

**IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
(DIVORCE)**

CLAIM NO. BVIHMT 2016/007

BETWEEN:

RUDOLPH GEORGE

Petitioner

-and-

IONE GEORGE

Respondent

Appearances

Ms. Marie-Lou Creque for the Petitioner

Ms. Dancia Penn Q.C. for the Respondent

2017: February 6, 17, 23, 24
March 15

Matrimonial Law – Divorce – Marriage irretrievably broken down on ground that parties have been living separate and apart for continuous period of five years – Petitioner to prove that the parties did not live in the same ‘household’ – Various elements to be considered and weighed - Petitioner’s evidence that the Respondent cooked for him, assisted with his laundry, sat with him occasionally and watched TV, slept in the same matrimonial bed and continued to run the family business together during the required period – Whether they lived separate and apart?

DECISION

[1] **RAMDHANI J. (Ag.)** This is a contested petition for divorce filed on the 29th January 2016 filed by Mr. Rudolph George, a 68 years old man claiming a divorce against his 68 years old wife Mrs. Ione George.

[2] The parties were married on the 27th of February 1971, at the Zion Hill Methodist Church, West End, Tortola, Virgin Island, and had lived together until June 2014 when the Petitioner moved out of the matrimonial home.

History of Litigation between the Parties

- [3] In his Petition, reference was made to an application (No. 62 of 2015) filed in court by the Respondent for judicial separation. This was granted prior to the hearing of the Petition.
- [4] The Petition did not mention any other court proceeding, but evidence was given at the trial that the Respondent had also filed an application as she believed that she had had to protect the matrimonial assets against attempts by the Petitioner to dispose of them after he had left the matrimonial home. Those proceedings had led to him giving an undertaking and an allegation that he had failed to honour those which had then led to contempt proceedings. The contempt application was dismissed.
- [5] Learned Queen's Counsel, Mrs. Penn submitted that the Petition was defective for failing to comply with paragraph 1 (i) of Schedule 2 of the Matrimonial Proceedings Rules 1997 which requires that the Petition set out all previous proceedings connected to the marriage.
- [6] Having regard to the fact that no preliminary objection was taken to the hearing of the Petition and the fact that matter was set down for hearing and it was in fact heard where evidence of all the previous proceedings was led, this court will not treat this omission as being fatal and will not be a reason for the dismissal of this Petition.

Petition

- [7] The Petitioner relied on the singular ground that the marriage had broken down irretrievably on the basis that the parties 'have lived apart for a continuous period of at least five years immediately preceding the Petition'.
- [8] The Respondent filed an answer to the Petition on the 23rd February 2016, denying that the parties had lived separate and apart and that the Petitioner was not entitled to the order of divorce.

- [9] In support of the Petition, the Petitioner filed two affidavits, the first was a “reply” to the answer filed by the Respondent and dated the 7th April 2016 and the second was filed on the 14th October 2016. The Respondent filed two affidavits, one filed on the 7th July 2016 and the other filed on the 28th July 2016. The Petition was heard on the 17th February 2016. The Petitioner and the Respondent gave evidence at the trial and each was cross-examined. Each of the parties stated on oath at the hearing that they were relying on their respective affidavits as well as their evidence given under oath.
- [10] The Respondent in this marriage had filed an application for juridical separation for judicial separation in 2015 which was in fact granted. Notwithstanding all this, and the fact that the Petitioner continues to live with another lady in Tortola, the Respondent has resisted this petition. She went as far as saying that she has a conscientious objection to divorce, it being against her religious beliefs.
- [11] Under section 3 of the Matrimonial Proceedings and Property Act 1995 (the Act), ‘The sole ground on which a petition for divorce may be presented to the Court by the other party shall be that the marriage has broken down irretrievably.’ Having regard to the ground of the instant petition, the Petitioner must satisfy the court that ‘the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the petition. (Section 4(1) (e) of the Act).
- [12] Section 4(5) of the Act states that: “For all purposes of this Act, a husband and wife shall be treated as living apart, unless they are living with each other in the same household.”
- [13] This provision has been interpreted to include situations where the parties are living under the same roof but they do not share the normal incidents of a marriage. Similar provisions were examined in *Blair v Blair*¹ and the court explained that:

“Thus references to parties to a marriage living with each other shall be construed as references to their living with each other in the same household and as husband and wife. Thus if the parties are living together in the same household they are not living apart (which is the antithesis of living together). The word

¹ Northern Ireland Unreported Judgment del. 29th Feb 2000

'household' requires to be contrasted with the word 'house' which is not used in the legislation. The word 'house' denotes something physical, whereas the word 'household' has an abstract meaning.

[14] As was stated in Blair v Blair:

“Where the parties occupy the same residence then the party to the marriage seeking the dissolution of the marriage is required to establish by evidence that the parties were in fact living apart although living in the same residence. Where the spouses are living under the same roof they can be regarded as living apart only if they are living in two households within the same residence. There must be established a degree of separation necessary to satisfy the court that they are indeed living apart.”

[15] In **Mouncer v Mouncer**² it was held that they will not be living apart if they share their meals and living accommodation, even though they sleep in separate rooms, no longer have sexual intercourse and largely live their own lives.

[16] As is stated in Volume 72 Halsbury Laws of England (2015) at paragraph 465:

*“In most cases, the parties will not be considered to have been living apart whilst both recognise the relationship as continuing, even though they are separated. Thus, the relationship does not end by reason of a separation brought about by the pressure of external circumstances such as absence on professional or business pursuits, or in search of health, or, it may be, even of pleasure; **and sexual intercourse, dwelling under the same roof, society and protection, support, recognition in public and in private and correspondence during separation, may be regarded separately as different elements, the presence or absence of which go to show more or less conclusively that the relationship does or does not exist, the weight of each of these elements varying with the health, position in life, and all the circumstances of the parties.** The court must look for a definite termination of the consortium before the physical fact of being apart can be said to constitute separation. [Emphasis supplied]*

[17] It is therefore for the Petitioner to satisfy this court that he and the Respondent have lived continuously apart for a period of at least five years. In the context of this case where they shared the same residence for a significant portion of the five year period, it must be shown that there was a sufficient degree of separation satisfy this court that they

² [1972] 1 All ER at 289

effectively lived in separate households. The several identifiable elements of their relationship must be examined and weighed to answer this question.

[18] In this case an important starting point would be to find that point, if possible where consortium would have ended. This is important as it is one of those crucial elements in grounding separate living. In this case the Respondent, has denied that sexual intimacy had ceased for the five years period preceding the Petition.

[19] I have seen and heard the evidence. Both of these parties clearly had some difficulties with recollection and there was some glossing over the details of relevant events as well as some uncertainty as to when these actually took place. This was understandable having regards to their age. This made the task of the court even more difficult in this strange case.

[20] As far as intimate relations were concerned the Petitioner stated in his Petition filed on the 29th January 2016, that there has been not been any sexual intimacies the past ten years. He stated in his affidavit dated the 7th April 2016 that he and she did not share the same sleeping quarters for all that time.

[21] He did accept however that, during the recovery period of his illness, he wife would care for him, walk with him to the beach. He said: "...if the husband is sick the wife, if the husband is sick, yes, the wife smooth you down. I don't have any objection to that."

[22] There was this exchange between him and Mrs. Penn Q.C. for the Respondent:

Q. "...sometimes when she was smoothing you down, bathing you, massaging you, you would feel a little aroused. You would feel a little excited yes or no?

A. "I don't have any objection to that."

Q. "And you and her used to talk about the fact that things couldn't be the way they used to be when you were younger and in better health?"

A. "Obviously, yes."

This exchange related to the period of his recovery after his illness in 2008. According to the Respondent his recovery continued into 2013. The Petitioner stated in his affidavit that he was fully recovered by 2009.

[23] The Petitioner states that after his illness in 2008, he had tried to rekindle their relationship but without any success. He refers to one time when on his initiative, they went together to Virgin Gorda on their anniversary. He stated that she turned down all his advances. She said that he was still recovering and that she did not want his recovery to be affected.

