[2017 Gib LR 277]

WP v. CP

SUPREME COURT (Butler, J.): September 1st, 2017

Family Law—divorce—three years' separation—parties not living apart, even though separate bank accounts and no intimacy, if remained in matrimonial home for sake of children, with no separation agreement or intention to divorce

The petitioner petitioned for divorce.

The parties had married in August 2003 and had two children, aged 18 and 11. The petition was based on the irretrievable breakdown of the marriage. It was simply stated that the parties had lived apart for a continuous period of over three years immediately preceding the presentation of the petition.

Section 16(2) of the Matrimonial Causes Act 1962 provided that the court should not hold a marriage to have broken down irretrievably unless the petitioner satisfied it of one or more specified facts. Those relevant in the present case were that the parties had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consented to a decree being granted (s.16(2)(d)); or that the parties had lived apart for a continuous period of at least three years immediately preceding the presentation of the petition (s.16(2)(e)).

It was apparent from the petition that the parties' current addresses were the same. At the preliminary hearing it was confirmed that the parties both still lived in what had been the matrimonial home. It was said that they had remained in the matrimonial home for the sake of their children. The parties had not discussed their status or possible divorce until January 2016, when they decided to separate. The respondent moved out of the family home in December 2016.

Held, dismissing the petition:

(1) The petitioner conceded that the parties had not been living apart until January 2016 and had decided not to pursue his petition under s.16(2)(e) of the Matrimonial Causes Act. For the purpose of considering whether the parties had been living apart, it was insufficient that the parties had separate bank accounts (which they had had throughout the marriage); that the husband had done little cooking or housework (again, this had been the case throughout the marriage); or that the parties had ceased to have a sexual relationship long before. The parties had had no

discussions as to their status or the possibility of divorce until January 2016. There was no separation agreement. The fact that they had decided to continue living together, postponing living apart, for the sake of their children did not mean that the marriage had not continued (paras. 14–15).

(2) The petitioner would not be permitted to amend the petition so as to rely instead on the parties having lived apart for two years and the respondent's consent to the grant of a decree (s.16(2)(d) of the Act). That application would be bound to fail as, on the basis of his earlier concession that the parties had not lived apart until January 2016, they had not yet lived apart for two years. The petition would be dismissed but it would be recorded in the recital that the parties had separated in January 2016, so as to assist them to obtain the dissolution of their marriage soon (para. 16).

(3) To obtain a divorce, a petitioner had to satisfy the court that the marriage had irretrievably broken down, establishing at least one of the statutory facts in s.16(2) of the Act. The court had a duty under s.16(4) to inquire into the alleged basis for the divorce. In separation cases, it was necessary to show that the parties had truly been living separate and apart for a period of at least three years (or two years with the consent of the respondent), although some periods (not exceeding six months) during which the parties had lived together in the relevant period could be ignored provided the actual period of separation was sufficient. Parties would be considered to have been living apart when they lived in separate households. They could be living in the same household though at different addresses, or in different households though living at the same home. It was the duty of lawyers to take full and proper instructions in order to ensure that the parties were, in law, living separate and apart during the relevant period. Lawyers had also to take into account the established case law. Failure to do so could result in serious disappointment for the parties and an unnecessary waste of money and time. Petitions should particularize the circumstances of the alleged separation and its continuance. If the parties lived in the same property during the relevant period, that should be stated and the basis of the claim that they were living separate and apart pleaded. The affidavit accompanying the petition should be clear and full, enabling the court and the parties to proceed efficiently and speedily if the necessary facts were proved. A separation agreement would be strong evidence of the parties living in separate households. The petition should follow the order and form set out in r.8(1) of the Family Proceedings (Matrimonial Causes) Rules 2010. The affidavit accompanying the petition should contain full particulars of the circumstances to support the allegation and the petitioner's evidence to support them (para. 18).

