JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 97 of 1990

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A

BETWEEN KIMLAN MAXINE MINOTT PETITIONER/APPELLANT

A N D DENNIS AUDLEY MINOTT RESPONDENT

Dr. Lloyd Barnett and Miss Leila Parker for the appellant

Ian Wilkinson for the respondent instructed by Alton E. Morgan, and Co.

April 22, 23 and September 23, 1991

WRIGHT, J.A.:

This appeal enjoys the distinction of being the first to come before this Court under the Matrimonial Causes Act, 1989 (The Act). But by that same token and, further, because the Act introduces a system which represents quite a departure from that which previously obtained it suffers from the handicap of not having within our jurisprudential system any precedents which can render assistance in its interpretation. I remind myself, however, that it is an interlocutory appeal and that I should yield neither to temptation nor the invitation to endeavour beyond the bounds of the immediate requirements of this case.

The appeal challenges the exercise by the Master of her discretion in granting an extension of time to the respondent to file an Answer and Cross-Petition. It will be necessary, therefore, to examine whether that discretion was judicially exercised and in doing so the relevant provisions of the Act must necessarily be examined.

The single ground for a decree of dissolution of marriage is provided by section 5(1) of the Act. It reads:

> "A petition for a decree of dissolution of marriage may be presented to the Court by either party to a marriage on the ground that the marriage has broken down irretrievably."

The prerequisite to this ground being considered by the Court is stated in section 5(2) which states:

> "Subject to subsection (3), in proceedings for a decree of dissolution of marriage the ground shall be held to have been established, and such decree shall be made, if, and only if, the Court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than twelve months immediately preceding the date of filing of the petition for that decree."

But subsection (3) makes it plain that it is not all plain sailing. That subsection provides:

> "A decree of dissolution of marriage shall not be made if the Court is satisfied that there is a reasonable likelihood of cohabitation being resumed."

The section requires therefore:

(a) A separation

(b) A continuous period of twelve months living separately immediately preceding the presentation of the petition.

(c) No reasonable likelihood of cohabitation being resumed i.e. no reasonable likelihood of a reconciliation.

For the purposes of this appeal, it is not necessary to deal with these various aspects in detail but because of a lack of precedents and the fact that counsel did express opinion on the section, I will make certain comments. The first comment I make is that is is certainly not correct, as Dr. Barnett seems to think, that the parties are the ones best suited to decide

the issue of irretrievable breakdown so that once they say the marriage is irretrievably broken down that should be final. The language of subsection (2) (supra) demonstrates that this could not be so. It is the Court which must be satisfied:

1. That there is a separation, and

2. That after the separation the parties lived separately and apart continuously for the prescribed period.

Obviously, therefore, proof of the continuous living apart is not the separation which will satisfy the Court that there has been an irretrievable breakdown, otherwise subsection (3) (supra) would be superflous. If I may express myself this way, I would say that proof of irretrievable breakdown can only be shown by evidence which demonstrates that the fabric of the marriage has been damaged beyond repair. In more accustomed language "Has the consortium vitae been terminated?". Since our Act has been modelled along the lines of the Australian Family Law Act, 1975, it will be instructive to see how the subject is regarded in that jurisdiction. H. A. Finlay and R. J. Bailey-Harris, the authors of Family Law in Australia, Fourth Edition at paragraphs 404-405, treat the matter thus:

> "Consortium or consortium vitae to give its full name is the legal relationship of husband and wife. Its meaning has been encapsulated as 'living together with all the incidents that flow from that relationship' P. M. Bromley and N. V. Lowe, Family Law, 7th Ed. 1987, p. 105. What those incidents are in law current law can best be ascercained from recent cases on separation, for separation (itself now the sole ground for divorce in Australia if it is of twelve months' duration) represents the breakdown of the consortium vitae and so its antithesis.
>
> Recent decisions of the Family Court of Australia have offered a checklist of the various incidents of the consortium vitae, but also stressed that no checklist can be exhaustive since marriage means different things to different people

"and thus the incidents will vary from couple to couple. Thus in THE MARRIAGE OF TODD (No 2) (1976) 9 ALR 401 at 403 Watson J observed that

> 'What comprises the marital relationships for each couple will vary. Marriage involves many elements, some or all of which may be present in a particular marriage - elements such as dwelling under the same roof, sexual intercourse, mutual society and protection, recognition of the existence of the marriage by both spouses in public and private relationship.'

To these may now be added "The nurture and support of the children of the marriage recognized by the Full Court of the Family Court of Australia in Pavey's Case (1976) 10 ALR 259 as one of the common duties of the parties, both as an essential element in the marital relationship, and as an obligation recognized by the Family Law Act...'

This, then, appears to reflect, at least in part, the legal background against which our legislators have chosen to operate.

In purported compliance with Form 2 prescribed by the Matrimonial Causes Rules, 1989 (The Rules), the petitioner on April 10, 1990, filed the following petition:

"1. That the parties were married at Woodbrock Port-of-Spain, Trinidad by Reverend Turnell Nelson a Marriage Officer of the Island of Trinidad and Tobago on the 12th day of August, 1973.

2. That at the time of the marriage the husband Respondent was a bachelor and the wife Petitioner was KIMLAN MAXINE POO, a Spinster.

3. The husband was born in Portland Jamaica on the 31st day of March 1946.

The wife was born in Port-of-Spain, Trinidad on the 15th day of May, 1951.

4. That after the said marriage the parties lived and cohabited at the following place within the jurisdiction:-

10 Hopeview Avenue, Kingston 6 Saint Andrew

5. The Petitioner has been ordinarily resident

"in Jamaica for a period of over twelve (12) years immediately preceding the presentation of this petition and has lived at 10 Hopeview Avenue Kingston 6 from March, 1987.

The Respondent is a Company Director and lives at 10 Hopeview Avenue, Kingston 6.

6. The following are the relevant children:-

STEFAN MINOTT born June 16, 1974 and live at 10 Hopeview Avenue

SUZANNE MINOTT born February 14, 1977 and live at 10 Hopeview Avenue

JOANNA MINOTT born January 6, 1979 and live at 10 Hopeview Avenue.

7. The arrangements proposed by the Petitioner for the welfare of the relevant children are set out in the Statement of Arrangements for children attached hereto

8. That there have been no previous proceedings in this Honourable Court or in a Court of Summary Jurisdiction with reference to your Petitioner's said marriage either by or on behalf of your Petitioner or the Respondent or between the Petitioner and the Respondent with reference to any property of either or both of us,

save and except:

Divorce Suit D.M. 031 of 1988 - an application for dissolution of marriage. This was never heard, but was subsequently discontinued by Order on the 20th March, 1990.

Summons for Custody - D.M. 031 of 1988 which resulted in an interim Order made on the 24th July, 1989 that the relevant children of the marriage continue to live with Respondent and the Petitioner should have access on alternate weekends and half of the school holidays.

