Collett

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

BEFORE THE HON. THE CHIEF JUSTICE

ON 10TH & 11TH AUGUST, &
13TH DECEMBER 1988

3-01-89

CAUSE D 70 of 1986

BETWEN	DAVID RUSSELL MYERS	PETITIONER
AND	LORNA MYERS	RESPONDENT

Mr. J. Jenkins of Truman Bodden & Co. for the Petitoner
Mr. A. Steve McField for the Respondent.

COLLETT C.J. **JUDGEMENT**

This is a husband's Petition for divorce brought pursuant to section 10 (1) (b) of the Matrimonial Causes Law on the sole ground alleging that the Respondent wife has behaved in such a way that the Petitioner cannot reasonably be expected to live with her. It also alleges that the marriage has broken down irretrievably. Paragraph 11 contains particulars of the conduct relied on.

By her Answer, the wife has denied all the allegations of conduct made against her in paragraph 11. In evidence although not in the Answer she has further denied that the marriage has broken down irretrievably. She has in turn made various counter-allegations of unreasonable conduct on the part of the husband but apart from maintenance pending suit and costs she has not sought any substantive relief from the Court for herself against him in the suit.

Upon this state of the pleadings the Court is required to examine the whole of the evidence and to decide in the first place whether or not the allegations of conduct brought against the wife in this Petition have been made out to such an extent that the Court considers it would in the light of the whole

history and circumstances of this marriage be unreasonable to expect the husband to live with the wife any more. The test is a subjective one - see Rayden on Divorce 14th Ed. pp 234/235. Unless this is proved a decree cannot be pronounced.

This has been a relatively short and stormy marriage. The parties were married in 1984. The husband is 26 years older than the wife and he was married previously. There are no children of their union but two children born to the Respondent before the marriage were initially treated by the parties as children of their family. They are a girl now aged 9 and a boy now aged 6. The husband has a grown up daughter of 23 years. Until the Summer of 1986 the parties' relationship seems to have been quite amicable as is borne out by the evidence of Mrs. Niscombe, the wife's mother which I accept on this point. In or about July, 1986 however, the wife according to the husband's evidence began to make unprovoked physical assaults upon him as they were retiring to bed for the night, by striking him about the head and body. The wife in evidence denied she ever did so. He further testified that on another occasion she took up an electric radio/clock and smashed it to the floor destroying it: this also the wife denied in evidence. On or about the 10th of August 1986 the husband says the wife moved most of her belongings to the spare room and took to sleeping there by herself for some 2 - 3 weeks before returning to the parties bedroom just as abruptly and without any explanation. According to the wife she moved there because he asked her to, so as not to disturb him when she had to get up very early for work and returned because he apologised and asked her to come back. This in turn was denied by the husband under cross-examination.

Then the husband said on the 18th August 1986 he came home at lunch-time and was taking a 20 minute catnap in a chaise lougne in the front room when the wife came in and shortly afterwards struck him a heavy blow to the head as he was dozing - nothing had been done or said before hand to provoke that assault. The wife's evidence was a complete denial that this incident ever took place. There is quite naturally no kind of

corroboration of this allegation but it is surprising that the husband should have recounted in detail an incident of this nature if nothing of the kind had taken place at all: a vivid stroke of imagination from a witness who seemed to me to display a rather pedestrian set of characteristics.

According to the husband, at this time the wife was issuing frequent threats to kill him which so alarmed him that he took to going downstairs in the nighttime after the wife had gone to sleep so as to remove all the sharp knives etc. from the kitchen and hide them away. Once again the wife denies this allegation saying that she never found any knives missing when she got up in the morning. Once again corroboration is absent. The husband went on to say that since he was unable to reason with the wife about these incidents he became concerned about her emotional and mental well-being and sought advice from his family doctor. He was referred to Dr. Frank Knight who was then a consultant psychiatrist at George Town Hospital. The husband said he consulted Dr. Knight, explained the problem to him and enlisted his aid to persuade the wife to attend with him joint counselling sessions at Dr. Knight's office. Initially she was reluctant but subsequently she agreed to attend.