Cases cited:

(1) *Mouncer* v. *Mouncer*, [1972] 1 W.L.R. 321; [1972] 1 All E.R. 289, followed.

(2) *Santos* v. *Santos*, [1972] Fam. 247; [1972] 2 W.L.R. 889; [1972] 2 All E.R. 246, followed.

Legislation construed:

Civil Partnerships Act 2014, s.25: The relevant terms of this section are set out at para. 5.

Matrimonial Causes Act 1962, s.16(2): The relevant terms of this sub-section are set out at para. 8.
s.17(5): The relevant terms of this sub-section are set out at para. 11.
s.17(6): The relevant terms of this sub-section are set out at para. 10.

Family Proceedings (Matrimonial Causes) Rules 2010, r.8(1): The relevant terms of this paragraph are set out at para. 18.

J. Daswani for the petitioner;
The respondent appeared in person.

1 **BUTLER, J.:** This is an undefended petition for dissolution of the parties' marriage. They were married on August 29th, 2003. There are two children of the family, now aged 18 and 11. The petition is based upon the irretrievable breakdown of the marriage, allegedly evidenced by the parties' separation for a period of three years immediately preceding the presentation of the petition. The sole issue which arises is whether the petitioner has established, on the balance of probability, that the parties were indeed separated (or "living apart") for a continuous period of three years immediately preceding the presentation of the petition.

The background

2 The petition is dated September 30th, 2016. In para. 12 it is alleged that the marriage has broken down irretrievably. In para. 13 it is baldly asserted that the parties have lived apart for a continuous period of over three years immediately preceding the presentation of the petition, "namely over 8 years ago." There then appears what are said to be "PARTICULARS," though they simply repeat that the parties "have lived apart for a continuous period of three years immediately preceding the presentation of this Petition, namely over 8 years ago." No further details are provided in the affidavit which accompanied the petition, which simply confirms that the petition is true. There was therefore nothing to put the court on notice that the parties may not, as alleged, have separated over eight years previously, save that in paras. 3–4 of the petition, the parties' current respective addresses were the same. Upon enquiry by me at the preliminary hearing, it was confirmed that both the parties still lived in what had been the matrimonial home.

3 This is by no means the first time that this court (not only myself) has encountered this situation. I have on many occasions emphasized that if a

petition based upon two or three years' separation fails to contain proper particulars of the circumstances of the alleged separation, the court is bound to make enquiries as to those circumstances. If the parties continued to live in the same home during the relevant period, the court will be bound to enquire with some care into the circumstances and date when the separation is said to have taken place and to have continued throughout the relevant period. If these matters are properly pleaded in the petition and/or covered in the accompanying petition, such enquiries, or at least the expense and unnecessary emotional disappointment of an adjournment of the preliminary hearing, may be avoided. Furthermore, if the parties, together with their advisers, if any, carefully address this issue properly, it should become apparent if there are likely to be difficulties in establishing the necessary period of separation in law, and appropriate advice can be given. In a case such as the present, in which neither party has formed another relationship, there is little hardship in their waiting until the statutory period is satisfied.

The law

4 I am aware that many take the view that the law should be changed in order to simplify divorce, so that marriages may be dissolved, without establishing fault, once they have clearly broken down irretrievably. This is, however, a matter palpably for the legislature and not for the courts, which must apply the law as it is, unless and until Parliament decides to change it.

5 I observe that as recently as 2009, matrimonial law in Gibraltar was updated and changed. In most respects, the changes accorded with then law in the United Kingdom, but not in all. Even more recently, in 2014, the Civil Partnership Act was passed. Section 25 of that Act deals with dissolution of civil partnerships. The ground for dissolution (irretrievable breakdown of the relationship) and the statutory facts necessary to establish that breakdown mostly (but not entirely) mirror those in the Matrimonial Causes Act 1962 ("the MCA") concerning dissolution of marriage. Section 25 reads as follows:

> "(1) Subject to section 22, an application for a dissolution order may be made to the Court by either civil partner on the ground that the civil partnership has broken down irretrievably.
>
> (2) On an application for a dissolution order the Court must inquire, so far as it reasonably can, into—
>
> (a) the facts alleged by the applicant; and
>
> (b) any facts alleged by the respondent.
>
> (3) The Court hearing an application for a dissolution order must not hold that the civil partnership has broken down irretrievably

unless the applicant satisfies the Court of one or more of the facts described in subsection (5) (a), (b), (c) or (d).