Summons to dismiss Petition for Dissolution of Marriage on the 20th March, 1990 when the Order was made.

9. There has been no resumption of cohabitation since the making of those orders.

9. The marriage between the parties has broken down irretrievably.

10. The parties separated on the 2nd February, 1988 and have lived separate and apart from that date.

"11. The circumstances in which the parties last separated are as follows:-

> The marriage was never a happy one. Your Petitioner has been subjected to a lot of abuses and acts of cruelty from the Respondent which have caused your Petitioner to leave the matrimonial home on many an occasion to seek the protection of friends. On the 2nd February, 1988 after much abuse the Petitioner was told by the Respondent and in a boisterous manner to leave the matrimonial home and which your Petitioner did and has not returned to cohabitation.

12. There is no reasonable likelihood of cohabitation between the parties being resumed."

Rule 7(2) of the Rules provides:

> "Where a petition for dissolution of marriage or for a decree of nullity discloses that there are relevant children who are under 18, the petition shall be accompanied by a statement signed by the petitioner personally containing the information required by Rule 4(3) in the form of statement required as set out in Form 2 Appendix 1."

No such statement accompanied the petition. It was dated May 9, 1990. There is no indication on the papers before me as to when it was filed. It reads:

> "The proposed arrangements for the care and upbringing of the relevant children under the age of 18 are as follows:-
>
> (a) Residence
>
> That the said children continue to reside with the Respondent at 10 Hopeview Avenue Kingston 6 Saint Andrew as ordered where Suzanne and Joanna share the same bedroom and Stefan has his own bedroom. In addition to the Respondent a female adult lives in the same house.
>
> (b) Education
>
> That Stefan will continue to attend Wolmers High School and Suzanne at St. Hugh's High School and Joanna

"at St. Andrew High School. The children attend the Brethren Church in Swallowfield.

(c) Financial Provision

The children are at present supported solely by the Respondent who takes care of their maintenance and educational, dental and medical needs as well as your Petitioner. It is not proposed at this time to make any application to the Court for the financial support of the children.

(d) Access

That the Petitioner has access to the said children on alternate weekends and one half of all School holidays.

The said children are not suffering from any serious disability or chronic illness or from the effects of such illness."

There is no indication as to the date of service of the Petition but it is alleged that appearance was entered on or about the 10th day of July, 1990. At some unspecified date the Petition was set down for hearing on the 12th November, 1990. Thereafter a Summons dated September 19, 1990, was issued seeking leave to file Answer and Cross-Petition out of time. The supporting affidavit reads as follows:

"I, DENNIS AUDLEY HINOTT, being duly sworn make oath and say as follows:-

1. That I reside and have my true place of abode and postal address at 10 Hopeview Avenue, Kingston 8 Post Office in the parish of Saint Andrew and I am a Businessman and the Respondent herein.

2. That in or about the first week of July, 1990 a copy of the Petition filed herein was served on me.

3. That I immediately consulted my Attorneys-at-Law, Messrs. Alton E. Morgan & Co., and instructed them to file an Appearance on my behalf, preliminary to filing an Answer to the Petition.

4. That I have been advised by my said Attorneys-at-Law and do verily believe that an Appearance was

"filed herein on or about the 10th day of July, 1990 and served on the Petitioner's Attorney-at-Law on the 12th day of July, 1990.

5. That since the time of being served with the Petition filed herein to the present time, I have attended at the chambers of my said Attorneys-at-Law on numerous occasions, giving instructions for the preparation, and filing, of an Answer and Cross-petition on my behalf.

6. That I was recently advised by my said Attorneys-at-Law and do verily believe that "setting down papers" have been filed on the Petitioner's behalf, necessitating the instant application.

7. That the filing of the Answer and Cross-petition was primarily delayed because I was awaiting medical reports for my children, Suzanne Minott and Joanna Minott, to be attached to the Statement of Arrangements for Children which was to be filed with my Answer and Cross-petition.

8. That I did not receive these medical reports until the 5th day of September, 1990 for two primary reasons. Firstly, my said children's doctor was on vacation and not accessible and, secondly, an appropriate time had to be set for the children to be re-examined by the said doctor and the relevant medical records consulted.

9. That I have been further advised by my said Attorneys-at-Law and do verily believe that I have a good and proper Answer and Cross-petition to be filed herein and there is now produced and shown to me a copy of the Answer and Cross-petition my said Attorneys-at-Law intend to file on my behalf marked "DAM" for identification.

10. That I do verily believe that in the circumstances, there has been no inordinate delay on my part and that the Petitioner will not be unduly prejudiced by an Order of this Honourable Court granting the relief sougt herein.

11. That in the circumstances I respectfully pray that this Honourable Court will make an Order in the terms of the Summons for leave to file Answer and Cross-petition out of time filed herein."

This Summons was heard on November 12, 1990, when it was ordered that:

1. The respondent be granted leave to file and serve on the petitioner an Answer and Cross-Petition within fourteen days of the hearing of this application.

2. The petitioner be granted leave to file Reply and Answer to the Cross-Petition within fourteen days of the service of said Answer and Cross-Petition.

3. Costs of today be awarded to the Petitioner to be agreed or taxed.

4. Liberty to apply.

The master gave the basis for her decision and there are at least two very good reasons why they should be disclosed. Firstly, the Act is new and since it departs radically from the English System, which had previously obtained in our Courts but which can no longer assist us there is great jurisprudential value in building up our own body of opinion on the Act with the assistance of such systems as are of comparable design and purport. Secondly, it is important where decisions are arrived at involving the exercise of a judicial discretion that the Court of Appeal, as a general rule, be able to refer to the reasons for such exercise. See **Eagil Trust Co. Ltd. v. Piggott-Brown and another** (1985) 3 ALL E.R. 119. The mainstay of her reasons is stated thus:

> "Further, the respondent has advanced a reasonable excuse for the delay in filing the answer and cross-petition, in that the medical evidence necessary for the filing of the Statement of Arrangements for the children, who reside with him, did not become available until after the expiration of the time limited for filing the answer. Therefore, mere lapse of time should not operate as a bar in permitting him from securing an opportunity to have his day in Court since he is desirous of being heard and was advised that he had good grounds for obtaining a

"decree. He ought not to be deprived of a right which ordinarily would accrue to him had he filed his pleadings within the time prescribed by law.

The draft answer indicates that the respondent has a plausible answer to the petition and the proposed cross-petition recites allegations of acts of adultery which may have conduced to the irretrievable break-down of the marriage, which if proven would entitle the respondent to a decree of divorce."

