Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE FAMILY DIVISION
FD 00144 OF 2004

BETWEEN	**ALVA MELFORD HERON-MUIR**	**PETITIONER**
AND	**MAUREEN VERONICA HERON- MUIR**	**RESPONDENT**

Miss Hilary Phillips QC instructed by Grant, Stewart, Phillips and Company for the petitioner

Mr. Gordon Steer instructed by Chambers, Bunny and Steer for the respondent

June 16, 17, July 15, September 30 and October 21, 2005

CONTESTED PETITION FOR DIVORCE

SYKES J

1. A contested petition for divorce in these courts is so rare that not many persons can recall any. The parties were joined in holy matrimony by the venerable Reverend David Clark, a Marriage Officer of Jamaica, at the famous first Missionary Church, 58 East Street, Kingston, in the halcyon days of the city of Kingston on May 10, 1958. It was the first marriage for both of them. They were twenty eight years old at the time of the marriage.

2. As is common with many young couples then and now, they lived at several places in the city before finally settling at 25 West Kirkland Heights, Kingston 19. This is not the first petition filed by Mr. Heron-Muir. He filed a previous on December 13, 2002 (Suit No. F 2002/ M147) which was withdrawn in January 2003. He served the 2002 petition on his wife in December 2002. He filed this petition on February 17, 2004. Mr. Heron-Muir moved out of the matrimonial bedroom in December 2002. The couple sold the house at 25 West Kirkland Heights in March 2004. Mrs. Heron-Muir went to live in Miami in the United States of America while

Mr. Heron-Muir went to live in another part of Kingston. They have not lived under the same roof since save for a visit to Miami by Mr. Heron-Muir in August of 2004.

3. What has been stated so far are the agreed facts. The respondent filed her answer on October 27, 2004, in which she says that (a) the marriage has not broken down irretrievably and (b) the parties have not separated and consequently have not been living separate and apart for twelve months before the filing of this petition. She vigorously challenges the assertion in Mr. Heron-Muir's petition: *the Petitioner vacated the matrimonial bedroom on or about December 13, 2002, and has not resumed cohabitation with the Respondent.* Her petition concludes with a prayer for a dismissal of the petition. The respondent amended her petition by deleting all the words after the word "petition" in paragraph one of her prayer. I shall examine the applicable law.

The relevant law

4. Sections 5 and 6 of the Matrimonial Causes Act (MCA) are the relevant provisions to be examined to resolve this petition. Section 5 provides

(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 a 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.

(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.

Section 6 is as follows

(1) The parties to a marriage may be held to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties.

(2) The parties to a marriage may be held to have separated and have lived separately and apart notwithstanding that they have continued to reside in the same residence or that either party has rendered some household services to the other.

5. This statute changed the law considerably in Jamaica in respect of divorce. It removed the old law based primarily upon faultfinding with one sole ground,

namely, irretrievable breakdown. Conceptually, this means that there is no necessity for the court to find any of the parties at fault. Once the marriage has irretrievably broken down with no prospect of reconciliation and the procedural hurdle of section 5 (2) is overcome, the Court must grant the petition.

6. It is well known that these provisions are virtually identical to sections 48 and 49 of the Family Act (1975) (Cth) (FA) of Australia. The Jamaican Act was passed in 1989 and by then there was a number of decisions of the Australian Family Court on sections 48 and 49 of the FA which are the same as sections 5 and 6 of MCA. I have not detected any difference in wording in the Jamaican legislation that would suggest that the Jamaican legislature intended to avoid or modify the interpretation put upon the equivalent Australian provisions. It is therefore reasonable to conclude that the Jamaican Parliament intended to import, for the most part, the Australian interpretation directly in to our jurisprudence. I say for the most part because my research has unearthed the Australian practice of requiring corroboration, in some cases, of the petitioner's evidence that they separated and lived separate and apart for twelve months before the presentation of the petition where the parties are still living under the same roof and have performed household services for each other. I shall indicate my views on this practice later on.

