SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: SLUHMT 2011/0102

THERESA JOSETTE DALSOU (nee MAXWELL)

Petitioner

and

PHILIP DALSOU

Respondent

Appearances:

Mr. Ermin Moise for the Petitioner
Ms. Andra Gokool Foster for the Respondent

2012: May 2nd

RULING

[1] WILKINSON J.: On July 11th 2011, the Petitioner filed her petition and on September 1st 2011, the Respondent filed his answer and cross-petition. On November 18th 2011, the Petitioner, appeared in person and the Court observed that she had filed a document titled 'Response to the Respondent's answer and Response to cross-petition'. The document was not in the nature/structure of pleadings so the Court recommended that the Petitioner seek legal advice to guide her through the process. At December 15th 2011, the Petitioner appeared with Counsel and on an oral application by Counsel for leave to withdraw the document an order granting leave to withdraw it was made. The contents of the remaining documents are of no moment to this ruling.

[2] The Court has for some time observed that like this Respondent, other respondents frequently file cross-petitions and then the majority of these suits are listed as undefended suits for hearing. Following this at the undefended hearing either the Petitioner or the Respondent withdraws their petition or cross-petition and the matter proceeds as an undefended divorce.

[3] The Court has for some time also inquired as to where is the authority to file a cross-petition when neither the Divorce Act 1973 ("the Act") nor the Divorce Rules 1976 ("the Rules") provide for such a document and the Court was often told that the Respondent merely wanted to have his/her facts on record.

[4] The Court having not heard any submissions before on the issue of whether or not a cross-petition is a valid document in divorce proceedings asked Counsel in the present suit to submit on the issue.

Issue

[5] The sole issue is whether the Respondent or any respondent for that matter is permitted to file a cross-petition being it conveniently set out with his answer or filed as a separate document when there is no provision for a cross-petition in either the Act or the Rules.

Submissions

Counsel for the Respondent

[6] Counsel said that divorce and connected matters were governed by the Act and the Rules and where they were silent, then the Court was to adopt and be guided by the applicable law, rules and procedures at England.

[7] The Act and Rules she submitted were based on the Matrimonial Causes Act 1973, the Matrimonial Causes Rules 1973 and 1977 at England and this was to be seen in that the language of both Acts and the Rules were similar. Such similarities included that there was a sole ground for divorce being that the marriage had broken down irretrievably. Further, like England either the husband

or wife could petition the Court for a divorce using the similar facts prescribed in the Acts, (a noted exception being that at the United Kingdom there was the additional fact of separation of two (2) years with consent of the other party) and the Court was required to make a finding that a petitioner had satisfied the evidential burden of proving the irretrievable breakdown of the marriage. A divorce could only be granted on the petition of a petitioner.

[8] Counsel further submitted that the pleadings of a respondent were prescribed by section 5(5) of the Act and this section was pivotal to the contention that the practice and use of language "cross-petition" in conjunction with an answer is in fact accepted by the Court as the pleading to be filed by a respondent seeking the relief of a petitioner in divorce proceedings.

[9] As to the content of an answer, she said the Rules were silent.

[10] Counsel cited Rayden[1] :

> "**Cross prayers in answer**. ... It has been held[2] by the Court of Appeal that an answer which claimed relief was a petition within the meaning of the rules, ..."

Here she submitted that the Court of Appeal was applying the Matrimonial Causes Rules 1957 that like the English Rules of 1973 and 1977 they had language similar and were identical in most respects to that of the Rules at Saint Lucia.

[11] Counsel further submitted that section 6 of the Matrimonial Causes Act 1950 had the same wording as section 5(5) of the Act and in **Blacker v. Blacker**[3] Hodson LJ said:

> "For this purpose an original answer may be regarded as a cross-petition (see Faulkner v Faulkner); for by s.6 of the Matrimonial Causes Act, 1950, the court may give to the respondent the same relief to which he or she

[1] Rayden on Divorce 14th edition Chap. 12 para.20
[2] Blacker v. Blacker [1960] P 146
[3] Ibid

would have been entitled if he or she had presented a petition seeking such relief."