Following upon the leave granted by the Master the under-mentioned Answer and Cross-Petition, which is fully stated for its effect, was filed:

"The Respondent, DENNIS AUDLEY MINOTT, by his Attorneys-at-Law, Alton E. Morgan & Co. in answer to the Petition filed in this Cause:-

1. Admits the matters set out in paragraphs 1 to 6 and paragraphs 8 and 10 thereof.

2. Does not admit Paragraph 7 thereof. Further, in relation to paragraph (a) of the "Amended" Statement of Arrangements of Children filed herein, your Respondent says that apart from the Petitioner and Mrs. Jennifer Baker, the live-in domestic helper, the only other "female adult" who lived at 10 Hopeview Avenue, Kingston 6, Saint Andrew, was Miss Cecelia Mitchell who slept in/shared the bedroom with Mrs. Baker at all times during her stay at the said premises.

Your Respondent was assisting Miss Mitchell with badly needed accommodation whilst she was studying to become a technical education teacher at the College of Arts Science and Technology in the parish of Saint Andrew.

Miss Mitchell was raised by your Respondent and the Petitioner during the latter part of Miss Mitchell's high school years.

To the present time, your Respondent has never had sexual intercourse, neither before marriage, during cohabitation with the Petitioner nor since the separation, with anyone other than the Petitioner.

3. Admits the matters set out in paragraph 9 thereof.

4. Denies specifically the matters set out in paragraph 11 thereof.

5. As to paragraph 11 the Respondent states as follows:-

> The marriage was a happy one until 1982 when your Respondent discovered that the Petitioner was committing adultery. The Petitioner and your Respondent were reconciled in 1982 and the marriage was again a happy one until 1987 when the Petitioner admitted to your Respondent that she was still committing adultery. Your Respondent has never committed any acts or cruelty or abuse against the Petitioner but, on the contrary, has been extremely forgiving of the Petitioner's adulterous and abusive conduct. Further, your Respondent specifically denies that he told the Petitioner to leave the matrimonial home on February 2, 1988 and highlights the fact that the Petitioner, your Respondent and the relevant children of the marriage celebrated a happy marriage on January 31, 1988.

6. Admits paragraph 12 thereof.

7. That the arrangements proposed by your Respondent for the welfare of the relevant children are set out in the Statement of Arrangements for children attached hereto.

8. As to the whole Petition, your Respondent relies upon the following facts:-

(a) That the Petitioner has committed frequent acts of adultery, during the course of the marriage up to the time of separation and since the separation, and persists in so doing with divers individuals, including XY, a medical doctor then on the staff of the National Chest Hospital and the Bustamante Children's hospital, CD, formerly First Secretary of the Trinidad and Tobago High Commission and EF of Texaco Limited who resides in Mandeville in the parish of Manchester. Further, your Respondent has on several occasions throughout the marriage seen "hickies" on the Petitioner's neck and the Petitioner, when confronted by your Respondent admitted that these "hickies" were the result of adulterous encounters;

(b) That your Respondent finds the Petitioner's sexual promiscuity and/or persistent adulterous conduct onerous and intolerable;

(c) That the Petitioner's persistent adultery has caused such odium and sexual scandal in Jamaica, Trinidad and Tobago and Barbados, where the Petitioner has frequently worked, that your Respondent finds a reconciliation with the Petitioner highly improbable;

(d) That the Petitioner's trivialising of her repeatedly having contracted sexually transmitted diseases and living with such diseases is frightening and repulsive;

(e) That your Respondent finds the Petitioner's persistent lying and dishonesty to be intolerable wherein your Respondent can no longer trust the Petitioner;

(f) That your Respondent finds it impossible to further tolerate the numerous telephone calls made to your Respondent's home and office, including telephone calls in the early hours of the morning, by wives complaining of the Petitioner's sexual involvement with their respective husbands;

(g) That your Respondent also finds it impossible to further tolerate the fact that the Petitioner engages in frequent quarrels and ugly confrontations with divers individuals who regularly complain to your Respondent that the Petitioner defames them. Consequently, your Respondent is ashamed to be identified as the Petitioner's husband;

(h) That the Petitioner's frequent abuse and neglect of the said relevant children whilst she was living at the matrimonial home, combined with the said children's reluctance to live with the Petitioner, makes any resumption of family life or cohabitation between the parties highly unlikely;

(i) That despite constant counselling by church officials in the years immediately preceding, and up to, the separation of the parties in February, 1988, the Petitioner refuses to discontinue her outrageous behaviour and shows either indifference or a complete lack of remorse and,

(j) That two of the relevant children, namely STEFAN and SUZANNE, have consistently threatened to "run away" or leave the matrimonial home if the Petitioner were to return there;

9. That the Answer and Cross-Petition is neither presented nor prosecuted in collusion with the Petitioner, neither has your Respondent in any way been accessory to, connived at or condoned the adultery herein alleged.

WHEREFORE THE RESPONDENT HUMBLY PRAY:-

1. That this Honourable Court will be pleased to reject the Prayer of the said Petition and dismiss the Petition;

2. That further, or in the alternative, this Honourable Court will be pleased to dissolve the marriage on the grounds set out herein;

3. That he may have custody of the relevant children;

4. That this Honourable Court do award to him such weekly or monthly sums of money by way of maintenance of the children pending suit as appears just and,

5. That he may have such further and other relief as may be just."

Two observations may be made at this point. The first is that the reason given by the respondent for his delay in taking the contemplated action was his endeavour to comply with Rule 7(2) (supra). The second is that paragraph 8 of the Answer and Cross-Petition is redolent of the previous Divorce Act.

The four Grounds of Appeal were dealt with in an omnibus position. The Grounds are as follows:

"1. The learned Master erred in law in granting leave to the Respondent to file an answer to the Appellant's Petition in that the Respondent's application disclosed that there was no answer or reasonable answer to the Petition;

2. The learned Master erred in law in granting leave to the Res-

"pondent to file an answer or Cross-Petition in that they were calculated to delay the fair hearing of the Petition, vexatious and an abuse of the process of the Court;

3. The learned Master erred in law in granting leave as aforesaid in that the patent objective of the Respondent and effect of the proposed Answer and Cross-Petition are to produce allegations, recriminations and conclusions as to guilt, contrary to the purpose and intendment of the Matrimonial Causes Act; and

4. The learned Master erred in law and on the facts in granting leave as aforesaid as there was no reasonable cause, excuse or explanation for the Respondent's delay."

In support of these grounds, Dr. Barnett referred to section 5(1) of the Act and submitted that the requirements are:

1. The parties separated and lived separately and apart for twelve months.

2. There is no reasonable likelihood of cohabitation being resumed.

3. Marriage irretrievably broken down.

I have earlier dealt with the section and do not propose to repeat myself. He then referred to Rule 24(1) of the Rules which provides for the filing of an Answer and Cross-Petition. The Rule is as follows:

"A Respondent or other party named in a Petition who has entered an Appearance to a Petition and who

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

(b) wishes to pray for relief on any ground authorised by the act, or

(c) .....

shall within fourteen days after the expiration of the time allowed for the entry of such Appearance file an Answer to the Petition."