7. I should point out that neither the MCA nor the FA defines the phrases "*broken down irretrievably*" or "*separated and thereafter lived separately and apart*". It is therefore for judges to define these terms. Before I define these terms, let me state the conclusions that can be drawn just from the wording of the MCA:

a. the procedural bar of separation and living separate and apart for twelve months ***immediately preceding*** the date of filing of the petition for the decree of dissolution of marriage must be met before the Court can grant the petition;

b. it is not necessary that both parties agree to dissolve the union. The decision of one to end the marriage relationship is sufficient. It does not matter what the reason is;

c. separation can still be established once the consortium vitae has been brought to an end even if the parties live under the same roof and provide household services for each other;

d. it is quite possible for the marriage to have broken down irretrievably but the petition cannot be presented unless the twelve-month period of separation and living separate and apart has not elapsed. The aim of the legislature seems to be to provide the parties with an opportunity to salvage the marriage.

8. I now turn to defining the phrase "*separated and thereafter lived separate and apart*". From my research it appears that the leading case is ***In the Marriage of Pavey*** 25 FLR 450. In that case the unanimous opinion of the Full Court of the Family Court of Australia approved the following definition of separation given by Watson J in ***In the Marriage of Todd (No 2)*** 25 FLR 260, 262

> *In my view "separation" means more than physical separation - it involves the destruction of the marital relationship (the consortium vitae). Separation can only occur in the sense used by the Act where one or both of the spouses form the intention to sever or not to resume the marital relationship and act on that intention, or alternatively act as if the marital relationship has been severed. What comprises the marital relationship 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 relationships.*

9. The Full Court made two modifications to this dictum, one stylistic and the other substantive. The Court said it would be more felicitous to use "breakdown" rather than destruction because the statute uses "breakdown" (see ***Pavey*** at 454). The substantive alteration is that the court would add to the list of marriage elements "the nurture and support of the children of the marriage" (see ***Pavey*** at 455).

10. The Full Court in speaking of section 48 stated that what the legislation contemplates is a "very serious alteration in the marriage, which the Act calls a 'separation', and the continuance of that state, for a period of twelve months" (see ***Pavey*** at 454).

11. To get a fuller sense of what is meant my the marital relationship or consortium vitae I adopt the following dictum of Selby J in ***Crabtree v Crabtree (No 2)*** [1964] ALR 820 as quoted by Wilczek J in ***In the Marriage of Batty*** 83 FLR 153, at, 156

[T]he question of consortium is ... a different matter from that of physical separation. Consortium has been defined as a partnership or association; but in the matrimonial sense it implies much more than these rather cold words suggest. In (sic) involves a sharing of two lives, a sharing of the joys and sorrows of each party, of their successes and disappointments. In its fullest sense it implies a companionship between each of them, entertainment of mutual friends, sexual intercourse - all those elements which, when combined, justify the old common law dictum that a man and his wife are one person. It is not necessary that all these elements should be present to establish the existence of a matrimonial consortium; one or very few may exist and they may show that the matrimonial consortium has not been destroyed; that it is still alive, although in a maimed and attenuated form.

12. I also take into account the warning sounded by the Full Court in ***Pavey*** against a mechanical application of the "check list" of the indicia of a marriage relationship. The Court said at page 454 – 455

Thus we agree with the words in Todd's case that "separation can only occur in the sense used by the Act where one or both of the spouses form an intention to sever or not to resume the marital relationship and act upon that intention or alternatively act as if the marital relationship has been severed".

There are marriages where the parties drift apart without discussing the problems that cause this, and, without expressing any intention about the matter, act as if the marital relationship has been severed. In a case such as that, the time at which the parties can be said to have "separated" is often difficult to establish in evidence, but it must be established under s 48. It may be said that the use of the word "sever" in the passage quoted has the sound of "fault" about it, but at this point the intentions of the parties in the breakdown of the marriage are merely being described, and "sever" is an appropriate word to use. It is not used to express any concept of blame or fault but merely to describe a sequence of events.

We also agree with the statement in Todd's case that "what comprises the marital relationship for each couple will vary". It is for this reason that it is difficult to formulate a satisfactory test in cases where the parties live under the one roof. As s 48 is concerned with the marriage of the parties, it is the content of their marital relationship which must be examined, not a definition of what a marital relationship ought to include. This, of course, does not mean that the various statements about the content of the marital relationship are useless. They do provide valuable checklists in each case, but they cannot be applied mechanically. If, during the marriage, the parties treat as of little importance something which may ordinarily be a significant part of the marital relationship, then that aspect of their life may be of little importance in determining whether they have separated.