(4) But if the Court is satisfied of any of those facts, it must make a dissolution order unless it is satisfied on all the evidence that the civil partnership has not broken down irretrievably.

(5) The facts referred to in subsections (3) and (4) are—

(a) that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent;

(b) that—

(i) the applicant and the respondent have lived apart for a continuous period of at least 2 years immediately preceding the making of the application ('2 years' separation'); and

(ii) the respondent consents to a dissolution order being made;

(c) that the applicant and the respondent have lived apart for a continuous period of at least 3 years immediately preceding the making of the application ('3 years' separation');

(d) that the respondent has deserted the applicant for a continuous period of at least 2 years immediately preceding the making of the application."

6 Even more recently, the Matrimonial Causes Act was amended to include same-sex marriages. The statutory requirements for dissolution were amended accordingly but not so far as separation divorces are concerned. It is significant that the relevant period for the separation basis for divorce without consent in the United Kingdom remains five years. The legislature in Gibraltar gave serious consideration to the issue, the period here being three years.

7 It is therefore apparent that, despite having recent opportunities to amend the statutory requirements for dissolution of marriage, the legislature has decided not to do so. It seems to me that it must also have decided that existing case law interpreting the meaning of "living apart" should continue. Otherwise it would have taken the opportunity to clarify the matter when amending the Act. The institution of marriage is fundamental to society in Gibraltar. In my view, this area of law is one in which this court should avoid the impression that it is attempting "judicial legislation," especially when the legislature has had recent opportunity to make changes, if it sees fit, to reflect changes in society.

8 The sole ground for divorce in Gibraltar is irretrievable breakdown of marriage. Section 16(2) of the MCA provides that the court shall not hold a marriage to have broken down irretrievably unless the petitioner has satisfied it of one or more of five specified facts. The following facts relate to the petition in this case:

> "(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 (hereafter in this Act referred to as two years separation) and the respondent consents to a decree being granted; or
>
> (e) 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 Act referred to as three years separation)."

9 If the court is satisfied of any of the facts specified in s.16(2), sub-s. (5) requires the court to grant a decree of divorce unless it is satisfied on all the evidence that the marriage has not broken down (subject to s.49, which relates to any children of the family).

10 Section 17(6) of the MCA provides that—

> "for the purposes of section 16(2) (d) and (e) . . . a husband and wife shall be treated as living apart unless they are living with each other in the same household, and references in this section to the parties to a marriage living with each other shall be construed as references to their living with each other in the same household."

Sub-section (6A) extends that provision to same-sex marriages.

11 Section 17(5) of the MCA provides that in considering whether the period for which the parties have lived apart has been continuous for the purposes of s.16(2), "any one period (not exceeding 6 months) or of any two or more periods (not exceeding 6 months in all) during which the parties resumed living with each other" shall not be taken into account. Nor shall they count towards the required period of separation.

12 Section 16(4) of the Matrimonial Causes Act in Gibraltar specifically enjoins the court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent.