On the question of fault he referred to some English cases which he said demonstrated that an enquiry into fault is not permissible if it leads to no benefit to a party or is not a means of safe-guarding that party against some grave financial or other hardships. To my mind, that submission reveals an umbilical bond to the English System which we are told is not maintained by the Act.

Turning his attention to the "Statement of Arrangements for Children", Dr. Barnett submitted that there is no requirement for a Medical Report. But such a Report does, indeed, appear in Form 3 which prescribes the contents of the Statement of Arrangements for Children. The final paragraph of that Form reads:

> "The said children is(are) not suffering from serious disability or chronic illness or from the effects of such illness. State in respect of each child so suffering the nature of the disability or illness and attach a copy of any up to date medical report available."

Such a report was all the more relevant when reference is made to the Statement of Arrangements for Children filed by the Petitioner which concludes:

> "The said children are not suffering from any serious disability or chronic illness or from the effects of such illness."

He further submitted that insofar as the children are concerned there is no need for the parents to be exposed to a trial when the substance of the Petition is conceded. Finally, he submitted that the learned Master exercised her discretion on wrong principles of law and took into consideration irrelevant matters and applied English principles without recognising the distinction between the English and Jamaican Acts.

On his part, Mr. Wilkinson submitted that it is incorrect to contend that an Answer is not an answer as con-

templated by Rule 24(1) simply because it does not offer a defence to any of the elements required by section 5 of the Act because the respondent can only defend or dispute any of the facts in the Petition by filing an Answer. I think he is correct. And inasmuch as a step in default had been taken in that the Petition had been set down for hearing, he adverted to Rule 27 which has been complied with. That rule provides:

> "No pleading shall be filed out of time without leave after a step in default has been taken or directions for trial have been given."

As regards disputing any of the facts in the Petition, he questioned whether the respondent could be denied that right if the petitioner had alleged that "the respondent together with a criminal gang had assaulted the petitioner?". The answer to that question must be no. His contention was that the respondent was only striving to place before the Court all the matters which should properly be considered before a decision is made. He showed to the Court a copy of the Medical Report which reveals that the two relevant children are asthmatic, one being chronically so.

Dr. Barnett's self-defeating argument was that since the respondent conceded the irretrievable breakdown of the marriage he ought not to have had the discretion exercised in his favour. That submission ignores the fact that it is only from the Answer that the petitioner or, for that matter, the Court can know what the respondent is saying; so to refuse leave to file the Answer and Cross-Petition out of time is to hold the mind of the Court hostage to such allegations which the petitioner chooses to include whether they be true or false.

In response to the allegation that granting leave to file the Answer and Cross-Petition is calculated to delay

the fair hearing of the Petition, Mr. Wilkinson submitted that that is not so because without that pleading were the Court to dismiss the Petition thus leaving it to the respondent to take action then it is that greater delay would result. For my part, I am averse to any suggestion that speed in departing from the marriage bond is to be placed on par with the interests of the children of the marriage let alone being accorded paramount status as seems to be implied in the ground of appeal. That to my mind would have the effect of tying the hands of the Court insofar as protecting the interests of the children is concerned - a subtle form of child abuse. I have already pointed out that the petitioner deliberately omitted to inform the Court of the health of the children as she was required to do by Form 3. Had not the Master exercised her discretion in favour of the respondent the petitioner would have succeeded in pulling wool over the eyes of the Court.

Paragraph 11 of form 2, setting out the matters to be included in the Petition, states:

> "The circumstances in which the parties last separted are as follows: (Set out shortly the facts relied on)."

In response to this requirement the petitioner alleged:

> "11. The circumstances in which the parties last separated are as follows:
>
> The marriage was never a happy one. Your Petitioner has been subjected to a lot of abuses and acts of cruelty from the Respondent which have caused your Petitioner to leave the matrimonial home on many occasion (sic) to seek the protection of friends. On the 2nd February, 1988 after much abuse the Petitioner was told by the Respondent and in a boisterous manner to leave the matrimonial

"home and which your Petitioner did and has not returned to cohabitation."

In stark but condensed terms that paragraph charges the respondent with several acts of cruelty occasioning her leaving the matrimonial home on several occasions prior to the final break on February 2, 1980. Indeed, if those are the facts one can only sympathise with the petitioner. At the same time, how can Dr. Barnett, while defending such a Petition, criticize the Answer and Cross-Petition on the ground that it has done the impermissible, i.e. "to relate to the period before the last separation"? Frankly speaking, I deeply sympathise with draftsmen who are expected to draft Petitions alleging irreconcilable breakdown of marriages while at the same time avoiding all indications of fault. If the ground for divorce were that "The Petitioner no longer wishes to cohabit with the Respondent" and no reasons had to be stated there would be no difficulty. But as the ground now stands no one can expect paragraph 11 to be filled with the language of courtship. It is the decision of the Court and not the ipse dixit of one or other of the parties which determines whether there has been an irretrievable breakdown. While insisting that the respondent on legal advice only sought to place before the Court relevant matters for consideration, Mr. Wilkinson conceded that the allegations by the respondent could be less explicit - names and acts of adultery could be omitted. To that extent, therefore, the Answer and Cross-Petition can be amended.

Having given careful consideration to the record before the Court and the competing submissions as to whether the learned Master erred in the manner in which she exercised her discretion, I have come to the conclusion that she exercised her discretion judicially as endorsed in her reasons. I repeat that the Act and the accompanying Rules are both new

and time will be required for their application to assume its proper rhythm. In the meantime, the Court must be alert to ensure that the interests of the children of the marriage are protected so that the children are not treated as some inconsequential appendage to a marriage which has gone sour.

It is evident that the petitioner was far more concerned about making her exit from the marriage than showing appropriate concern for the welfare of her children.

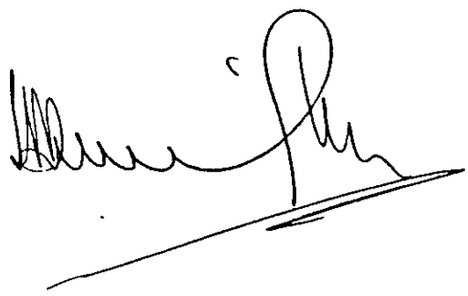
While it is true that there have been omitted from the record before this Court the Statement of Arrangements for the Children, which was alleged to be attached to the Answer and Cross-Petition as well as the Medical Report concerning the children, it is my opinion that the learned Master was sufficiently alerted to the fact that the whole truth had not been told about the children by the petitioner and was thereby justified by the exercise of her discretion to allow for such information to come before the Court. Added to this is the fact that the opportunity afforded by Rule 24(1) to dispute any of the facts in the Petition should not be rendered nugatory.