13. The Full Court in ***Pavey*** had a word to say, at page 457 – 458, about spouses that separate and live under the same roof:

The words in italics are particularly significant in cases where the parties to a marriage continue to live in the same residence, and yet assert that the marriage has irretrievably broken down. In such cases, without a full explanation of the circumstances, there is an inherent unlikelihood that the marriage has broken down, for the common residence suggests continuing cohabitation. Such cases therefore require evidence that goes beyond inexact proofs, indefinite testimony and indirect inferences. The party or parties alleging separation must satisfy the court about this by explaining why the parties continued to live under the one roof, and by showing that there has been a change in their relationship, gradual or sudden, constituting a separation. For this reason many of the judges of the Family Court of Australia have adopted the practice of requiring corroboration of the applicant's evidence in cases where the parties reside in the same residence. We do not wish to lay down an inflexible rule that evidence from a witness other than the parties to a marriage must be given, but an applicant should always be ready to call such evidence. Whether the judge will require such evidence will depend on the circumstances of each case.

In the light of what we have said, it is important that in cases where the parties have spent all or portion of the period between the "separation" and the presentation of the application for dissolution of marriage under the one roof this should be stated clearly in par. 9 of the application. That paragraph should also state concisely the facts which it is said show that the marital relationship broke down, and which show that that state of things continued for a period of not less than twelve months immediately preceding the date of filing the application.

It also seems necessary to comment upon the fact that so often evidence in a case of this kind turns upon cooking, washing and housework. As more men turn their hands to these activities they will become much less significant as indicators of the condition of the marital relationship. In any case it is not possible to apply some mathematical formula to these activities and determine whether a "separation" has occurred. Rather the evidence should examine and contrast the state of the marital relationship before and after the alleged separation. "If all the essential qualities of a common life are gone, the parties can be said to have separated. And that can be asserted, and asserted accurately, notwithstanding that difficulties in respect of accommodation, or financial difficulties, leave them closer together in space than they would be if those difficulties did not exist"-per Nettlefold J. in Morris v. Morris.

14. What the court is saying is that living under the same roof is prima facie proof that the parties have not separated. It simply raises (I wish not to use the word presumption with all of what that entails and to avoid arguments about rebutting the presumption and presumption becoming conclusive if not rebutted and so on) the probability that the couple have not separated and living apart. I would not go as far as saying that corroboration is required and I would not so decide in this case especially because (1) the point was not even hinted at in the submissions made

before me and (2) there is the danger of encrusting the statute with ideas and concepts that the legislature seemed to have deliberately avoided. This is not to say that the Full Court has not raised a valid point. What I understand the court to be saying, which is good sense, is that where it is being alleged that parties have separated but still under the same roof the evidence should be examined carefully. The need for careful examination is highlighted where the petition is contested and the party opposing the petition is saying that the parties have not separated and lived separate and apart for the twelve months. The evidence that the parties have separated and lived separate and apart for the required period though under the same roof should be clear, cogent and unequivocal.

15. The final point I wish to make is that separation in this area of law "really means a departure from a state of things rather than a particular place" (see ***Falk v Falk*** (1977) 29 FLR 463 cited in ***In the Marriage of Batty*** at page 156).

16. The principles of law that I have deduced from the cases cited are

a. the expression "separated and thereafter lived separately and apart" means a severing of the consortium vitae. The severance has two components, namely, a physical separation and an intention on the part of at least one of the parties to terminate the marriage relationship. Separation can only occur if one or both spouses intend to sever the marital bond **and** act upon that intention;

b. there can be a cessation of cohabitation or severance of the marriage relationship even if the parties continue to live in the same premises and provide some household services to the other. Conversely, absence from being under the same roof is not sufficient. The absence of performing some household services is not necessarily conclusive that there is an intention to sever the marriage bond. Likewise the provision of household services is not necessarily conclusive that there was either no separation or that the separation has ended. The critical thing is to see if one or both parties have separated from a state of affairs (i.e. the marriage);

