

**COMMONWEALTH OF THE BHAMAS
IN THE SUPREME COURT
Family Division
BETWEEN**

2021/FAM/div/00748

AOT

Petitioner

AND

GAT

Respondent

Before: The Honorable Madam Justice J. Denise Lewis-Johnson

Appearances: Christina Galanos for the Petitioner
Constance McDonald K.C. for the Respondent

Hearing Date: 3 October 2022

Divorce - Petition - Decree Nisi - Petitioner seeking divorce on the ground that Respondent living separate and apart from him for continuous period of at least five years - Living separate and apart interpretation - whether Section 16 1 (d) requires fault on the party - Respondent refusing divorce - Matrimonial Causes Act, Ch iii, s 16(1)(d).

RULING

Lewis-Johnson J;

Background Facts

1. The parties were married on 6 June 1998. There are three children of the marriage, all of whom are now sui juris.
2. By Petition filed 29 November 2021, the Petitioner filed for divorce on the ground that the Respondent has lived separate and apart from him for a continuous period of at least five years immediately preceding the presentation of the petition, namely since March 2016. The Petitioner prayed for the court to exercise its discretion in his favour notwithstanding his adultery.
3. There have been no previous proceedings in any Court within the Commonwealth of The Bahamas, save and except in March 2017 the Petitioner commenced

divorce proceedings on the ground of cruelty by way of Petition filed in Supreme Court Action No. 2017/FAM/div/FP/0031 and in or about 2018, the said Petition was dismissed.

4. The Respondent filed an Answer on 8 February 2022 denying that she has lived separate and apart from the Petitioner for a continuing period of at least five years. She alleged that it is the Petitioner who voluntarily left the matrimonial home to partake in an extramarital affair and exercises frequent access to the matrimonial home. The Respondent asks for the Petitioner to be dismissed as she does not believe in divorce and would suffer grave financial hardship as a result.
5. In his Reply filed 24 May 2022, the Petitioner concedes that he voluntarily left the matrimonial home in March 2016 and that the parties have not resumed cohabitation as husband and wife. He also indicates that there has been no attempt at reconciliation between the parties. He refutes the Respondent's claims that he 'comes and goes' as he pleases in the matrimonial home as he only goes to visit the children of the marriage.
6. The Petitioner refutes the Respondent's claims that she will suffer grave financial hardship as she is employed for the past twenty years. The Respondent also indicates that he is paying the entire mortgage over the matrimonial home, and he is assisting 'tremendously' with the children of the marriage. He also alleges that the Respondent owns a home which is free and clear of any mortgage or encumbrances and is presently being rented out by the Respondent.
7. During the hearing of the matter on 3 October 2022, the issue arose as to whether Section 16 1 (d) requires the Petitioner to show fault on the part of the Respondent.

Issue

8. Whether Section 16 1 (d) requires the Petitioner to show fault on the part of the Respondent.

The Law

9. The Matrimonial Causes Act Chapter 125 ("the Act") and its relevant rules sets out the law concerning divorce proceedings in The Bahamas.
10. **Section 16 (1)** of the Act establishes six grounds on which a Petition for divorce may be presented. The Section provides:-

"16 (1) A Petition for divorce may be presented to the Court either by the husband or the wife on any of the following grounds that the Respondent:-

**(a) has since the celebration of the marriage committed adultery; or
(b) has since the celebration of the marriage treated the petitioner with cruelty; or**

(c) has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; or

(d) has lived separate and apart from the Petitioner for a continuous period of at least five years immediately preceding the presentation of the petition; or

(e) has, since the celebration of the marriage been guilty of a homosexual act, sodomy or has had sexual relations with an animal:

Provided that a wife may also petition on the ground that her husband has since such celebration been guilty of rape.

11. Section 16 (6) provides:-

"(6) In considering for the purposes of subsection (1) whether the period for which the Respondent has deserted the Petitioner or has lived separate and apart from the Petitioner has been continuous, no account shall be taken of any one period (not exceeding three months) or of any two or more periods (not exceeding three months in all) during which the parties resumed cohabitation but no period during which the parties cohabited shall count as part of the period of desertion or of the period for which they lived separate and apart, as the case may be."

12. The Court's discretion relative to petitions based on Section 16 1 (d) is provided for pursuant to Section 19 (2), (3) and (4). It also provides for reasonable objections a party may take to the petition. The Section provides:

"19 (2) The Respondent to a petition for divorce in which the Petitioner alleges five years separation may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all circumstances be wrong to dissolve the marriage.