There is a peculiarity about this appeal to which I think reference ought to be made. It is this. Criticism has been levelled at the Master for considering English cases and consequently applying the wrong principles but it is important to observe that counsel for the petitioner - not Dr. Barnett - sought to persuade the Master by citing and relying on English cases. Before us, although it is contended that we have broken ties with the English system in the provisions of this Act, only English cases were mentioned. The nearest we came to being presented with any assistance from Australia was to be told by Mr. Wilkinson that up to 1988 there were no Australian cases on the point. We are there-

fore very much on our own in this regard and must be careful to ensure that in applying the guiding principles human considerations are not sacrificed for strictness of construction.

Before parting with the case, I should mention a matter raised by Dr. Barnett, strange though it appears. He was a member of the Committee which signed the Matrimonial Causes Rules, 1989, into being which came into operation on the 26th day of May, 1989. However, as he made his submissions he thought he detected some incongruity between Rule 24(1) and the Act. I mention the matter without passing judgment upon it with a view to alerting appropriate authorities to the need to take a second look at these new provisions.

In conclusion, I would dismiss the appeal with costs to the respondent.



FORTE, J.A

In a petition dated the 10th April, 1990, the appellant sought the dissolution of her marriage to the respondent. No Answer to the petition having been filed, the appellant applied in July, 1990 for the cause to be set down for hearing and it was so set for the 12th November, 1990. However, on the 12th September, 1990, the respondent filed a Summons for leave to file an Answer and Cross-petition out of time, and this was heard on the 12th November, 1990 by the learned Master who ordered:-

> "1. The Respondent be granted leave to file and serve on the Petitioner, an Answer and Cross-Petition within 14 days of the hearing of this application;
>
> 2. The Petitioner be granted leave to file a Reply and Answer to the Cross-Petition within 14 days of the service of the said Answer and Cross-Petition."

It is from this order that the Petitioner/Appellant has appealed.

In order to come to an understanding of the issues raised, an examination of the content of the Petition and the proposed Answer and Cross-petition is necessary.

In keeping with the Matrimonial Causes Act and the Matrimonial Causes Rules, the petitioner alleged in so far as is relevant, the following:-

Paragraph 9	"The marriage between the parties has broken down irretrievably.
Paragraph 10	The parties separated on the 2nd February, 1988 and have lived separate and apart from that date.
Paragraph 11	The circumstances in which the parties last separated are as follows:-

"The marriage was never a happy one. Your Petitioner has been subjected to a lot of abuses and acts of cruelty from the Respondent which have caused your Petitioner to leave the matrimonial home on many an occasion to seek the protection of friends. On the 2nd February, 1988 after much abuse the Petitioner was told by the Respondent and in a boisterous manner to leave the matrimonial home and which your Petitioner did and has not returned to cohabitation, and

Paragraph 12 There is no reasonable likelihood of cohabitation between the parties being resumed."

The respondent in his proposed Answer and Cross-petition in so far as is relevant states:-

"Paragraph 1 Admits the matters set out in paragraphs 1-6 and paragraphs 8 and 10 thereof.

Paragraph 3 Admits the matters set out in paragraph 9 thereof.

Paragraph 4 Denies specifically the matters set out in paragraph 11 thereof.

Paragraph 5 As to paragraph 11 the Respondent states as follows:-

'The marriage was a happy one until 1982 when your Respondent discovered that the Petitioner was committing adultery. The Petitioner and your Respondent were reconciled in 1982 and the marriage was again a happy one until 1987 when the Petitioner admitted to your Respondent that she was still committing adultery. Your Respondent has never committed any acts of cruelty or abuse against the Petitioner but, on the contrary, has been extremely, forgiving of the Petitioner's adulterous and abusive conduct. Further, your Respondent

"specifically denies that he told the Petitioner to leave the matrimonial home on February 2, 1988 and highlights the fact that the Petitioner, your Respondent and the relevant children of the marriage celebrated a happy marriage on January 31, 1988."

Paragraph 6 Admits paragraph 12 thereof."

The respondent then in answer "to the whole Petition" proceeds to allege numerous acts of adultery by the petitioner, then in so far as the likelihood of resumption of cohabitation is concerned makes the following relevant statements:-

"Paragraph 8(c) That the Petitioner's persistent adultery has caused such odium and sexual scandal in Jamaica, Trinidad and Tobago and Barbados, where the Petitioner has frequently worked, that your Respondent finds a reconciliation with the Petitioner highly improbable;

(g) That your Respondent also finds it impossible to further tolerate the fact that the Petitioner engages in frequent quarrels and ugly confrontations with divers individuals who regularly complain to your Respondent that the Petitioner defames them. Consequently, your Respondent is ashamed to be identified as the Petitioner's husband;

(h) That the Petitioner's frequent abuse and neglect of the said relevant children whilst she was living at the matrimonial home, combined with the said children's reluctance to live with the Petitioner, makes any resumption of family life or cohabitation between the parties highly unlikely."

The effect of the proposed Answer and Cross-petition therefore is to admit:-

(i) A separation in excess of twelve months

(ii) That the marriage has irretrievably broken down, and

(iii) That there is no reasonable likelihood of cohabitation being resumed.

However, in so far as (i) is concerned though admitting the separation on the 2nd February, 1988, the respondent seeks to deny through paragraphs 4 and 5 of the Answer, the circumstances of the last separation as set out in paragraph 11 of the Petition. In respect to (iii) above, though admitting that there is no reasonable likelihood of resumption of cohabitation he seeks to set out the grounds upon which he has come to that conclusion.

On that background, Dr. Barnett for the appellant contended that leave to file an Answer out of time can only be granted where:-

(i) a triable defence is disclosed in the Answer,

(ii) a reasonable cause has been advanced for the delay in filing same, and

(iii) that the granting of leave is not against the policy of the act.

He submitted that neither the affidavit in support nor the proposed Answer satisfied any of the above criteria, and consequently the learned Master was in error in granting the application.

In dealing firstly with (i) above, a look at the relevant sections of the Act and of the Rules is necessary for a determination of that issue.

Section 5 of the Act reads as follows:-

> "(1) A petition for a decree of dissolution of marriage may be presented to the Court by either party to a marriage on the ground that the marriage has broken down irretrievably.
>
> (2) Subject to subsection (3), in proceedings for dissolution of marriage the ground shall be held to have been established, and such decree shall be made, if, and only if, the Court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than twelve months immediately proceeding the date of filing of the petition for that decree.
>
> (3) A decree of dissolution of marriage shall not be made if the Court is satisfied that there is a reasonable likelihood of cohabitation being resumed."

It is clear then that a petitioner in advancing his petition for dissolution of the marriage is required to prove one ground only and that is 'that the marriage has broken down irretrievably'. In order to do so, however, two elements must be established to the satisfaction of the Court, and that having been done, the ground 'shall be held to have been established' and the decree shall be made. The two elements are:-

> " (i) that the parties separated and thereafter lived separate and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the petition for that decree; and
>
> (ii) that there is no reasonable likelihood of cohabitation being resumed."

Additionally, it is clear from the wording of Section 5(i) that either party can petition for dissolution of the marriage on the ground that the marriage has broken down irretrievably and this irrespective of whose conduct resulted in that situation. The question of fault then is not a

relevant issue, the only matter for determination being whether the marriage has irretrievably broken down.

