

SUPREME CT.

REYES V. REYES

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REYES v. REYES

SUPREME COURT (Alcantara, A.J.): December 2nd, 1988

Family Law—divorce—three years’ separation—parties may be separated while living in same house if lack of matrimonial consortium—lives must be truly separate, e.g. absence of sexual intercourse, shared bedroom or meals taken together—burden of proof rests on petitioner

The husband petitioned for divorce on the ground of irretrievable breakdown of the marriage.

The husband and wife were married in 1980. After the death of the wife’s father, in 1984, the couple drifted apart, to the extent that cohabitation ceased, the husband moving into the study of the matrimonial home, which became his bedroom. The husband carried on paying money to the wife, and the wife did his laundry; apart from this, and the occasional meal together, they led entirely separate lives. In August 1987, the wife went to live with her mother.

The husband submitted that although living in the same house, the couple had been living apart continuously since the husband had moved into the study, so the requirement for three years’ continuous separation set out in the Matrimonial Causes Ordinance, s.16(2)(d) was fulfilled.

Held, dismissing the petition:

The requirement for three years’ separation had not been fulfilled. Although sexual intercourse had come to an end in mid-1984, and the parties had been living apart since August 1987, there was evidence of some degree of matrimonial consortium prior to the wife’s leaving the matrimonial home, including the husband’s paying the wife’s bills when she could not afford to pay them, her doing his laundry, and their occasional shared meal. While it was legally possible for a couple to be living apart while living in the same house, the burden of proving that co-habitation had ceased rested on the petitioner; here, the husband had not offered sufficient evidence to discharge it (paras. 6–10).

Case cited:

(1) *Santos v. Santos*, [1972] Fam. 247; [1972] 2 W.L.R. 889; [1972] 2 All E.R. 246; (1972), 116 Sol. Jo. 196, applied.

Legislation construed:

Matrimonial Causes Ordinance (1984 Edition): s.16(2): The relevant terms of this sub-section are set out at para. 1.

E.C. Ellul for the petitioner;

The respondent did not appear and was not represented.

1 **ALCANTARA, A.J.:** This is an undefended petition for divorce by a husband on the ground that the marriage has broken down irretrievably. Reliance is being placed on s.16(2) of the Matrimonial Causes Ordinance, which reads:

“(2) On a petition for a divorce, the court 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— . . .

(d) that the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition (hereafter in this Ordinance referred to as ‘three years separation’) and the respondent consents to a decree being granted . . .”

2 The petitioner married the respondent, then Sandra Janet Bates, at the Cathedral of St. Mary the Crowned, Gibraltar, on September 7th, 1980. The parties lived and cohabited at 24 Crutchett’s Ramp for four years, and thereafter moved to a flat at 14/1 Danino’s Ramp, also in Gibraltar.

3 According to the petitioner—and he has been the only one who has given evidence—the marriage was happy at first, but then things became worse because he and his wife were incompatible and had different interests in life. Time emphasized this difference.

4 The respondent’s father died in March 1984, and she was much affected. For some unexplained reason, this caused the drifting apart of the couple to the extent of cohabitation ceasing. A few weeks after the cesser of cohabitation, the petitioner moved out of the matrimonial bedroom into a study, which became his bedroom. By this time, the parties were already living at the flat at 14/1 Danino’s Ramp, which consisted of two bedrooms, a small room (the study), the kitchen and a bathroom.

5 In this new sleeping arrangement the petitioner says that they led separate lives until August 1987, when the respondent left the matrimonial home and went to live with her mother at 23 Archbishop Amigo House, where she is residing at present. The petitioner lives by himself at 14/1 Danino’s Ramp.

6 I am satisfied on the evidence that sexual intercourse came to an end shortly after the death of the respondent’s father in March 1984. Similarly,

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I am satisfied that the parties have been living apart since August 1987. But the question is whether they have been living apart continuously for at least three years preceding the presentation of the petition. The petition was presented on March 24th, 1988. The question therefore is whether the parties were living apart continuously from at the latest March 1985 to August 1987. At the time they were both living in the matrimonial home.

7 Legally, it is possible to be living apart although living in the same house. 1 *Rayden on Divorce*, 14th ed., para. 117 (footnote 5), at 302 (1983) refers to two Commonwealth cases, which I now quote as a guide:

“[The court in] *Rushton v. Rushton* . . . [states that] the spouses have been living separate and apart, within the meaning of s. 4(1)(e) [of the Divorce Act], where they lead separate lives, have no sexual intercourse, live in separate rooms of the same suite and perform no services for each other, although the husband pays the wife a sum for maintenance, the sharing of the suite being necessary because their jobs as joint caretakers of the building required them to be, or appear to be, husband and wife . . . In *Cherewick v. Cherewick* . . . [the] wife prepared meals, [and the couple had an] ordinary social life together, but different bedrooms: [this was] not ‘living separate and apart’.”

8 In the present petition, during the period from March 1985 to August 1987 the parties were sleeping in separate bedrooms and were not having sexual intercourse, and were leading separate lives. According to the evidence, the petitioner was handing over his pay to the respondent. At one stage, he took over the payment of rent and telephone rental because the wife had fallen into arrears, but continued to hand over the balance of his pay. The evidence further discloses that, although they hardly spoke to one another because they had nothing to say, on occasion the husband or the wife would cook a meal which they would eat together. This happened very rarely, but it happened. Further, although the husband made his bed and cleaned his room, the washing was either taken to the laundry or done by the wife.

9 The onus of proof is on the petitioner to satisfy the court that there has been a withdrawal from matrimonial consortium, as well as a physical separation, to establish three years’ separation. On the question of whether that onus has been discharged, the case of *Santos v. Santos* (1) should be borne in mind. The relevant part of the headnote to the case in *The All England Law Reports* reads ([1972] 2 All E.R. at 246):

“The degree of proof required to establish the moment when the condition of living apart commenced, following a period of physical separation, will depend on all the circumstances of each case. In some cases there will be evidence, such as a letter, a reduction or cessation of visits to a spouse in prison, or cohabitation with a third party. Where however there is only the oral evidence of the petitioner

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on the point, special caution may need to be taken. In some cases, where it appears that a petitioning spouse's conduct is consistent with a continuing recognition of the subsistence of the marriage, automatic acceptance of the petitioner's uncorroborated evidence inconsistent with such conduct would not be desirable. On the other hand there may be cases where a moment arrives as from which resumption of any form of married life becomes so plainly impossible that only slight evidence is needed, for the nature of the breakdown is so patent."

10 On the evidence produced, I am not satisfied that the petitioner has discharged the onus of proof required to establish that he has lived apart from his wife for a continuous period of three years immediately preceding the presentation of the petition. I accordingly dismiss the petition.

Petition dismissed.