[12] Reference was also made to **Faulkner v. Faulkner**[4] which Counsel said established the authority for a Court deeming and accepting that an answer that sought relief is a petition and that where the respondent in the answer sets up a substantive case the answer is really in the nature of a petition so far as the respondent's case is concerned.

[13] A respondent at Saint Lucia she said must meet his legal obligation and to do this he must establish his substantive case and the right to the relief that he claimed to be entitled to pursuant to the Act and the Rules. The language of 'cross-petition' in conjunction with an answer to refer to the facts relied on and relief sought by the respondent in divorce proceedings was simply a mode or style of presenting the pleadings. The Respondent must plead facts as required by section 4 of the Act in proof of the irretrievable breakdown and he could not seek his relief as a petitioner by simple denials in his answer. The authorities supported the view that whether referred to as a 'cross charge", "cross prayer", or "cross petition" an answer to a divorce petition that seeks the same relief as a petition is a cross-petition.

[14] She said that it had been accepted and remained the precedent of the High Court at Saint Lucia that a respondent seeking relief as a petitioner may do so by an answer (defending) conjunctively with a cross petition (seeking relief) and a respondent who filed pleadings in this form was properly before the Court. This interpretation of the law (a) established the position of each party from their pleadings, (b) avoided administrative delays and waste of judicial time by allowing from the outset the consolidation of cross action since the Act and the Rules do not prohibit the filing of a separate petition by a respondent.

[15] In conclusion, Counsel said that all the authorities presented show that an answer which seeks relief must satisfy the requirements of a petition and therefore

[4] [1941] 2 All ER 748

notwithstanding the nomenclature, a cross-petition included in the answer should be accepted by the Court as an answer that seeks a cross prayer which must receive the Court's due consideration. The use of the language 'cross-petition' was not procedurally irregular and in any event should not be deemed fatal to preclude the Respondent from the exercise of his legal right to seek relief under the Act and Rules.

[16] Counsel provided the Court with the copy of the precedent for an answer from Rayden[5] and therein was set out a cross-charge. She said it was a matter of pleading style how the respondent sets up his case. The precedent provided:

> "**16. Cross-charge: irretrievable breakdown of marriage**. The said marriage has irretrievably broken down by reason of the matters hereinafter alleged.
>
> **17. Cross-charge of adultery and intolerability.** The petitioner has since celebration of the said marriage committed adultery with ....
>
> 18. Particulars of alleged adultery. From in or about June 19...the petitioner frequently committed adultery with ....
>
> **Prayer.** The respondent therefore prays:
>
> (1) That the prayer of the petition may be rejected.
> (2) That the said marriage may be dissolved.
> (3) ...."
> (4) That [the petitioner [and] the party cited] may be ordered to pay the costs of this suit."

Counsel for the Petitioner

[17] Counsel for the Petitioner said that he did not oppose the submissions of Counsel for the Respondent as he believed that in a sense it was really what the document was called whether it be a cross-petition or otherwise substantively. He was of the view that the Respondent had a right in law to go a little further than merely responding or defending the petition and he ought to be able to look forward to having an order in his favour for divorce.

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[5] Ibid

The Law

[18] Counsel for the Respondent is correct when she states that the Act and the Rules are similar to the Matrimonial Causes Act 1973 and the Matrimonial Causes Rules 1977 and the former Rules 1973[6] at England. The Court was unable to secure a copy of the Matrimonial Causes Rule 1973 but believes that reference can be had to the Matrimonial Causes Rules 1977 as they too contain the provisions under discussion.

[19] The Act provides at section 3 that the sole ground on which a petition for divorce may be presented to the Court by either party to a marriage is that the marriage has broken down irretrievably. The Matrimonial Causes Act 1973 provides the identical ground at section 1.

[20] The Act further provides at section 4 the following:

> "**4. PROOF OF BREADKOWN**
>
> (1) The Court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the Court of one or more of the following facts, that is to say-
>
> (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
>
> (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
>
> (c) that the respondent has deserted the petitioner for a continuous period of at least two (2) years immediately preceding the presentation of the petition;

[6] It is important to note the date because the Rules at Saint Lucia came into force at August 19th 1976.

(d) that the parties to the marriage have lived apart for a continuous period of at least five (5) years immediately preceding the presentation of the petition.