In this case, as the proposed Answer admits to all the factors which mandate the Court to grant the decree, it would appear then that no defence is disclosed therein.

Mr. Wilkinson for the respondent, however, though conceding these admissions, maintains that that is not the end of the matter. He contends that Rule 24(1)(a) of the Matrimonial Causes Rules, gives the respondent the right to challenge the facts upon which the petitioner alleges that the marriage has broken down irretrievably.

Section 24 of the Rules states.-

> "(1) A Respondent or other party named in a Petition who has entered an Appearance to a Petition and who
>
> (a) wishes to defend the Petition or to dispute any of the facts alleged in it, or
>
> (b) wishes to pray for relief on any ground authorised by the act, or
>
> (c) wishes to oppose the grant of a decree under Section 8 of the Act,
>
> shall within fourteen days after the expiration of the time allowed for the entry of such Appearance file an Answer to the Petition."

It is by virtue of this rule that Mr. Wilkinson argues that the respondent, ought to be given the opportunity to file his Answer and Cross-petition. But is the petitioner required to state in the petition, the facts upon which it is alleged that the marriage has broken down irretrievably? The Matrimonial Causes Rules in Rule 8(1)(i) states:-

> "1. The petition in a matrimonial cause shall state:-

(a) the name of the parties to the marriage and the date and place of the marriage;

(b) the principal permanent addresses within the jurisdiction at which the parties have lived together as husband and wife;

(c) where it is alleged that the Court has jurisdiction based on domicile, the country in which the petitioner and the respondent respectively are domiciled;

(d) where it is alleged that the Court has jurisdiction based on residence, the places of residence and the dates on which the same commenced of the petitioner and respondent throughout the period of one year ending with the date of presentation of the petition;

(e) the occupation and residence of the petitioner and the respondent at the time of the institution of the cause;

(f) apart from the provisions of Rule 7(2), whether (to the knowledge of the petitioner in the case of a husband's petition) any other child now living has been born to his wife during the marriage and, if so, the full names (including surname) of the child, and his date of birth, or, if it be the case, that he is over 18;

(g) if it be the case, that there is a dispute whether a living child is a child of the family;

(h) whether or not there are or have been any other proceedings in any court in Jamaica or elsewhere with reference to the marriage or to any children of the family, or between the petitioner and the respondent with reference to any property of either or both of them and, if so -

(i) the nature of the proceedings;

(ii) the date and effect of any decree or order; and

(iii) in the case of proceedings with reference to the marriage, whether there has been any resumption of cohabitation since the making of the decree or order;

(i) in the case of a petition for divorce, that the marriage has broken down irretrievably; and whether or not there is a reasonable likelihood of cohabitation being resumed."

Rule 10 states that the petition "shall be in the form indicated in Form 2 of Appendix 1 with such alterations as circumstances may require".

And the relevant sections of the petition in Form 2 merely state:

"9. The marriage between the parties has broken down irretrievably.

10. The parties separated on the _____ and have lived separate and apart from that date.

11. The circumstances in which the parties last separated are as follows: (set out shortly the facts relied on).

12. There is no reasonable likelihood of cohabitation between the parties being resumed."

If a petitioner follows the Form in the Appendix therefore, there is really no requirement to allege any facts except in so far as it is required to state the circumstances of the last separation, a factor which it is conceivable may have nothing to do with whether there is a reasonable likelihood of resumption of cohabitation.

In the appeal before us, apart from the history and antecedents of the marriage, the only allegation of facts alleged in the petition relates to the circumstances under which the parties last separated, which in the context of each particular case may or may not be relevant to the proof of the irretrievable break down of the marriage. If apart from the twelve months separation, the real test in coming to such a conclusion, is whether or not there is a reasonable likelihood of the resumption of cohabitation, it is conceivable that the circumstances of the last separation, would not necessarily lead to that conclusion, as the determination of that question must

take place at the hearing of the cause, and there may be events occurring even after the separation which may be very relevant to the issue. In keeping with Section 5(3) of the Act, the Court must be made aware of the circumstances upon which the allegation of the unlikelihood of resumption of cohabitation is based so that it can come to a conclusion on that issue. It cannot be expected to operate in vacuo, and grant a decree merely on the "say so" of the petitioner. It follows that even though there is no requirement to state in the petition, the facts upon which it is alleged that the marriage is broken down, the petitioner must nevertheless at the hearing of the cause satisfy the Court in that regard.

It appears strange therefore that there is no requirement in the Rules for setting down in the petition the facts upon which the petitioner alleges that there is no reasonable likelihood of resumption of cohabitation. Because of that omission, the reference in section 24(1)(a) to the respondent's wish to dispute any facts stated in the petition must relate to:-

(i) The date of the last separation though nevertheless twelve months or more and the facts in relation to circumstances thereof; or

(ii) Matters in the Matrimonial Causes Rules 8(1)(a) to (i), that is, the facts relating to the history and antecedents of the marriage, for example, the date and place of marriage, places of abode, number of children, etc.

In spite of the fact that the circumstances of the last separation may in some cases be immaterial to the determination of whether there is an irretrievably breakdown of the marriage, it appears that section 24(1)(a) of the Rules still permits an answer where those facts are disputed. It provides for the filing of an answer, not only in cases where the

respondent wishes to defend the petition but also where he merely wishes to dispute any facts stated therein. It follows, that in this case, the admissions by the respondent though amounting to non-disclosure of a defence to the petition, nevertheless do not preclude the respondent from disputing the circumstances of the last separation as set out in the petition. The Matrimonial Causes Rules, extends beyond the normal civil proceedings where in such circumstances it is incumbent on the applicant to establish that the proposed defence discloses a triable cause. In these cases a disagreement with any facts stated in the petition is sufficient to allow the filing of the Answer. The petitioner in the instant case alleges (paragraph 11) that the respondent had always been cruel to her and it was that conduct that led to their separation on the 2nd February, 1990. The respondent wishes through his Answer (paragraph 5) to place those facts in dispute, and to establish that it was the petitioner's adultery that led to the separation. Had he filed his Answer merely disputing the facts in paragraph 11 of the petition, within the prescribed time, there could therefore be no complaint against it. This, even though the Act does not contain any requirement for proof of the circumstances of the last separation, being significantly and specifically concerned with the passage of time since the separation and the likelihood of the resumption of cohabitation.

The learned Master in coming to her decision, did not, it appear, give consideration to the fact that the Matrimonial Causes Act does not recognize fault in the determination of whether a decree of dissolution should be made. Instead, she relied on the case of Huxford v. Huxford (1972) 1ALL ER 330, an English case decided on the English Divorce Reform Act 1969. That Act is significantly different from our Matrimonial Causes Act in that although it enacts like the

Matrimonial Causes Act that the sole ground on which a petition may be presented shall be that the marriage has broken down irretrievably (Section 1) still retains the element of blame.