13 So far as I am aware, there is no reported judicial dictum in the courts of Gibraltar as to the meaning of "living apart" for these purposes. I therefore turn to the UK case law, which I find entirely persuasive in this regard. Mr. Daswani has put forward an analysis of the well-known case of *Santos* v. *Santos* (2), in which Sachs, L.J. considered this phrase. His judgment included the following ([1972] Fam. at 259–264):

"The cogent volume of authority, to which we have been referred, makes it abundantly clear that the phrase . . . when used in a statute concerned with matrimonial affairs normally imports something more than mere physical separation. This is something which obviously must be assumed to have been known to the legislature in 1969. It follows that its normal meaning must be attributed to it in the Act of 1969, unless one is led to a different conclusion either by the general scheme of the statute coupled with difficulties which would result from such an interpretation, or alternatively by some specific provision in that statute.

. . .

These factors tend to highlight some linked problems bearing on the meaning of 'living apart' which have caused us concern. If these words import an element additional to physical separation, can that element depend on a unilateral decision or attitude of mind; if so, must its existence be communicated to the other spouse; and, in any event, how can it be identified so that it is in practice capable of judicial determination?

Obviously this element is not one which necessarily involves mutual consent . . . So it must be an element capable of being unilateral: and it must, in our judgment, involve at least a recognition that the marriage is in truth at an end . . .

If the element can be unilateral in the sense of depending on the attitude of mind of one spouse, must it be communicated to the other spouse before it becomes in law operative?

. . .

In the end we have firmly concluded that communication by word or conduct is not a necessary ingredient of the additional element.

On the basis that an uncommunicated unilateral ending of recognition that a marriage is subsisting can mark the moment when 'living apart' commences, 'the principal problem becomes one of proof of the time when the breakdown occurred' . . . Sometimes there will be evidence such as a letter, reduction or cessation of visits, or starting to live with another man. But cases may well arise where there is only the oral evidence of the wife on this point. One can only say that cases [based upon separation] may often need careful examination by the first instance judge and that special caution may need to be taken. In some cases, where it appears that the petitioning wife's conduct is consistent with a continuing recognition of the subsistence of the marriage, automatic acceptance of her uncorroborated evidence inconsistent with such conduct would not be desirable. On the other hand, there can be cases where a moment arrives

as from which resumption of any form of married life becomes so plainly impossible, e.g. on some grave disability becoming known to be incurable, that only slight evidence is needed—for the nature of the breakdown is so patent.

The difficulties arising from some of these problems at one stage led to hesitation as to whether after all 'living apart' in this particular Act might not refer merely to physical separation. But there are at any rate two cogent reasons against holding that the standard meaning does not apply. First, in any statute in which those words are used the same problems are normally inherent to a considerable degree—and it cannot be said that they have such a special impact in the Act of 1969 as to lead to the inference that the standard meaning is negatived. Secondly—perhaps more importantly—there are the injustices and absurdities that could result from holding that 'living apart' refers merely to physical separation; these, in our judgment, outweigh any hard cases or difficulties that can arise from the standard interpretations.

. . .

Accordingly, in our judgment, there is nothing in the scheme of the Act of 1969 as a whole nor in the problems arising under it to negative the standard meaning of the relevant words.

. . .

It is unfortunately by no means plain what exactly the legislature had in mind when enacting this subsection—nor even what is its general objective. Three points on its phraseology are however to be noted. First, it does not use the word 'house,' which relates to something physical, but 'household,' which has an abstract meaning. Secondly, that the words 'living with each other in the same household' should be construed as a single phrase. Thirdly, it specifically refrains from using some simple language referring to physical separation which would achieve the result for which Mr. Picard contended. On the contrary, use is again made of words with a well settled matrimonial meaning—'living together,' a phrase which is simply the antithesis of living apart, and 'household,' a word which essentially refers to people held together by a particular kind of tie, even if temporarily separated and which has been the subject of numerous decisions in matrimonial as well as in other cases. Whatever the object of this subsection, the combination of the first and third points makes it plain that it does not produce the result which has been urged on behalf of the wife.

. . .