The Matrimonial Causes Act 1973 has set out that identical facts are required as proof of the breakdown and the additional that the parties to the marriage have lived apart for a continuous period of at least two (2) years immediately preceding the presentation of the petition and the respondent consents to the decree being granted.

[21] The Act section 5 (5) provides:

> "(5) If in any proceedings for divorce the respondent alleges against the petitioner and proves any such fact as is mentioned in section 4(1), the Court may give the respondent the relief to which the respondent would have been entitled if the respondent had presented a petition seeking that relief." (Emphasis is mine)

The equivalent in the Matrimonial Causes Act 1973 section 20 provides:

> "**20. Relief for respondent in divorce proceedings**. If in any proceedings for divorce the respondent alleges and proves any such fact as is mentioned in subsection (2) of section 1 above (treating the respondent as the petitioner and the petitioner as the respondent for the purposes of the subsection) the court may give to the respondent the relief to which he would have been entitled if he had presented a petition seeking that relief." (Emphasis is mine)

[22] The matters to be pleaded in an answer are prescribed at rule 15 which provides:

> "15. Filing of answer to petition. (1) Subject to paragraph (2) and to rules
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> 13, 17, and 34 a respondent or co-respondent who –
>
> (a) wishes to defend the petition or to dispute any of the facts alleged in it,
>
> (b) being the respondent spouse, wishes to make in the proceedings any charge against the petitioner in respect of which the respondent spouse prays for relief, or
>
> (c) ...

(d) ...

shall within twenty-one days after the expiration of the time limited for giving notice of intention to defend, file an answer to the petition." (Emphasis is mine)

The equivalent provision is found at the Matrimonial Causes Rules 1977 rule 18(1) (b):

"18. (1) Subject to paragraph (2) and to rules 16, 20 and 49, a respondent or co-respondent who-

(a) wishes to defend the petition or to dispute any of the facts alleged in it,

(b) **being the respondent wishes to make in the proceedings any charge against the petitioner in respect of which the respondent prays for relief**, or

(c) ...

shall, within 21 days after the expiration of the time limited for giving notice of intention to defence, file an answer to the petition. (Emphasis is mine)

[23] The Court has found Halsbury's[7] to be instructive in assisting with the interpretation of rule 15(1)(b) and the Matrimonial Causes Rules 1977 rule 18(1)(b). At paragraphs753 to 762 it is stated:

"**753. Filing of answer to petition: transfer of cause to High Court**. Within twenty-one days after the time limited for giving notice of intention to defend a respondent or co-respondent must file an answer to the petition (1) if he wishes to defend the petition or dispute any of the facts alleged in it, or (2) if he is the respondent and wishes to make in the proceedings any charge against the petitioner in respect of which he prays for relief,..." (Emphasis is mine)

762. Counter-charges to be in answer. If a husband or wife, who has been served with a petition, desires (in addition to resisting, by an answer, the prayer of such petition) to obtain affirmative relief, the purpose should

[7] Halsbury's Laws of England 4th edition, Vol.13 Divorce

be effected by a prayer for relief in the answer, and not by a separate petition[8] except in a nullity suit. (Emphasis is mine)

764. Relief for respondent in divorce proceedings. If in any proceedings for divorce the respondent alleges and proves any such fact as is mentioned in section 1(2)[9] of the Matrimonial Causes Act 1973[10] (treating the respondent as a petitioner and the petitioner as a respondent) the court may give the respondent the relief he would have been entitled if he had presented a petition seeking that relief. (Emphasis is mine)

765. Nullity. It is the established practice for a respondent to a nullity suit to put forward a charge of a matrimonial offence by way of a separate petition, for such a charge has no connection with the substance of the petition either as a plea in law or by way of mitigation. In order to save expense, however, there is no objection to an answer and a cross-petition containing such a charge being contained in one and the same document.[11]

Analysis

[24] It is noteworthy that for the very Act and Rules of England upon which the Respondent relies Counsel did not produce a precedent for a cross-petition.

