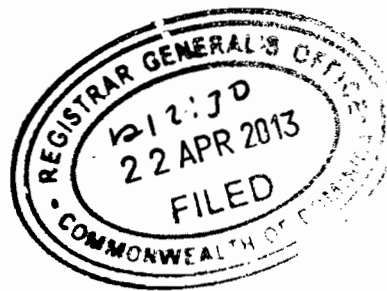


COMMONWEALTH OF DOMINICA

DOMHMT2012/0005



BETWEEN:

SYLVESTER MARK

Petitioner

and

ELPHA MARK

Respondent

Before: The Hon. Justice Brian Cottle

Appearances:

Mr. Jeffrey Lynn Douglas Murdock for Petitioner

Mrs. Alix Boyd-Knights for Respondent

[2012: July 20th]

[2013: April 22nd]

JUDGMENT

- [1] **COTTLE J:** The parties were married in 1979. On 24th January 2012 the petitioner presented a petition for divorce. He averred that the marriage had broken down irretrievably and evidenced this by the claim that they had lived apart for more than 5 years, namely since about November 1994. The respondent in her answer denies that the parties have lived apart for at least 5 years before the petition was filed. Interestingly the respondent in her answer claimed the union to have broken down irretrievably. She says the parties have been living apart for at least two years before the filing of the petition and the fact that the petitioner is seeking divorce indicates that he consents to the grant of a divorce. She prayed that the petitioner's request for a divorce be denied.
- [2] In his evidence before the Court the petitioner swore that since 1994 cohabitation between the couple had ceased. They continued to sleep on the same bed, though with heads at opposite ends and their youngest daughter sleeping between them. This went on for a year. The respondent then moved into another room to sleep. It appears that they continued to share household tasks – the wife continued to cook and clean for the husband. In 2004 the petitioner says he began to cook his own meals and wash his own clothes. He stopped speaking to the respondent despite the fact that they remained resident under the same roof.
- [3] He was cross-examined. He agreed that the respondent left the home they then shared in 1994, but that he joined her at 20 Virgin Lane Roseau a few months later. He says that cohabitation resumed in the sense that they continued living as before with the exception of the sleeping arrangements. He insisted that the youngest daughter would sleep between the parties.

- [4] In this case the Court is confronted with a strange situation. Both parties seem to agree that this union has broken down irretrievably. Yet the petition for divorce is contested! For the petitioner to succeed he must show that the parties have been living apart for at least 5 years immediately preceding the presentation of the petition. Compounding his difficulty is the fact that the parties have remained living under the same roof. The Matrimonial Causes Act 1973 (UK) which is the applicable legislation in the Commonwealth of Dominica sets out certain fact situations which may evidence irretrievable breakdown of a marriage so as to be a ground for the grant of a divorce.
- [5] Section 1 (2) (e) requires a petitioner to establish that the parties have been "living apart" for at least 5 years continuously immediately preceding the presentation of the petition. Counsel for the petitioner submits that the petitioner has established this fact.
- [6] Under section 2 (6) of the Matrimonial Causes Act (MCA) **"... the husband and wife shall be treated as living apart unless they are living with each other in the same household..."** This formulation largely reproduces Section 2 (5) of the Divorce Reform Act 1969 UK which is the predecessor Act to the MCA. Sachs LJ examined the position in the case of Santos v Santos [1972] All E.R 246. He pointed out that the legislation spoke of the abstract concept of a "household" as opposed to the physical construct of a "house". Lord Denning in Fuller v Fuller [1973] 2 All ER 650 defined "living with each other" as living with each other as husband and wife.
- [7] Counsel for the respondent cited the case of Rushton v Rushton 1968 2 DLR referred to in Rayden and Jackson on Divorce 7th edition at page 325. There the two spouses lived under the same roof but lived separate lives. There was no sexual intercourse and they performed no services for each other. This was held to be living apart. Counsel submitted that the absence of performance of services for each other is a crucial element in determining whether the parties are living apart.
- [8] In the present case Mrs. Mark continued to provide some services to Mr. Mark she did his laundry up to "about" 5 years before the hearing in July 2012. Counsel says that this does not establish clearly what the position was 5 years before the petition was presented in January 2012. It is crucial that the period of separation be prior to the presentation of the petition. See for example Warr v Warr 1975 Fam .25
- [9] The evidence in this matter conflicted but having seen the parties I accept the evidence of the petitioner that they have lived apart for at least 5 years just before the filing of the petition. The respondent agrees that the parties have lived apart but could give no clearer indication than her view that it was more than two years but less than 5. She said it may be as much as 5 years that has elapsed. I conclude that it is more likely than not that at least 5 years of living apart continuously has immediately preceded the presentation of this petition.
- [10] I find that the union solemnized between the parties has broken down irretrievably. A decree nisi is granted to be made absolute in six weeks unless cause is shown why it should not be made absolute. Matters of ancillary relief are adjourned to a hearing in chambers on the application of either party. I make no order as to costs. None was requested.



Brian Cottle
High Court Judge