c. there may be instances where the date of separation may be difficult to establish because the parties simply drift apart without any words passing

between them but even in this situation the requirements of section 5 (2) must be met;

d. what amounts to a separation will vary from couple to couple because the court is not concerned about generic marriages but the particular marriage before the court. Despite this, the "checklist" of what is considered to be the indicia of marriage may provide some assistance when the specific marriage is being examined. However, the judge should not apply the "checklist" in a mechanical manner;

e. in trying to determine whether there has been a severing of the consortium vitae, it is legitimate to look at the behaviour of the parties before and during the period of alleged separation to see if the physical and mental elements are satisfied.

17. The expression "*broken down irretrievably*" is self explanatory. To my mind, it means a state of affairs in which it can be said that the couple no longer function as husband and wife. A marriage is irretrievably broken down where there has been a severance of the consortium vitae with no intention by both parties to resume the marriage. The separation and period of separation referred to in section 5 (2) of the MCA is not a part of the definition of "*broken down irretrievably*" but is evidential. The separation and continued separation is usually the best evidence of the breakdown of the marriage.

18. Finally, when the MCA speaks of "*not less than twelve months immediately preceding the date of filing of the petition for that decree*" the calculation excludes the date of separation (see Kay J in ***In the Marriage of Bozinovic*** 99 FLR 155 and section 8 of the Interpretation Act (Jam)).

The evidence

19. At the outset let me say that Mr. Heron-Muir's credibility was severely tested. He attempted to make the case that he was separated from his wife on December 13, 2002. The main evidence supporting this was said to be (a) his moving from the matrimonial bedroom to his daughter's bedroom and (b) serving her with the first petition. Thereafter, he said, sexual relations ceased. The thrust of his testimony was that although he and his wife were under the same roof they had separated

and lived separate and apart for the required period before presenting this petition. I should indicate that in December 2002 the couple's children had become adults and did not live at home. In light of the legal principles already cited, Mr. Heron-Muir is saying that he had the intention to sever the marriage bonds and acted upon that intention. He is saying that although he and his wife were living under the same roof he had removed himself from the marriage.

20. The reasons for the breakdown of the marriage, according to Mr. Heron-Muir were

a. he and his wife were not able to see eye to eye for quite some time;

b. she was critical of everything he did and said, which undermined the relationship;

c. his wife liked alcohol and drank enough, in public, to become inebriated. At the best of times, she was talkative. When alcohol was added, she became even more so;

d. Mrs. Heron-Muir constantly berated him. This eroded his status in the household. He no longer felt like a man.

21. To demonstrate his point Mr. Heron-Muir spoke of an incident that occurred at and after the birthday party for his pastor. At this august gathering Mrs. Heron-Muir apparently was not enamoured with the prospect of Gene Robinson (a homosexual cleric) being elevated to the rank of Bishop in the Episcopalian Church as Anglicans in the United States are called. She, it appears, made her views on this subject known. During the party, his wife indulged herself with wine, with the predictable result already described. This time however, his wife became physically ill with unpleasant consequences. When she got home, her body rebelled violently. She kept calling the petitioner for assistance. He declined. His wife eventually fell asleep in their daughter's bedroom. According to Mr. Heron-Muir, this event tore from his heart and soul whatever vestige of respect he had for his wife. There is some difficulty in establishing the precise date of this incident. The evidence from him suggests that it took place in December 2004. But this could not have been since it is common ground that Mrs. Heron-Muir has been living in Miami, United States of America since March 2004 when 25 Kirkland Heights was sold and her first visit to Jamaica since then was in June this year to contest this petition. The incident is

supposed to have taken place after Mr. Heron-Muir moved out of the matrimonial bedroom. I did not get the impression that this incident took place in December 2002. This would leave December 2003. I am prepared to accept that the incident took place in December 2003. The main reason for accepting that the incident took place at all is that Mrs. Heron-Muir accepted that it did.

22. Mr. Heron-Muir spoke of counseling sessions with Dr. Davidson and the Rev. Dr. Sam Greene. These two gentlemen were unable to heal the rift between husband and wife. This was his examination in chief.