The wife in her evidence agreed that they did both attend counselling sessions with Dr. Knight on several occasions and that it was the husband who had approached the doctor first. According to her evidence, however, the topic of conversation was not her own behaviour but rather the alleged alcoholic drinking problems of the husband, problems the existence of which he denies altogether. It seems unlikely that he would have sought help from Dr. Knight over a problem which he denies existed.

Clearly here was an issue capable of corroboration one way or the other. Attempts to secure the attendance of Dr. Knight whose home is in Jamaica to give evidence at the trial were not apparently successful. After the hearing had been adjourned part heard on 11th August 1988, the Petitioner's attorneys served a notice on the Respondent's attorneys and the

Court under rule 13 of the Civil Evidence Rules 1978 in respect of an affidavit sworn by Dr. Knight exhibiting a written statement concerning his professional counselling of these parties in July 1986 and thereafter. No counter notice was served by the Respondent's attorneys as provided for by Rule 18 of the Rules requiring his attendance at the resumed trial. Despite objections by counsel for the Respondent I ruled that this documentary evidence was admissible under section 30 of the Evidence Law. I bear in mind that the weight of this evidence is significantly reduced by the lack of opportunity for cross-examination of the Doctor, but so far as it goes that evidence, which I accept as probably true, lends support to the husband's version of what transpired during these joint consultations rather than to that of the wife as to the course they took.

The husband who gave evidence of the wife doing wilful damage to the structure of the matrimonial home, namely two interior doors and a deadbolt lock. As to one of the doors the wife's evidence was that it was an old one and had rotted. The door was not produced for inspection and I place little weight on that part of the evidence. There was a further incident related by the husband which is alleged to have happened on the 11th September 1986. After an argument between the parties the husband said he moved into the guest room for the night. While he was there the wife came to the guest room door "screaming and shouting" and demanding to be let into the room. When he did not comply the husband said there was a sudden loud crash and when he went to investigate he discovered that she had kicked a hole in the door. The wife's evidence was a complete denial that this incident occurred. Once again, I find it a surprisingly detailed account to be the fruit of a total invention of the husband.

In her evidence in chief the wife made a number of specific allegations of unacceptable conduct against the husband. One was that the husband allowed his daughter and her boyfriend to live in the matrimonial home for several months during 1986

despite her own protests that the boyfriend was involved with illegal drugs. The husband admitted that they stayed with his permission for some months and that the wife had objected but stated that her complaints were groundless. He obtained and produced a certificate from the Royal Caymanian Police showing that the boyfriend had no drug convictions. This was put to the wife in cross-examination and she then stated that the basis of her assertions was information which she had apparently received from an acquaintance in the Court's office - in other words, tittle tattle. This did not predispose me to place any excessive reliance upon the dogmatic assertions which recurred throughout her evidence.

During her cross-examination the wife repeated allegations that the Petitioner used foul language on occasions; she admitted on occasions using bad words back but the strongest she would admit to using was "damn". She was then compelled to admit that she had on one occasion given her husband a note in her handwriting admittedly written under provocation which employed a very much stronger epithet than the only one she had earlier admitted using.

Finally she referred to an incident when, upon her having qualified as an air stewardess in Cayman Airways the husband presented her as a so-called present with a box of contraceptive pills. This tasteless and insensitive jape on his part understandably caused resentment upon hers. However, in evidence she stated and maintained that the pills came with a piece of paper attached to the box on which was written the words "this is something I think you need for your job, whore". A card bearing traces of gift wrapping was put to her in cross-examination which bore the exact message but minus the opprobious epithet. She refused to agree that this card was the one which had actually accompanied the pills and persisted in that answer even when forced to concede that this must mean the Petitioner had deliberately manufactured and put forward the card for the purpose of misleading the Court. A more improbable hypothesis would be hard to imagine.

These various aspects of her evidence lead me upon a careful assessment of it to treat her testimony with extreme caution. My observation of the Respondent in the witness box led me to believe that although she can, on occasion, behave with extreme and indeed refined decorum, she is equally capable of flying into furious tantrums. She is also, as a witness, not over careful of the truth. I cannot accept the tenor of her evidence.