> It follows that, in our judgment, there is nothing in the general scheme of the Act of 1969 nor in any of its specific provisions which results in the words 'living apart' not having . . . the standard—one might say settled—meaning which they normally have in statutes relating to matrimonial affairs. Therefore, 'living apart' . . . is a state of affairs to establish which it is in the vast generality of cases arising under those heads necessary to prove something more than that the husband and wife are physically separated. For the purposes of that vast generality, it is sufficient to say that the relevant state of affairs does not exist whilst both parties recognise the marriage as subsisting. That involves considering attitudes of mind; and naturally the difficulty of judicially determining that attitude in a particular case may on occasions be great. But the existence of such a difficulty cannot be in point, for [separation cases] are not the only ones in which the identification of an attitude of mind is required: indeed the whole concept of a breakdown being 'irretrievable' may involve coming to conclusions on attitudes of mind, when an issue is raised under [this provision].
>
> . . .
>
> It will be essential in this, as indeed in all cases . . . where a physical separation starts on a voluntary basis, for the judge to examine closely exactly how the separation originally came about; what the petitioner's attitude to the marriage then was; and whether he is satisfied that then or at some and what later stages she ceased to recognise and continued to cease to recognise the marriage as subsisting, but on the contrary regarded it as in truth a mere shell, intending never to return to her husband.
>
> It is clear from our examination of the issues inherent in petitions founded on [living apart] that the bulk of such cases need careful judicial scrutiny and ought not (as might else be suggested) to be determined on affidavit evidence or otherwise than by a judge."

14 The case of *Santos* (2) involved parties who were living in separate houses. Nevertheless it was found that they were not "living apart" for the purposes of the matrimonial legislation. Having referred at length to the judgment of Sachs, L.J. in that case, the petitioner in the present case, through Mr. Daswani, conceded that for these purposes the parties were not living apart until January 2016. The respondent was not represented but agreed. With some reluctance, I too agree. The parties are both pleasant and, I find, genuine people. Both desire an end to their marriage. I have no doubt that in practical terms their marriage has broken down.

15 The evidence is most unsatisfactory in a number of respects, which in the circumstances I need not rehearse in detail. The petitioner chose not to give oral evidence at the final hearing, though I had allowed him to do so

at the preliminary hearing. It is quite apparent that the parties did not separate as long ago as 2008. The issue was whether they "lived separate and apart" for at least three years immediately prior to presentation of the petition. They pointed out that they had separate bank accounts, but in answer to my question, it was agreed that this was the case throughout the marriage. It was agreed that the husband did little cooking or washing or housework; again it transpired that this was the case throughout the marriage (largely as a result of his shifts at work). They ceased to sleep together long ago but this has long been held to be insufficient alone to amount to "living apart" (*e.g.* in the case of *Mouncer* v. *Mouncer* (1) to which I refer below). They had no discussions as to their status or possible divorce until January 2016. Although they had drifted apart, both wished to continue to live together for the sake of their child until she had grown up. They did not proclaim in any way to the outside world that they had separated until that time, because in truth they had not, though no doubt close friends were aware that the marriage was in difficulty. There was no separation agreement. Neither mentioned separation or divorce until the beginning of 2016. Neither has had any other relationship. There was no sufficiently significant change or moment when it is possible to say that a separation took place prior to January 2016. That the marriage only continued for the sake of their child and because there was no other pressing need to separate, does not mean that it did not continue. They both wished to care for their child jointly, which is an important part of marriage. Many people who have problems within their marriages or who have little remaining in common postpone separation or "living apart" for the sake of their children. In the light of the petitioner's decision not to pursue his petition I do not propose to set out the facts of the case further, save to say that I am satisfied that in January 2016 the parties did truly separate. They discussed their marriage and then decided that it was over and they no longer wished to live together. The respondent left the matrimonial home in December 2016.