[24] I have considered the evidence on both sides and I am satisfied though there may not have been the kind of sexual relationship that the Petitioner wished, sexual intimacies of a kind did exist at least for some time between these parties after his illness in 2008. During his recovery period, the Petitioner's description of their relationship including matters such as going to the beach together and her 'smoothing' him, and exciting him when she gave him a bath makes it clear to this court that during his recover period there was no withdrawal of any sexual privileges in this marriage. His own recollection of things not being the same is more in keeping with their own age and her testimony which I believe that he was recovering from an illness and she was afraid of harming him.

[25] In deciding on this element of separation it was for the Petitioner to show if he could that there was no sexual intercourse between the two parties and that it had ceased at least five years before the Petition. What I have seen was a waning of this element of the marriage. I find as a fact that all acts of intimacy stopped at some point after his recovery. The Respondent's evidence left me with the impression that she was immersed in that period of his recovery. I am uncertain, however as to date when he actually was fully recovered. That said, I have had regard to these parties' ages and the fact of the Petitioner's illness and the Respondent's fear of what sexual intimacy may do to him, and I cannot treat this finding as being definitive of proving that these parties lived separate and apart and as being in separate households.

- [26] Before the Court departs from this issue of sexual intimacy, there was one issue raised by the Respondent which bears mention. She speaks to contracting sexual diseases from him and speak to having treatment from a certain named doctor. She did not provide any supporting documents of this and her own description of her symptoms does not assist the court at all in deciding that she in fact contracted any illness from the Petitioner. The court has been unable to make any finding on this matter.
- [27] Quite apart from sexual intimacy, I have considered the evidence of the parties related to them being separate and apart in deciding whether they did in fact cease to be in the same 'household'.
- [28] First, there is no doubt that the Petitioner stayed in the matrimonial home up until June 2014, when he finally moved out. There was some evidence from the Respondent that he continued to 'come and go' until some point in 2015. That however is of little moment as both agreed that he 'left' the home in June 2014; the fact that he may have visited for some time after did not change the significance of his departure in June 2014 and what it meant to the marriage.
- [29] Second, in his Petition the Petitioner provided information related to the sleeping arrangements before he left the matrimonial home. In his Petition he provides that his address on the filing of the Petition as being: "Great Harbour, Jost Van Dyke, from February 1971 to November 2015 – However since 2006, not in the same sleeping quarters. Since Nov, 2005 I stayed on my boat." In his affidavit dated the 7th April 2016, he says at paragraph 3, "Further, as far back as then, notwithstanding the fact that the Petitioner continued to occupy the matrimonial home, the Petitioner and the Respondent did not share the same sleeping quarters'.
- [30] This evidence was in stark contrast to what he said in his affidavit dated the 14th October 2016 where he stated at paragraph 8:

"During the past ten years or so, the Respondent would only come into the bedroom when she thought I was sleeping. She would make sure she slept on the farthest end of the bed away from me."

Later in paragraph 14 he added:

"...There was no sexual interaction at all."

[31] In cross-examination there this was the exchange:

Q. "Mr. George, up to when you left home in 14 June 2014, your wife, this lady here, was cooking for you. She was washing your clothes. You and her was sitting down in the living room watching tv together?

A. "Occasionally'.

Q. And the two of you were sleeping in the same bed?

A. She sleep on one side of the bed and I sleep on the other side.

Q. But in the same bed?

A. Yes.

[32] There is also evidence about cooking and laundry which came out in evidence in chief. With his own lawyer, there was this exchange:

Q. When she cooked for you, did she cook for you as well? Prior to your moving out of the house, what was cooking for you like?

A. Most of time when she cooked, it would be night-time, when she come up from the shop. Because she stay in the shop all day and when she comes home at night, then she may put a little something together to eat.

Q. For you in particular or?

A. Well, we had a grandchild living with us, so a grandchild living with us. She would put some little thing together so we would have dinner.