It has not gone unnoticed by the Court that whereas the husband has no discernible motive for lying in the witness box, she has a strong motive for doing so. As a Jamaican national married to a person possessing Caymanian status she stands to lose both residential and job security if this marriage is dissolved and it is clear from the evidence that she relishes her present job as an air stewardess with Cayman Airways.

On an assessment of credibility, therefore, I prefer the evidence of the Petitioner to that of the Respondent on all matters of fact in issue between them as to the nature and quality of her behaviour towards him and in particular as to the existence of the pleaded acts of unreasonable conduct on her part which I find to be proved to my satisfaction. In coming to that conclusion I have not overlooked the evidence of the wife's mother, Mrs. Niscombe. However, even if her evidence is accepted at face value it does not go directly to the issue of the acts of unreasonable conduct on which the petitioner relies. The answer does not seek to justify those acts on the basis of any alleged provocation from the husband - rather it denies them altogether. In evidence the Respondent has said that she never struck the Petitioner except in self defence. I cannot accept that evidence and having rejected it, there is no basis on which any actions of the husband such as unkindness to the mother-in-law, unkindness to the children or an alleged assault on the wife with an ice-tray, for instance, could be relied upon as precluding him from reliance upon S. 10 (1) (b) of the Matrimonial Causes Law, as a ground for divorce.

Counsel for the Respondent has laid stress upon the circumstance that the Petition was filed in this suit on 22nd September 1986 whereas on the husband's own evidence co-habitation did not cease until at least 16th November 1986. In these circumstances he submits that the Court should not find it proved that the husband cannot reasonably be expected to live with the wife. In effect he suggests that the husband condoned the wife's behaviour towards him and cannot now found his Petition upon it.

Condonation even before the enactment of the Matrimonial Causes Law 1976 was never a bar to obtaining a decree of dissolution of marriage except where the ground relied on was adultery - see section 27 (2) (ii) of the former Divorce Law, Cap 41. The repeal of that enactment by the present Law in 1976 swept away condonation as a defence in divorce proceedings altogether.

In Bradley v Bradley 1973 3 A.E.R. 750 the Court of Appeal in England held that the fact that the parties had continued to co-habit after the occurrence of acts of alleged unreasonable behaviour did not of itself preclude reliance upon those acts as showing that it was unreasonable to expect the party to whom they were directed to co-habit any further. Of course, such cohabitation over a long period may lead the Court to conclude in all the circumstances of a particular case that it is not unreasonable to expect cohabitation to continue further. In Bradley it was the economic circumstances which had compelled the wife to continue cohabitation despite the husband's behaviour but that cohabitation had extended for two years beyond the occurrence of the personal violence of which she complained. Nevertheless it was held that her petition should not be summarily struck out.

Here there is no economic necessity but the cohabitation was very much shorter. Further, as the evidence shows, the situation in the matrimonial home did not improve and the relationship continued to sour after 1986. The husband's

reasons for filing a divorce petition as early as 22nd September 1986 were so that he could obtain a non-molestation order from the Court. That indeed seems only to have exacerbated matters. The parties finally separated in January 1987 when the wife left the matrimonial home for good. It would, in these circumstances, be wholly unrealistic to find that it is or was as of 22nd September 1986 reasonable to expect the husband to go on living with the wife. In fact he tried to do so but that fact does not require me to find that it was reasonable for him to do so. It seems indeed in the light of retrospect to have been unreasonably optimistic although, perhaps, understandable of him to have done so.

Has this marriage broken down irretrievably? Despite the wife's assertions in the witness box to the contrary that question on the totality of the evidence admits of only an affirmative answer. The parties have already been apart now for nearly two years. Their life-styles and temperaments are clearly incompatible and the likelihood of any resumption of co-habitation if the Court refuses to pronounce a decree must realistically be assessed as nil. This is a limping marriage indeed and it is the policy of the legislation to enable it to be ended. There is no impediment to a decree being granted.

I therefore find sufficient grounds proved to the satisfaction of this Court for the pronouncement of a decree of dissolution of marriage in this case but that pronouncement will be adjourned in accordance with the practice of this Court until the resolution of outstanding matters of ancillary relief has been completed.

Dated the 3rd January 1989

Chief Justice.