it would make absolutely no difference to her financial position at all; her right to periodical payments or other ancillary relief would be completely preserved if the husband were to be granted a decree. All the controversy which there might be about the circumstances in which the parties had separated could be fully investigated on the wife's claim for periodical payments and other relief.*"

31. Davies L.J. also stated at paragraph (f) on page 661 in ***Collins v. Collins*** :

> "*On the whole of the case it seems to me that to grant the wife's application in this case would be quite pointless, would do her no good at all, and, what is more, might well involve a good deal of extra expense, either to the parties or, if legal aid comes into this case, which I know nothing about, to public funds.*"

In the case before this Court both parties have been granted Legal Aid, although the Petitioner's Legal Aid, unlike the Respondent's Legal Aid, has been capped, and therefore she is exposed to expending further costs in these proceedings.

32. Harre C.J. also referred to a second English Court of Appeal decision, ***Spill v. Spill*** [1972] 3 All E.R. and stated in ***B (E.M.) v. B (J.)*** at line 41on page 334 :

> *"... the Court took the view that the respondent was seeking discretionary relief without showing adequate ground why the court should exercise that discretion in his favour. Once again it was pointed out that the respondent would have ample opportunity to place before the court any submissions that he wished to make if and when questions arose thereafter as to the distribution or apportionment of property*."

Harre C.J. stated at page 335 line 8:

> *"[The respondent] has given his reasons for now wishing to defend and his layman's perception that in view of the allegation in the petition that he has failed to contribute to the marriage financially he might be in some way prejudiced in relation to ancillary matters is perfectly understandable. It is also groundless. He may be sure, that as in the English cases, ample opportunity will be given to him at a separate hearing in chambers to put his case fully with regard to his financial claims arising out of the division of the matrimonial property. This is the normal and routine way of dealing with such matters if agreement has not already been reached before the hearing of the petition.*"

Harre C.J. continued at line 17 on page 335:

> "*If in every such case the petition ought to be defended the courts would be spending a great deal of their time in dealing with battles which would not only be painful to the parties but also completely pointless in cases such as this where both are agreed that the marriage has irretrievably broken down.*"

For those reasons Chief Justice Harre refused the Respondent's application for leave to file an answer and cross petition, and ordered that the costs of the Summons be costs in the cause.

33. In the case before me I would adopt and apply the reasons of L.J. Davies in ***Collins v. Collins*** and Harre C.J. in ***B (E.M.) v. B (J.)***. The Respondent has not put forward any grounds as to why leave to allow him to file an answer and cross petition out of time should be granted. To allow his answer and cross petition to be filed out of time would not only be painful to both parties but also completely pointless. It is clear that both are agreed that the marriage has irretrievably broken down, and

therefore the Court should proceed to continue with the hearing on all matters of ancillary relief upon which both parties wish to be heard. There is no prejudice to be suffered by the Respondent. He is out of time and I apply Harre C J's ratio in ***B (E.M.) v. B (J)*** and reject the Respondent's application for the aforementioned reasons. Like Harre C.J. I also order that the costs of the Summons be costs in the cause.

Dated this the 15th day of March 2011

Honourable Mr. Justice Charles Quin
Judge of the Grand Court