Q. And before the breakdown of your marriage, when she cooked for you, what was that like? For example, was there a setting of table? Did you sit together? What was that like?

A. The only time we would actually sit together would be like on a Sunday when we come from Church, like during the week she just put something, just put it there.

Q. And when the marriage was good, what was it like?

A. It was, the way of cooking, I used to make my own breakfast. I used to make my own breakfast and then, of course, she went down to the shop and that is where she spend all day, down at the hop.

Q. Okay. Mr. George, is that when the marriage was good or the usual routine?

A. This is when the marriage was good. She would go down to the shop and fix something for lunch and then we go home at night-time, she would, you know, fix something, lil thing for us to eat.

Q. So you don't eat together or we would fix something? What do you mean?

A. She would fix something so that I can eat.

Q. Okay. And you would both eat that together?

A. No. Not us eat together.

Q. She put out a plate of food for you?

A. On the table, yes.

Q. And that stopped when?

A. That stopped within five years or so.

[33] In relation to his laundry, in his affidavit dated 14th October 2016, he said: "I acknowledge that the [Respondent] used to do laundry for me, but this ended about three to four years ago. She would only sporadically do laundry for me if I left something out.' In his oral evidence he spoke about the two of them doing it together before things changed. He said, "She used to do laundry for me or sometimes we would take our clothes to the Laundromat in West End in Tortola." He then said that changed 'within the last five years of so'. This is a theme he has used several times where he appears to be at pains to get to that five year mark. Even his attorney tries to bring him to that counter where it was suggested to him that he was speaking to the year 2012 when things changed. This Petition, however was filed on the 29th January 2016, so that no point in 2012 can satisfy the required five year mark.

- [34] In his evidence he states that he had been telling his wife that he is not happy for the last 'three or four years'. That goes back to 2013. He said that he even told his son who came from Florida to 'talk to his mother' but that the son told him that he was not getting in between 'husband and wife'. This is the son who he says came from Florida four or five years ago. This would only go so far back as 2012. In relation to his business, he says that he tried to have meetings. What this tells the court is that when he brought his son from Florida, it is likely that he intended his son would be a part of the business he and his wife ran. It is also instructive that even at work his employees saw them as husband and wife. He describes one incident where he ordered food from the cook at their business. He uses this to say that he believed that his wife had switched the order to give him something which was not good for him. This, however also shows that the staff at work viewed them as husband and wife.
- [35] Even though this marriage had gotten to the point of being a shell of a marriage when they lived under the same roof, and this Petitioner has now clearly moved on, the preponderance of the evidence coming from the mouth of the Petitioner leaves this court to the unavoidable conclusion that the ground has not been proven; the Petitioner has failed to prove to this court he and the Respondent has been living continuously apart for five years in separate households. If it need be said, he himself has given evidence that they had not been living 'separate and apart' in the required sense for the required period.
- [36] Quite apart from the issue of sexual intimacy, they shared many things which identify with married couples of their age, being in a 'household'. They would sit occasionally and look at TV. She would cook for him. They went to and worked in the same family business. She would also cook for him at their business. There were at least attempts to manage the business together. A shared approach to laundry continued within the five year period prior to the presentation of the Petition. Prior to him walking out in June 2014, others saw them as husband and wife.

[37] From all of the above, I am unable to find that these parties to this marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of this Petition.

[38] There is one other matter which merits mention. The Petition did not comply with paragraph 1(k) of the Second Schedule to the Rules which required a statement as to whether any and what arrangements were in place for the support of Respondent. Mrs. Penn Q.C. urged that this was fatal to the Petition. I have already ruled that this Petition is to be dismissed. I would have thought that this would not have been fatal to the Petition since these were matters which could have been dealt with as ancillary matters if an order of nisi had been granted.

[39] That being the case, in all of the circumstances of this case, this Court finds itself compelled to refuse the relief being sought and to dismiss this Petition with costs to the Respondent to be assessed if not agreed.

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Darshan Ramdhani
High Court Judge (Ag.)