23. When cross-examined a different picture emerged. The event I am about to describe took place after Mrs. Heron-Muir returned from the United States of America on December 11, 2002. I shall call this incident "the Viagra experiment". Mrs. Heron-Muir brought home the now famous drug, Viagra, at the request of her husband. He testified that his wife's sexual desires increased significantly whenever she drank alcohol. He denied that his wife gave him Viagra to take. He denied that he complained that Viagra gave him a headache. He did agree, however, that he asked his wife to take the drug for him from the United States. He agreed that the drug did not work. He accepted that he wanted to benefit from the reputed restorative powers of the drug. With these admissions, Mr. Steer pursued his quarry relentlessly until he (Heron-Muir) admitted that the drug had the effect of giving him a headache.

24. Mr. Heron-Muir denied that his wife was in bed with him when the Viagra experiment took place. He then said that he could not recall taking Viagra in order to engage in sexual relations with his wife. Counsel then asked, sarcastically, with whom was he going to have sexual relations with and the petitioner replied that it might have been to try it out on her. This was as close as Mr. Heron-Muir was going to come to admitting that he and his wife engaged in using the drug for the specific purpose of pursuing sexual relations. This is important because there is no evidence that Mrs. Heron-Muir had any other opportunity to learn of the side effects of the drug on him outside of this context. If this is so, the obvious question is, how would his wife acquire such specific knowledge about the side effects of Viagra on her husband? I therefore accept that his wife was with him in bed during the experiment. I conclude that he took the drug with the intention of having sexual

relations with his wife. I believe that the drug failed to live up to its reputation in this case. I also accept that he must have told his wife about the side effects of the drug. All this, I accept took place after his wife returned from the United States in December 2002.

25. There was clear and obvious erosion of the confidence displayed in examination in chief. As the cross-examination progressed, Mr. Heron-Muir's body language, tone and pitch were such that his denials lacked sincerity and conviction. His mouth said one thing but his body and facial expression said another. I say this in relation to his testimony about the Viagra experiment and the reason he moved out of the matrimonial bedroom.

26. He denied the suggestion that the real reason he moved out of the bedroom was his embarrassment at not being able to maintain an erection sufficient to facilitate sexual intercourse. His reaction to the suggestion was, in my view, more consistent with being embarrassed by the revelation than anything else.

27. He admitted that he had told his wife that because of his behaviour she would have much more grounds to divorce him. He conceded further that he had told her that if he divorced her, he might remarry her. This could have been said between December 2002 and March 2004. The cross-examination described above was designed to show that Mr. Heron-Muir was not candid. I daresay that Mr. Steer succeeded.

28. The cross-examination I am about to describe was directed at demonstrating that Mr. Heron-Muir did not separate himself from the marriage relationship even though he served the first petition on his wife. Mr. Heron-Muir said that he might have gone out once between December 2002 and March 2004 to restaurants with his wife. However, the next answer he gave suggested that they went to more than one restaurant. He said that at the restaurants (the plural), they both sat at the same table and he paid the bill. I do not accept his evidence when he said that he went to a restaurant once with his wife during the period mentioned earlier in this paragraph.

29. He gave his wife money to pay for domestic assistance. His wife bought groceries and placed them in the house. He paid her credit card bills.

30. Mr. Heron-Muir agreed that his wife "looked after him good" after December 13, 2002, the day he claims to be the date of separation. Learned Queen's Counsel submitted that this expression meant nothing other than its ordinary English meaning. I disagree. The meaning to be attached to words and expressions is not the preserve of editors of dictionaries and thesauruses. Cultures do impart their own meanings to words and phrases. If this were not so one could hardly speak intelligibly about Jamaican, Trinidadian or even English idiomatic expressions. In Jamaica, the expression "looking after him good" has become a Jamaican idiomatic expression connoting more than just ordinary kindness and generosity. In the context of male/female romantic relationships, it includes doing things that flow more out of love and affection than duty. In this situation, it is expected that the recipient of this lavish attention would respond appropriately.