(3) where the grant of a decree is opposed by virtue of subsection (2), then-

(a) if the court finds that the petitioner is entitled to rely in support of his petition on the fact of five years separation and makes no such finding as to any other fact mentioned in section 16 (1), and

(b) if apart from this section the Court would grant a decree on the petition, the Court shall consider all the circumstances, including the conduct of the parties to the marriage and the interests of those parties and of any children or other persons concerned, and if of the opinion that the dissolution of the marriage will result in grave financial or other hardship to the Respondent and that it would in all the circumstances be wrong to dissolve the marriage it shall dismiss the petition.

(4) For the purposes of this section hardship shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved."

13. Strachan J in **Nottage v Nottage 1998 BHS J No. 24** Strachan J. explored the meaning of the term 'living separate and apart'. He stated:-

"15. Plainly then, for the reasons given in Santos case, and as one would expect, something more than physical separation must be proved. The use of the words "living separate and apart" may be treated as intended to convey that "something more" and, the more so, since Parliament must be taken to have been aware of the relevant English Acts of 1965 and 1969 and that in Santos case, merely living apart was construed to warrant more than mere physical separation. That something more, whether communicated to the other side or not is proof of the ending of recognition of the marriage as subsisting. Here the petitioner has satisfied me that that was his position for a period of at least five years before the presentation of his petition".

14. In cases concerning the interpretation of Section 16 (1) (d) judges often interpreted the section to mean that there has to exist fault on the Respondent in order for the Petitioner to rely on the section. In **Smith v Smith D/M No 483 of 1989** Smith J stated:

"12 In all cases in The Bahamas where a Petitioner petitions the Court to have his or her marriage dissolved, there must necessarily be an inquiry as to the fault of the injuring party. We have not reached the position of no fault' divorces as obtain in other jurisdictions. There must be a spouse who is sinned against and the spouse who sinned.

13 It is therefore imperative for the petitioner to prove the fault or matrimonial, offence of the respondent. In this case it is necessary for the petitioner to prove that the respondent has lived separate and apart from him for the requisite period before he can succeed in his prayer. It is not enough, as was suggested by Counsel for the petitioner, for the petitioner to show that the two parties were living apart. The petitioner believed that it mattered not that he voluntarily left the respondent so long as he can show that the two were apart. This is shown in the original petition which alleged as the ground for dissolution that the two had lived separate and apart.

14 It is not open to a party to a marriage voluntarily to leave the other spouse and after staying away for, more than five years petition the Court for dissolution of the marriage. That was also the conclusion reached by Malone, Sr. J. in Johnson v Johnson, Divorce Case No. 13 of 1988."

15. The same was held in **Johnson v Johnson D/M No.13 of 1989 Malone Sr J and BM v HM Fam/Div 314 of 2007.**
16. The case of **B v. A 2011/FAM/div/00015** is strikingly similar to the present. Justice Evans discussed the issue of the interpretation of **Section 16 1 (d) of the Act** and whether a Petitioner was required to demonstrate fault of the other party.
17. In that case, the Petitioner sought a divorce pursuant to Section 16 1 (d). The Respondent asserted that it was the Petitioner who chose to live separate and apart from the Respondent. She alleged that while the Petitioner left the home during a three-and-a-half-year period, he made frequent conjugal visits to her at the marital home. She further pleaded that the parties were in continuous communication up to February 2009 which led her to believe that the marriage would survive. The Petitioner admitted that the parties engaged in sexual intercourse on six occasions. However, from October 2006 to present, he has not

engaged in sexual relations with the Respondent and made no attempts at reconciliation.

18. Justice Evans provided a detailed analysis of the interpretation and application of Section 16 1 (d) which I find extremely helpful to the issue at hand. He states:

“18 It is in my view safe to say that the intent of Parliament was by virtue of the matrimonial Causes Act in general and section 16 in particular to make provisions for six (6) grounds on which parties may petition the Court for a decree leading to a divorce. It is also clear that these grounds were intended to be separate and distinct grounds. What is not clear is the validity of the assertion that the section creates grounds which reflect a complete fault based system.”

19. After a careful analysis of the authorities, Justice Evans found difficulty in adopting the interpretation that the ground of separate and apart can only be claimed by a Petitioner who is not at fault for said separation. He stated:

“24 There can be no reasonable argument put forward to refute the assertion that the grounds relating to adultery, cruelty, desertion, homosexuality and rape are all fault based. However 16 (d) in order to be fault based must be construed to mean that a petitioner can only succeed if he were to satisfy the court that a respondent has lived separate and apart from the Petitioner without just cause in circumstances whereby it can reasonably be concluded that the respondent intended to bring the matrimonial consortium to an end.

