

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN FAMILY DIVISION

CLAIM NO. F D 1364/2004

BETWEEN            JOSEPH SAMUEL DONALDSON            PETITIONER

A N D                ESMIE VICTORIA DONALDSON            RESPONDENT

Fara Brown for the Petitioner.

**Heard: 3<sup>rd</sup> & 12<sup>th</sup> November 2004**

**Brooks, J.**

Mr. Joseph Donaldson is in a hurry to be divorced from his wife. He has been married for less than two years but has been separated from his wife, according to him, for approximately seventeen months to date. He filed a Petition for Divorce in July 2004 and, quite predictably, the Deputy Registrar requested his attorneys-at-law to withdraw it because it was premature.

Miss Brown submits that the Deputy Registrar in making the request has misinterpreted the provisions of Section 8(1) of the Matrimonial Causes Act. She has applied on Mr. Donaldson's behalf for the court to direct the Registrar to accept the Petition and to issue a notice to Mrs. Donaldson to appear to the said Petition.

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The substance of the present application turns on the meaning of the word 'presented' as used in that Section.

The relevant subsection of Section 8 states as follows:

"8. (1) No petition for a decree of dissolution of marriage shall be presented, without the leave of the Court, unless at the date of the presentation of the petition two years have passed since the date of the marriage."

### **The Applicant's submissions**

Miss Brown's submissions on behalf of Mr. Donaldson may be conveniently summarized as follows:

1. A petition for divorce is 'presented' to the court by the petitioner giving oral evidence in support of the petition and seeking that the remedy claimed in the petition be pronounced by way of a *decree nisi* and for further orders.
2. Section 8 (1) refers to a restriction as to the time of presentation of a petition not a restriction as to the time of filing.
3. A petition may therefore, without prior leave, be properly filed in the registry, a notice to appear issued and service of the petition and notice effected on the respondent before the expiry of two years from the date of the marriage.
4. The Registrar may not however, set a date for the hearing of the petition before the expiry of the two years. Three options become

open to the Registrar at the stage, and only at the stage where the petitioner applies for a certificate that the pleadings are in order and that the petition be set down for hearing. These are as follows:

- (a) to set the petition for hearing on a date subsequent to the expiry of the two years,
- (b) to wait until after the expiry of the two years before setting the matter down for hearing, or
- (c) to indicate to the petitioner that in the absence of grant of leave by the court to present the petition before two years have elapsed that it would not be set down.

5. The literal interpretation of the word 'presented' as used in Section 8 should be given unless applying such an interpretation would bring about an illogical and impracticable situation.
6. The Registrar for this present petition has interpreted the word 'presented' to mean 'filing'. This interpretation is not in keeping with the reading of the Act. By way of demonstration; where Parliament means the word 'filing', it uses that word. So in Section 5(2) of the Act it is stated as follows:

“(2) 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.” (emphasis supplied)

When asked by the court whether the reading of Section 8 (3) affected her submission, Miss Brown said it did not affect it adversely.

Section 8(3) reads, in part, as follows:

“(3) If it appears to the Court at the hearing of the petition that the petitioner obtained leave to present the petition pursuant to this section by any misrepresentation or concealment of the nature of the case, then the Court may -...” (emphasis mine)

Miss Brown submitted that the word ‘hearing’ was used in order to allow for easier reading and that the word ‘presentation’ may have been used in its place without changing the import of the section.

She provided no authorities in support of any of her submissions.

### **Assessment of Section 8**

I am of the view that the submissions are, at best, interesting. They however lack merit.

Although Miss Brown submits that Section 8 does not apply to the present petition, an examination of the import of the section is critical to the analysis of this application. Subsection 2 of Section 8 states as follows:

“(2) A Judge of the Court may, upon application being made to him in accordance with rules of court, grant leave for a petition to be presented before two years have passed if he is satisfied that one of the parties has with the assistance of an approved marriage counsellor attempted a reconciliation and there are special circumstances that would justify the hearing of the petition. “

The intent of Parliament by this Section was to prevent persons from devaluing the hallowed institution of marriage by hastily seeking the dissolution of their marriage at the first hint of turbulence. The filing and service of the petition may well act as a catalyst to harden attitudes which, without that intrusion, may well have softened with the passage of time, to allow for reconciliation.

Section 8(2), quoted above, refers to the rules governing an application for the filing of an early petition for divorce. Rule 4 of the Matrimonial Causes Rules stipulates that where a petitioner seeks to present a petition for divorce before the expiration of two years from the date of the marriage, that petitioner must make an application for leave to do so by filing an Originating Summons. The Summons must be supported by evidence on affidavit, which affidavit should “exhibit a copy of the proposed petition, ... and shall also state ... whether there is any reasonable likelihood of a reconciliation between the parties.” (Rule 4(3)). (The emphasis is supplied.) The petition can only be a ‘proposed’ one if it has yet to be filed.

It is at the hearing of that application that the Judge would, if satisfied of the merits, “grant leave for a petition to be presented” (Section 8(2)). The grant of leave would allow for the petitioner to file the “proposed petition” for divorce.

In this context I find that the term ‘hearing’ as used in Section 8 (3) is not interchangeable with the word ‘presentation’. To read it otherwise would result in a situation where there would be no need to seek leave before filing the petition as rule 4, by implication, requires. That latter interpretation would make the requirement for exhibiting a proposed petition, mentioned above, or indeed the need for an originating summons, redundant.

The terms ‘presented’ and ‘presentation’, unless the context mandates otherwise, must be held to have a consistent meaning throughout the Act. I find therefore that in the Act a petition is ‘presented’ to the court when it is ‘filed’ with the court’s registry. Consequently a petition for a decree of dissolution of marriage may only be filed within two years of the date of the marriage, if the leave of the court shall have been previously obtained.

The use of the words “filing of the petition” as used in S. 5 (2) does not undermine my interpretation. I find that in the context they do not draw a distinction between “filing” and “presentation”. The word “presentation” may far more easily be substituted for the word “filing” in that subsection. It would create no inconsistencies with the tenor of the section or with any of the rules under the Act.

I draw support for my conclusion from the case of Alston v Alston [1946] P. 203 where Willmer, J. (as he then was) in interpreting Section 2 of the English Matrimonial Clauses Act 1937 said at p 205;

“I think that both on the merits of the case and also on the technical ground, I must decide that a petition is presented when it is filed with the court.”

The section, which the learned Judge was interpreting, stated in part, as follows:

“A petition for divorce may be presented to the High Court ... on the ground that the respondent ... (b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition.”

The issue which Willmer, J. was required to decide was whether the petition was presented on the date when it was signed or the date on which it was filed. Despite the difference in context, I find that that interpretation of the term ‘presented’ is instructive for the instant purposes.

### **Conclusion**

Based on the above analysis, I disagree with Miss Brown’s submissions and find that the Deputy Registrar was perfectly correct in requesting the withdrawal of Mr. Donaldson’s petition. The petition was filed, in breach of the rules, before the expiry of two years from the date of

the marriage. If Mr. Donaldson wished to hurry his divorce he should have complied with the provisions of Section 8 of the Matrimonial Causes Act.

The application is therefore refused.