31. Let us now see how "looking after Mr. Heron-Muir good" manifested itself in this case. He agreed that his wife after December 2002 prepared a "big Jamaican breakfast" very often. In Mr. Heron-Muir's own words, his wife gave him "good hot food. No cereal – green banana." I do not think Queen's Counsel missed the significance of this testimony. Mrs. Heron-Muir sometimes cooked dinner. He would return home from time to time during the working day to have lunch. The couple had breakfast and lunch together on many occasions. If he was unable to return home for lunch, he would call and tell her. At times, he would take home Chinese cuisine for dinner. Although there is a domestic assistant in the house, Mrs. Heron-Muir supervised her and saw to it that he was "well put together". Mr. Heron-Muir provided the money for the domestic assistant's salary either by paying her directly or by giving his wife the money to pay her. This was the nature of the relationship between December 2002 and March 2004 when the Kirkland Heights residence was sold and Mrs. Heron-Muir went to live in Miami and her husband went to live at Ravinia, Kingston, Jamaica. Mr. Heron-Muir even went as far as agreeing that his wife, between December 2002 and March 2004, and here I quote "she looked after me as she always did. She look after me good." Having admitted that he told his wife that if he divorced her, he may remarry her he concluded his remarkable testimony by saying "I don't think that up to March 2004 there was some love left for her."

32. Miss Phillips submitted that I should not make too much of the reference to Viagra. This submission overlooks that fact that I am sitting as judge of law and fact. Sitting as judge of fact, I am entitled to recognise that in Jamaica Viagra has a much vaunted reputation to be able to restore the virility of men who suffer from erectile dysfunction. Given this understanding, it is difficult to accept Mr. Heron-Muir's denial that he did not suffer from any erectile dysfunction.

33. There is one final point that must be made in respect of the cross examination of Mr. Heron-Muir. While giving evidence in chief he spoke of filing and then withdrawing the first petition. He said that he withdrew the petition because it contained erroneous information. According to him, his attorney told him that if he wanted a divorce he should sign it. He added that on reflection, he should not have signed it and he believes in telling the truth. He said that the erroneous statement was that he had separated from his wife for two years. The "real" truth, if there is such a thing, is that they separated on December 13, 2002.

34. When cross examined about the first petition it became apparent that it was not a simple withdrawal. His evidence in chief suggested that there was no prompting from anything or anyone. That impression turned out to be quite inaccurate. The context of the withdrawal is this: after his wife returned to Jamaica in December 2002, he served her with the petition. His wife read it and pronounced in stentorian terms, "What kind of a lie dis!" It would seem that his wife's proclamation about the petition restored his desire to speak the truth.

35. He attempted to place the blame for signing the petition on his then counsel. He alleged that his counsel (a female) "coerced" him into signing. He admitted that he signed another document in relation to the first petition which stated that the petition was true. Therefore, what we have here is a man who signed a petition knowing it to be false, a man who signed another document in which he asserts that the false petition was true, a man who withdrew the petition after he was told that it was a lie and a man, who like Adam, takes no responsibility for what he did, but blames the woman, in this case his attorney. I should point out that the alleged erroneous material in the first petition concerned a very, very material fact. The law is that the couple must have separated and lived separate and apart for twelve months before the petition is filed. He was saying that he was separated from his

wife for a period of time which he must have known to be untrue. This is the man that Queen's Counsel said I should accept as a witness of truth.

36. Learned Queen's Counsel said that I should not conclude that because he lied then he is lying now. That is true and this is my response to that submission. If the credibility of Mr. Heron-Muir was successfully challenged in areas such as (a) the Viagra experiment; (b) the character of the relationship between himself and his wife after her return in December 2002 and (c) the circumstances surrounding his first petition, then it is indeed asking a great deal to say that his unsubstantiated evidence should be accepted. I am not saying that corroboration or anything akin to corroboration is required as a matter of law or practice. But for the agreement on two vital facts the petitioner would have failed to establish his case.

37. In re-examination, Mr. Heron-Muir closed his testimony by saying that when he had breakfast, lunch and dinner with his wife he was not cohabiting with her. In my opinion, Mr. Heron-Muir has been completely discredited.

38. Mr. Heron-Muir's lack of credibility was not lost on Miss Philips. She was left with pursuing the normally difficult strategy of seeking to establish the petitioner's case through an opposing witness that was clearly more believable than her client was.