16 Having conceded that the petitioner could not succeed with the petition as it then stood, Mr. Daswani sought permission to amend the petition to rely upon the parties having lived separately and apart for two years and the respondent's consent to the grant of a decree (under the MCA, s.16(2)(d)). That application was, sadly, bound to fail, since (a) on the basis of his earlier concession, the parties, even now, have not lived apart for two years; and (b) any such amendment would relate back to the date of the petition and the relevant period must immediately precede the presentation of the petition. Mr. Daswani accepted ultimately that the petition had to be dismissed. I dismissed it but recorded in the recital that I had found that the parties did separate in January 2016, which I hope will enable them soon to achieve by consent the dissolution of their marriage which they both desire.

17 In addition to *Santos* (2), to which Mr. Daswani referred, it is important in cases in which the parties have not lived in separate houses for the whole of the alleged period of separation to consider carefully the judgment of Wrangham, J. in *Mouncer* (1), which concerned parties who continued to live in the same house during the alleged period of separation or "living apart." The facts were not dissimilar to those in the present case. It was found that the only reason that the husband continued to live in the same house as the wife was his wish to live with, and help look after, the parties' children. It was held that usually the relevant period of separation begins when the parties are living under separate roofs. In *Mouncer*, the parties during the period of alleged separation were on very bad terms and sleeping in separate bedrooms. They had meals together, cooked by the wife with one or both children. They shared the cleaning but the wife did not do the husband's washing. It was specifically held that "rejection of a normal physical relationship coupled with the absence of normal affection is sufficient . . ."

Summary

18 (i) In order to obtain a divorce, the petitioner must satisfy the court the marriage has irretrievably broken down. The court cannot so find unless at least one of the statutory facts has been established.

(ii) The court has a statutory duty to inquire into the alleged basis for the divorce.

(iii) In separation cases, it is necessary to show that the parties have truly been living separate and apart for a period of at least three years (or two with consent of the respondent). Some periods (not exceeding six months) during which the parties have lived together during the relevant period may be ignored provided that the actual period of separation then still spans three years.

(iv) The parties will be considered to have been living apart during any period when they were living in "separate households." They may be living in the same household though at different addresses and may not be living in the same household though living in the same home.

(v) It is the duty of lawyers to take full and proper instructions in order to ensure that the parties were in law living separate and apart during the relevant period. In doing so, they must take into account the established law as made clear in *Santos* (2) and *Mouncer* (1) and in this judgment. Failure to do so may result in serious disappointment and upset for clients and unnecessary waste of money and time.

(vi) Petitions should particularize the circumstances of the alleged separation and its continuance. If the parties lived during the relevant

period under the same roof, this should be stated, and the basis of the claim that they were living separate and apart should be pleaded.

(vii) The affidavit accompanying the petition should be clear and full. In this way the court and the parties will be able to proceed efficiently and speedily if the necessary facts are proved. A separation agreement, of course, is strong evidence of the parties living in separate households, even if under the same roof.

(viii) Rule 8(1) of the Family Proceedings (Matrimonial Causes) Rules 2010 lists what every petition must state. It is easy to follow and should be used in every petition. The court and everyone else concerned will be assisted if the necessary contents of the petition follow the order and form set out in r.8(1). Rule 8(1)(m) provides that the petition must state—

> "the facts alleged by the petitioner for the purposes of section 16(2) of the Act . . . together in any case with brief particulars of the individual facts relied on but *not the evidence by which they are to be proved* . . ." [Emphasis supplied.]

It is important in cases such as this that brief particulars of the facts are pleaded. This does not mean that the "particulars" pleaded in the petition should simply repeat that the parties have lived apart for the required period. The affidavit accompanying the petition should contain full particulars of the circumstances to support the allegation and the petitioner's evidence to support them. I accept that r.9(e) simply requires an affidavit "verifying the contents of the petition as true" but the contents are unlikely to be accepted as sufficient to prove the petition at the preliminary hearing unless they satisfy the court of the alleged circumstances of the parties' having lived apart for the requisite period immediately preceding the presentation of the petition.

Petition dismissed.