[25] Counsel has sought to imply that there was reception where the Act and Rules were silent.[12] The Court rejects this assertion as the Court believes that if Parliament had wanted that there was to be reception where the Act and Rules were silent it would have provided for this in the Divorce Act. Provision for

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[8] Norton v. Norton [1945] P 56, [1945] 2 All ER 122; Practice Direction [1945] WN 234. See also Robertson v. Robertson [1954] 3 All ER 413n [1954] 1 WLR 1537 (where a cross-petition, alleging desertion of three years to cross-prayer in answer, was permitted by way of amendment to the answer); Blacker v. Blacker [1960] P 146, [1960] 2 All ER 291, CA; Tulley v. Tulley [1967] p 285, [1967] 1 All ER 639.

[9] Facts to be satisfied are similar to Saint Lucia in that they are adultery, unreasonable behavior, desertion for 2 years, and separation for 5 years. The United Kingdom has the added fact of separation for 2 years with the consent of the other party.

[10] In which case a fresh suit may be presented on the same facts: Hall v. Hall and Richardson (1879) 48 LJP 57.

[11] Pickett v. Pickett (otherwise Moss) p 267, [1951] 1 All ER 614, following Humphrey v. Williams (falsely call herself Humphrey) (1860) LJPM &A 62, and Anon (1857) Dea & Sw 295. The issue of nullity should be tried first: S (otherwise P) v. S [1970] P 208, [1970] 2 All ER 251.

[12] The Court had asked Counsel to provide the authority covering reception on matrimonial matters but same was not provided until shortly before the decision was to be read.

reception is seen by example in the West Indies Associated States Supreme Court (Grenada) 1971 which provides:

> "11(1) The jurisdiction vested in the High Court in civil proceedings, and in probate, divorce and matrimonial causes, shall be exercised in accordance with the provisions of this Act and any other law in operation in Grenada and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice for the time being in force in the High Court of Justice in England."[13]

[26] Should the Court be wrong and there is in fact provision for reception of the law and practice at England so far as it pertains to divorce proceedings then the question is what is it that is being received? As seen, the relevant provisions cited from the Act and the Matrimonial Causes Act 1973 are identical and so too the relevant provisions of the Rules and the Matrimonial Causes Rules 1977. It bears repeating that none of the English provisions make provision for the filing of a cross-petition.

[27] As the Court interprets rule 15 and the Matrimonial Causes Rules 1977 rule 18, they both provide for what ought to be set out in an answer and such matters can include (a) the respondent's defence, (b) any charges the respondent wishes to make against the petitioner with prayers for relief, and (c) plead that the decree would bring about grave financial or other hardships and so in all the circumstances it would be wrong to dissolve the marriage. How to set these matters out in particular the charges by the Respondent against the Petitioner are clearly demonstrated in the very precedent of an answer submitted by Counsel.

[28] The Court has no quarrel with the authorities cited, and do believe that they simply reiterate how the Court is to direct its mind and approach an answer which contains any charges against the petitioner and render the prayers for relief. Thus when there is presented an answer with the charges of facts usually grounding a

[13] At Grenada there is no Divorce Act and so the practice at Grenada is identical through the use of reception to the practice at United Kingdom in all matrimonial matters.

petition the Court is required to view the charges as setting up the respondent in the role of a petitioner and petitioner as respondent.

[29] Bearing in mind that a cross-petition whether conveniently filed with an answer or separately is a separate petition, the Court believes that it is supported in its interpretation that a cross-petition is not part of the regime of documents permitted under the Act or Rules by Halsbury's paragraphs 753, 762 and 764. Halsbury's paragraph 765 suggests that the only instance in which a separate petition is to be filed is when the respondent wishes to respond to a suit alleging the marriage was a nullity.

[30] A further and real concern of the Court is that if it were to allow a document not provided for in the Act or Rules to proceed and be acted upon, the Court would be doing what it is not authorized to do and secondly, just as important, the Court could be seen as sending a signal and setting up a precedent for allowing Counsel and Parties to develop and or substitute documents whenever they feel an Act or its subordinate legislation has not provided for a situation which they believe ought to exist. The Court has no authorization to do this in the face of the clear directions of rule 15(1) (b).

[31] The Court will therefore not allow any party to proceed with a cross-petition whether it is conveniently set out in the same document as an answer or filed as a separate document.

[32] Given the nature of the issue before the Court there will be no order as to costs.

Rosalyn E. Wilkinson
High Court Judge