Section 2(1) of that Act states:-

> "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 years immediately preceding the presentation of the petition;
>
> (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted."

In Huxford v. Huxford (Supra) a husband petitioned for divorce alleging the wife's adultery and that he found it intolerable to live with her. (This being the requirement of Section 2(1)(a)). The wife not having filed an Answer within the required time, and having obtained evidence of the husband's adultery, applied for leave to file an Answer and Cross-petition alleging the husband's adultery. The husband opposed the application on the ground that it would cause delay, and extra costs to him, and that by allowing the husband's petition to proceed undefended, the wife's right to maintenance would in no way be prejudiced in that she could bring up all matters of the husband's conduct,

including adultery, in the subsequent ancillary proceedings. It was held that on the facts the wife had shown reasonable cause for the delay in filing an answer; although the wife had nothing to lose by allowing the husband's petition to remain undefended insofar as her rights to maintenance would be completely preserved, nevertheless it was important for a respondent, if she so desired, and was advised that she had good grounds for a decree, to seek to obtain a cross-decree; furthermore the wife's interest in having her allegations against the husband considered by the court and, if established, made the subject of a public decree, outweighed the slight inconvenience of the delay and extra costs incurred by the husband; accordingly the application would be allowed.

The learned Master relied on this case for the proposition that it is important for a respondent to seek to obtain a cross-decree notwithstanding that he runs the risk of a decree being granted to the petitioner.

This is so, however, in circumstances of the English Divorce Reform Act 1969 where it is still important for various reasons, not the least of which was the continued recognition of fault in that jurisdiction.

The learned Master, however, based her granting of leave on the following statement:-

> "If at the trial, the petitioner cannot satisfactorily prove to the Court that her marriage had irretrievably broken down as a result of the respondent's cruelty and that she cannot reasonably be expected to live with him, the respondent may successfully obtain a cross-decree if the allegations in his cross-petition are proven. Since he proposes to file a cross-petition on the ground of adultery it is of significant importance to him to obtain a cross-decree even though he is exposed to the vulnerability of a decree being granted to the petitioner."

These underlined words reflect the substance of the English Act the first being the requirement of Section 2(1)(b) except that the respondent's cruelty is substituted for respondent's behaviour, and the latter the requirement of proof of adultery in Section 2(1)(a). None of these requirements is in the Jamaican Act which for emphasis it is repeated, requires no pointing of the finger of blame on any one party.

Though the English cases are not generally helpful, because of the different approach in the English Act some assistance can be had from the cases decided in relation to the five years separation, in which as in our Act, no fault is attached to either party.

In the case of Parsons v. Parsons (1975) 1 WLR 1272 the facts are adequately set out in the headnote:-

> "The parties were married in 1941. In August, 1972 the wife filed a petition for divorce on the ground that the marriage had irretrievably broken down. She relied on the fact that the parties had lived apart for a continuous period of upwards of five years immediately preceding the presentation of the petition but also alleged constructive desertion by the husband. By his Answer the husband agreed that the marriage had broken down irretrievably, but he denied that his conduct had caused the wife to leave the matrimonial home, alleged simple desertion by the wife and stated that the parties had lived apart for upwards of five years immediately preceeding the presentation of the Answer. He prayed (1) for the rejection of the prayer of the petition and (2) that the marriage might be dissolved. The wife's summons to strike out the Answer was dismissed by the registrar.
>
> On appeal by the wife, limiting the relief sought to the striking out of the first part of the prayer in the Answer:-
>
> **Held**, that it was not open to a respondent in an Answer to a petition based on five years' separation under

> "Section 1(2)(e) of the Matrimonial Causes Act 1973 to pray for the rejection of the prayer of the petition if by the Answer the respondent agreed that the marriage had irretrievably broken down and that the parties had lived apart for at least five years immediately preceding the presentation of the petition; that there was no justification for the granting of cross-decrees in such a case; but that it was clear from rule 10(1)(a) of the Matrimonial Causes Rules 1973 that a respondent had to file an Answer if he wanted to dispute the granting of a decree based on some of the facts alleged in the petition and, accordingly, that the husband would be given leave to amend the prayer of the Answer to pray for the rejection of the prayer of the petition in so far as it was founded on matters denied in the Answer."

In delivering the judgment of the Court Sir George Baker, P had this to say, (at page 1275):-

> "In my opinion, when a respondent accepts that the marriage has irretrievably broken down and that the parties have been apart for the requisite five years at the time of the presentation of the petition (there might of course be an argument about the date), then, with these two admissions, there is nothing which he can defend under that head and the petitioner is entitled to a decree. That the marriage has broken down and the parties have been apart for five years by the time of the filing of the petition can never justify a decree being given to a respondent as well as to a petitioner .....
> .....
>
> Despite the word 'grant' in Section 1(4) of the Matrimonial Causes Act 1973, it does not seem to me that such a decree is 'granted' to either party except in the limited sense that the

> "spouse who has the conduct of the suit has the primary right to make the decree absolute. It is rather a declaration by the Court on proof of five years' separation that the marriage has broken down irretrievably and 'shall be dissolved.' In the instant case, therefore, the husband cannot oppose the wife's plea for divorce based on five years' separation, for he accepts that they have been separated for the requisite time and that the marriage has irretrievably broken down."

The husband was allowed to proceed in relation to the obvious issue raised as to whether there was constructive desertion or simple desertion by the wife. This, however, did not escape the following comments from Sir George Baker:-

> "At first sight the present answer would seem to be unprofitable and useless as the law now stands, but the wife has elected, perhaps unwisely, to add a plea of desertion which the husband is entitled to deny and defend. He was not out of time with his answer."

This case, dealing as it does with the five years' separation, which like the provisions of the Jamaican Statute, excludes the finding of fault, is very relevant to the issues raised in this appeal. It supports the view that the respondent having admitted the elements required to mandate the Court to make a decree, there is nothing for him to defend, and he cannot therefore oppose the wife's plea for divorce.

The respondent nevertheless seeks in his prayer to defend the petition as also to have the marriage dissolved on the basis of grounds set out in his Answer and Cross-petition the relevant paragraphs of which are set out above. In the prayer, he asks for the following reliefs:-

> "1. That this Honourable Court will be pleased to reject the Prayer of the said petition and dismiss the petition;

"2. That further, or in the alternative this Honourable Court will be pleased to dissolve the marriage on the grounds set out herein;

3. That he may have custody of the relevant children;

4. That this Honourable Court do award to him such weekly or monthly sums of money by way of maintenance of the children pending suit as appears just; and

5. That he may have such further and other relief as may be just."

In my view, having made the admissions of all the issues to be considered in the making of a decree of dissolution of the marriage, the respondent cannot pray for the dismissal of the petition.