25 The first problem with the above formulation is that the Act does not specifically add the italicized words and they would therefore have to be construed into the provision. Secondly such behaviour on the part of the respondent would already be covered by section 16 (1) (c) and would render subsection (1) (d) unnecessary. On this construction there would be no discernable difference between a ground of desertion and that of five years separation save for the time frame. To my mind the passage of an additional three years adds nothing to a party who is already guilty of desertion after two (2) years. Section (d) therefore in order to make sense must relate to situations not already covered by section (c).

....

28 In my view where parties have lived separate and apart from each other for a period of not less than five years in circumstances where it is clear that the marriage cannot be restored section 16 (1) (d) is available to either party. The pleading will carry the formulation made necessary by the wording of the section i.e. "the respondent has lived separate and apart from the Petitioner". Section 19 (2), (3) and (4) together with section 18 of the Act allows the court to ensure fairness in circumstances where the petitioner's conduct is such that it may be wrong to dissolve the marriage based on his petition. This in my view is the answer to the concerns raised by Smith J in Smith v Smith as to fairness. This to my mind having regard to the context of section 16 (1) (d)) and the Act as a whole is the sensible construction of the aforesaid provision.

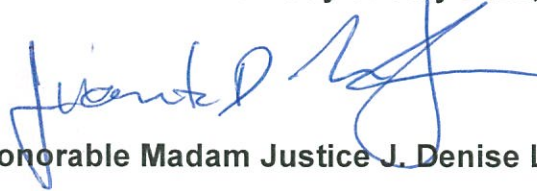
Decision

20. The task of the Court is to interpret Section 16 1 (d) of the Matrimonial Causes Act and determine whether a Petitioner must exhibit a degree of fault on the part of the Respondent in order to succeed on the ground of five years separate and apart.
21. As the Matrimonial Causes Act is silent on the meaning of 'living separate and apart', the term can only be given its natural and ordinary meaning. That is, the parties must live their own lives separate and apart from each other – not cohabitating as husband and wife - for a continuous period of five years. I agree with Justice Evans, as he then was, that the ground created by section 16 (d) is concerned with "the fact of five years separation" and not with the reason for that separation. There is no need for a party to show fault by the other for a Decree Nisi to be granted on the ground of five years separate and apart. What is necessary to succeed on this ground is to demonstrate that the parties did not operate as husband and wife. Whether one party remained hopeful of reconciliation is not a bar. Once it is proven that parties have lived separate and apart, the Petitioner leaving is only considered in the case where the Court is considering financial hardship to the Respondent.
22. In the instant case however, the Respondent has not shown the Court how she would experience grave financial hardship if the divorce were granted.
23. In examining the evidence and observing the demeanor of the parties, I accept the evidence of the Petitioner that he left the matrimonial home in March 2016. Both parties acknowledge that they have lived in separate residences over the last five years. The Respondent however has asserted that the Petitioner would visit the

matrimonial home to engage in sexual intercourse with her with the last time being a year after he left. The Respondent denies this. If the Respondent is correct, the period of separation would be four years – a year short of the qualifying period. I do not accept the Respondent's evidence in this regards.

24. The fact that the Petitioner left the matrimonial home does not prevent him from relying on the ground of living separate and apart for five years. This ground is not fault based and as such is open to either party. It is imperative to note a distinction between Section 16 1 (c), and Section 16 1 (d). For both to be considered fault based there would be no need to use Section 16 1 (d) for a party would satisfy the requirement within two years under Section 16 1 (c).
25. Accepting that Section 16 1 (d) of the Matrimonial Causes Act is not a fault based ground and as such is available to either spouse, I concur with Justice Evans in **B v. A 2011/FAM/div/00015**. Not to adopt this position would render this provision ineffectual, as one with the fault right will, should, and can use two years desertion.
26. In all the circumstances of the case, the Court having heard the evidence of the parties and having considered the relevant law finds as follows:
 - a. The Court exercises its discretion and grants the Petitioner a Decree Nisi on the ground that since the celebration of the marriage the Respondent has lived separate and apart from the petitioner for a continuous period of at least five years immediately preceding the presentation of the petition;
 - b. Ancillary matters are adjourned to Chambers; and
 - c. Each part bears their own costs.

Dated this 19th day of July 2023, A.D.



The Honorable Madam Justice J. Denise Lewis-Johnson