39. The respondent testified that in 2003 she did everything for her husband as she normally did. She testified that her husband tried the Viagra while she was in bed with him. This was after her return in December 2002. She added that she made breakfast, lunch and dinner for him. She was insistent that they went out to dinner at various restaurants and functions. Indeed she said that between December 2002 and March 2004, the only thing not happening between them was sexual relations. She admitted that her husband was less than chivalrous after they both came from the pastor's dinner party.

40. In cross-examination she denied that she knew that when her husband served her with the petition he wished to dissolve the marriage. I must say that on this point her answer is not quite true since it could not have escaped her that this was a possibility. She agreed that sexual relations with her spouse had reduced to the point that they had sexual relations about twice or thrice between December 2002 and April 2003 and none at all between April 2003 and March 2004. She admitted that her husband moved out of the bedroom in December 2002. There was some

inconsistency in her evidence about the taking of hormones. In examination in chief she was saying that she was taking the hormones up to and including December 2002. However in cross-examination she said that she was receiving the hormone treatment before 2002/03. This would be inconsistent with the tenor of her evidence that suggested that she was taking hormones in 2002/03. Despite these inconsistencies Mrs. Heron-Muir was immeasurably more believable than her husband.

41. Despite Mrs. Heron-Muir being a more credible witness, we are left with two stubborn facts which are agreed between the parties. These are (a) the filing of the first petition and (b) Mr. Heron-Muir moving out of the matrimonial bedroom. I must make the point that I am not to be taken as suggesting that litigants in a divorce petition are not expected to speak the truth at all times. The fact is that Mr. Heron-Muir did two acts which must be taken into account and some meaning given to them. Added to this is uncaring attitude when she became ill after the pastor's birthday party. It may well be that Mr. Heron-Muir thought that his conduct after December 2002 may have undermined his position and so he decided to fabricate evidence to bolster his case.

Conclusion

42. What then do I make of all the evidence? The filing of the first petition and moving out of the bedroom are powerful pieces of evidence that would support the intention to sever the consortium vitae. The moving out of the bedroom is a critically important fact, regardless of the true reason. It is true that Mr. Heron-Muir happily accepted all that was done by his wife after December 2002 including occasional sexual relations. The lack of regular sexual relations post December 2002 did not appear to be a new phenomenon. The experiment with Viagra suggests this. Thus in this marriage the absence of regular sexual relations is not extraordinarily significant.

43. I must confess that when the submissions were being made I was not inclined to agree with Miss Phillips and even though I agree with her after further reflection, it is not without some reluctance. I agree with her because the filing and service of the first petition clearly demonstrate the intention of Mr. Heron-Muir. It is difficult to

reasonably interpret this evidence any other way. It is equally difficult to put any other reasonable interpretation on the act of moving out of the matrimonial bedroom when looked at in the context of filing and serving the petition. Even though I accept Mrs. Heron-Muir's explanation that Mr. Heron-Muir removed from the matrimonial bedroom because of sexual inadequacies, the point is that the law does not require me to decide whether the reason is good or bad. The law says that I am to look to see if there was a separation and if there is evidence that support that conclusion then separation has been established. The fact that the other party to the marriage does not accept it and continues to behave as if the marriage is still on foot is irrelevant. The withdrawal of the petition in January 2003 is not necessarily inconsistent with an intention to sever the consortium vitae. Neither is the provision of money and going out with his wife. What the cross examination of Mr. Heron-Muir showed was that the reason why he withdrew the petition was not so much a change of heart but rather because the petition contained untruths.

44. The effect of this is that even if December 13, 2002, were not the date of separation it seems that Mr. Heron-Muir formed that intention sometime in December 2002 and acted upon it. The conduct of Mrs. Heron-Muir regarding breakfast, lunch, dinner, laundry and even sexual relations shows why the court must focus on the intention and conduct of the party who is alleging the separation. I do not see any prospect of reconciliation because reconciliation needs both parties to agree on this. Mr. Heron-Muir is not keen on reuniting with his wife and having taken section 5(3) of the MCA into account I cannot deny the petition.

45. The petition is granted but having regard to the conduct of Mr. Heron-Muir in putting forward untruthful evidence thereby precipitating a contested hearing he should pay the costs of the hearing.