In so far as the respondent in his prayer petitions that the marriage be dissolved on the grounds set out in the Cross-petition, it must be remembered that those "grounds" can only be the very ground upon which the petition has moved the Court, that is, that the marriage has broken down irretrievably.

The importance of which party, petitions for the decree loses any significance under the Matrimonial Causes Act, as the decree is not in that sense granted to any party, but is made by the Court, dissolving the marriage. The respondent in those circumstances, if allowed to file his Cross-petition, would be consequently allowed to delve into the realms of the misbehaviour of the petitioner on the basis of her alleged adulterous conduct. In this regard it is also of significance that the Cross-petition would not in its present form be in keeping with the Matrimonial Causes Rules nor the Form which gives the precedent for the drafting of a Petition.

Additionally, the allegations contained therein, are in my view contrary to the express provisions of the Matrimonial

Causes Rules and the appended Form in respect to petitions and runs contrary to the intention of the Legislature to determine, not who was responsible for the breakdown of the marriage, but whether having separated for a period of twelve months or more, the parties are reasonably likely to resume cohabitation. I would therefore agree with the submissions of Dr. Barnett that to allow the Cross-petition in its present form to be filed out of time would be against the policy of the Act.

In those circumstances, I would hold that the respondent cannot petition for dissolution on the grounds advanced by him, and consequently paragraph 2 of the prayer in the Cross-petition would also go.

CAUSE FOR DELAY

One other matter needs, however, to be considered, and that is whether the respondent advanced a reasonable cause for the delay in filing the Answer and Cross-petition.

The reason given appears in the affidavit of the respondent in support of the Summons. It reads as follows:-

> "Paragraph 7 That the filing of the Answer and Cross-petition was primarily delayed because I was awaiting medical reports for my children, Suzanne Minott and Joanna Minott, to be attached to the Statement of Arrangements for Children which was to be filed with my Answer and Cross-petition.
>
> Paragraph 8 That I did not receive these medical reports until the 5th day of September, 1990 for two primary reasons. Firstly, my said children's doctor was on vacation and not accessible and, secondly, an appropriate time had to be set for the children to be re-examined by the said doctor and the relevant medical records consulted."

In determining this issue the learned Master stated:-

> "Further the respondent has advanced a reasonable excuse for the delay in filing the Answer

> "and Cross-petition in that the medical evidence necessary for the filing of the Statement of Arrangements for the children who reside with him, did not become available until after the expiration of the time limited for filing the Answer."

The requirement for filing a Statement of Arrangements for children is provided for by Rule 9 of the Matrimonial Causes Rules which states:-

> "There shall be filed with every petition in a matrimonial cause an affidavit by the petitioner verifying the facts of which the petitioner has personal knowledge and deposing as to belief in the truth of the other facts alleged in the petition. Where there are relevant children the affidavit must also have the statement of intention referred to in Rules 4(3) and 7(2) in the form indicated in Form 3 Appendix 1 - Statement of Arrangements for Children."

Rule 7(2) states:-

> "Where a petition for dissolution of a marriage or for a decree of nullity discloses that there are relevant children who are under 18, the petition shall be accompanied by a statement signed by the petitioner personally containing the information required by Rule 4(3) in the form of the statement required as set out in Form 3 Appendix 1."

Form 3 in so far as it relates to the point in issue states in paragraph (d):-

> "The said child(ren) is (are) (not suffering from serious disability or chronic illness or from the effects of such ill ss. State in respect of each child so suffering the nature of the disability or illness and attach a copy of any up-to-date medical report available."

The relevance of the medical certificate did not become apparent until during the course of the arguments before us, when it was disclosed that two of the children of the marriage were asthma patients and required medical attention on occasions, sometimes necessitating hospitalization. This fact is not supported by the 'Statement of Arrangements' attached to the petition which

states:-

> "The said children are not suffering from any serious disability or chronic illness or from the effects of such illness."

As the proposed Answer and Cross-petition merely make reference to an attached Statement of Arrangements without actually attaching same, there was also no information in regard to the children's illness from that source. Dr. Barnett for the appellant contended that Form 3 states clearly that the medical report is only required if available, and laying great emphasis on the condition of availability argues that the Statement could have been filed without the medical certificate which could be attached at a later date when it became available. In my view this contention is sound, and I would conclude that the learned Master fell into error when she based her conclusion in this regard, on an opinion that the medical reports were necessary for the filing of the Statement of Arrangements. Consequently, I would hold that the respondent has advanced no reasonable cause for his delay in filing the Answer and Cross-petition in the required time.

Before leaving this appeal, I take note that in the proposed Cross-petition, the respondent prays for custody and maintenance of the children. The opinions I have expressed herein do not preclude the respondent from pursuing these matters in separate proceedings, and he should therefore not be prejudiced in this regard. In so far as custody is concerned, he presently has custody of the children and there is no prayer in the petition seeking their custody. He can therefore pursue in other proceedings, his application for custody and to have the petitioner share in the maintenance of the children.

For those reasons, I would conclude that the learned Master wrongfully exercised her discretion in granting leave

to file the Answer and Cross-petition out of time and would accordingly allow the appeal, and order the respondent to pay the costs of the appeal.

MORGAN, J.A.:

It is my view that the requirement of a Medical Report with respect to a child of the marriage is important and necessary for the final determination of divorce proceedings. The Act, however, does not make it necessary to delay pleadings if at the time of filing there is no up-to-date Medical Report. If such is available then it ought to be attached and filed but until then it seems that the mere reciting of the disability, if any is known, is sufficient.

In this case, up to the date of the filing of the application for leave, the Medical Report was still not filed though what was urged as the original reason for the delay in filing the Answer and Cross-Petition was its absence. As its absence is no valid reason for delay, it is my opinion that there remains no basis for the Court to exercise its discretion.

Again, it was the petitioner's allegation of fault, i.e. "cruelty and abuses" prior to the last separation that evoked the filing of the explicit and virulent Answer and Cross-Petition under Rule 24(1)(a) for which there is now grounds for appeal. Had the petitioner abstained from citing elements of fault no necessity for an answer could have arisen. The intendment of the Act is clearly one of "no fault" and it seems to me that Rule 24(1)(a) possibly contemplates a defence to the Petition in the nature of e.g.

(a) There has been no separation, we are still living together, or

(b) We have been living separate and apart for six months only, or

(c) There is still a likelihood of cohabitation.

This Answer and Cross-Petition, however, only served to support the petitioner by admitting factors required to be proved in section 5 of the Act in order to obtain a decree.

I entirely agree with Wright, J.A. in that Rule 24(1) appears to be in gross conflict with the Act and its intendment thus producing absurdities as has shown up in this matter.

However, in the circumstances of this appeal, I agree that leave should not have been granted. I concur with Forte, J.A. that the appeal should be allowed and I have nothing more to add to the reasons for that conclusion as expressed in his judgment.

WRIGHT, J.A

By a majority the appeal is allowed with costs to the appellant, to be agreed or taxed.