

BARBADOS

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
FAMILY DIVISION**

No. 74 of 2013

BETWEEN:

MARGARET MARQUITA SPRINGER APPLICANT/WIFE

AND

CAVOUR ST. AUBYN SPRINGER RESPONDENT/HUSBAND

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

**Dates of Hearing: 2013 October 1st, 21st
2014 January 23rd, 27th
2015 January 16th**

Appearances:

Mr. Ernest W. Jackman Attorney-at-Law for the Applicant/Wife

Mr. Arthur E. Holder Attorney-at-Law for the Respondent/Husband

DECISION

Introduction

[1] Barbados is a “No fault” jurisdiction with Irretrievable Breakdown being the sole ground for dissolution of marriage. This ground is only held to have been established “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 12

months immediately preceding the date of the filing of the application for dissolution of marriage”: **section 27(2) Family Law Act, Cap. 214.**

[2] This was the focus of this application filed in February 2013.

The Application

[3] In said Application, the Applicant/Wife alleged that the parties separated in 2011 (they married in May 1993) and lived separately and apart since that date. She alleges that it was at this date that she moved out of the matrimonial home after finding out that the Respondent/Husband was having affairs. She moved to an apartment owned by the parties.

[4] On October 15th 2013, the Respondent/Husband filed a document titled Affidavit in Answer in which he disputed that the parties had separated in 2011, deposing at paragraph 2 thereof, that the parties “continued to cohabit as husband and wife up to when I was served on the 13th day of February 2013 with the application for dissolution of marriage.”

The Evidence

[5] Outside of the bald conflicting statements in the filed documents, the Affidavits filed by the parties did nothing to address the issue of when, or if, there was a separation. The Applicant stated that it occurred in 2011 and the Respondent stated that it did not.

[6] This Court therefore conducted a trial to settle this fundamental dispute of fact.

[7] The parties hereto were the only witnesses before the Court.

[8] Bearing in mind that the burden of proof lay with the Applicant, her evidence was interesting. These extracts resonated with this Court:

“I have lived separate and apart from 20th August 2011. It was a long process. My moving out was a culmination of a lot of things: his affairs and I started to go back to school. I would be studying and he would be keeping noise. I moved out from the matrimonial house at Upper Kew Road and moved to 1st Avenue Jackson, St. Michael...

... I slept in Jackson when I first moved out but I slept in Kew Road on weekends. Initially we still used to sleep together, he would come once per week to Jackson and I would go to Bank Hall on Thursday night to Sunday morning. This continued up to February 2013...”

[9] When it was put to her in cross-examination that she continued to wash and cook for her husband, after stating categorically in her evidence-in-chief that she stopped washing and cooking for him in 2011, she stated:

“You would be correct. In August 2011, I had moved out. My husband would sleep at my house on Sundays and I would feed him. I would say yes I would wash his clothes at that time - clothes we wear to the beach. I would not cook from Thursday to Sunday. I neither cooked nor washed. Mr. Springer would cook all the time. He would cook for me.

Q: Up to February 2013, you and Mr. Springer were still intimate?

A: Yes.”

[10] The Applicant gave further evidence which did little in this Court’s opinion to clarify these equivocal acts. She told the Court that the parties had a very strained relationship; that she wanted to file for divorce in 2012 when she found two postcards from two different sets of women and children. She told the Court that when she asked the Respondent to explain, he gave a rambling story; she told him that she had had enough and was going to file for divorce;

he begged for another chance. She stated that she initially gave him another chance, but after finding out that he was “dealing” with one of the same women who was sending him postcards, she changed her mind.

[11] Significantly, it is her evidence that this discovery was made on February 4th 2013.

[12] The Respondent’s evidence in response was as follows:

“We still co-habited as husband and wife long after that date. My wife moved to Jackson in August 2011. When she moved, I would go to 1st Avenue Jackson about once a week and then I started going twice per week and then I would be there whole week. Up to July 2012, I was sleeping there every night up until I was served with this document in February 2013. Every night would mean from Sunday night to Thursday I would be in Jackson. During that period we lived as husband and wife. In our relationship I do the cooking and maintenance of the family. This continued until January 4th 2013. My wife was still cooking and I was eating from her during that period of time. Her explanation as to why she left in August 2011 is that she liked up there and wanna always making noise down here. I gine up Jackson and do my studying and when you want me you will know where you can find me for whatever. I understood her to mean her intimate relations”.

[13] When asked in cross-examination if the marriage had broken down, he responded as follows:

“The first time I know about this was when I was served. Me and Mrs. Springer was doing things, going to the sea, eating together, working together; I took responsibility for the matrimonial home even the apartment where we lived together. I exercise in one room and my wife in the other until I got my foot hurt in January of this year.”

[14] It was his evidence that even after the service of the divorce application the marriage was not over; he persuaded the Applicant to go to counseling as

recently as October 2013, she however attended one session and then said ‘that she is not going back and that she wants out’. He confided that he still does not ‘want out’, but is powerless in the face of the Applicant’s decision.

The Law

[15] Section 28 of the Act provides the meaning of separation. Separation in this context, relates to the disintegration or breakdown of the matrimonial relationship or “*consortium vitae*”. **Section 28** states:

“28 (1) The parties to a marriage may be held to have separated, notwithstanding that cohabitation was brought to an end by the action or conduct of only one of the parties.

(2) The parties to a marriage may be held to have separated and to have lived separately and apart, notwithstanding that they have continued to reside in the same residence, or that either party has rendered some household services to the other.”

[16] In the Australian case of *In the Marriage of Todd (No. 2)* (1976) 25 FLR 260 at 262; (1976) FLC 90-008 at 75,079 the Court found that the parties lived separately and apart although they existed under the same roof, as they had not restored the marital relationship. **Watson J** examined three (3) concepts: (a) separation, (b) living separately and apart and (c) resumption of cohabitation. In his oft cited statement, Watson J stated as follows:

“In my view ‘separation’ means more than physical separation - it involves the destruction of the marriage relationship (the *consortium vitae*). Separation can only occur in the sense used by the Act where one or both of the spouses form the intention to sever or not to resume the marital relationship and act on that intention; or alternatively, act as if the marital relationship has been severed. What comprises the marital relationship for each

couple will vary. Marriage involves many elements, some or all of which may be present in a particular marriage - elements such as dwelling under the same roof, sexual intercourse, mutual society and protection, recognition of the existence of the marriage by both spouses in public and private relationship.

As to the second element, that of living separately and apart, this element [concept] is present and continues to be present unless there is a substantial resumption of the marital state. Casual acts of intercourse do not constitute an interruption of separation. An agreement to resume cohabitation which is not carried out is insufficient. Just as intention (or acceptance) and action thereon are ingredients in the element (concept) of separation, so intention (or acquiescence) and action thereon are necessary ingredients in the termination of separation.

As to the third element, resumption of cohabitation, once the necessary period of separation has been established, the decree for dissolution should be made unless the Court is satisfied that there is a reasonable likelihood of cohabitation being resumed. The onus of establishing such likelihood is on the spouse who asserts. More than the likely resumption of some elements of marital relationship must be shown - resumption of cohabitation must be shown to be likely that is a bilateral intention on the part of both spouses to resume living together.” (Emphasis mine)

[17] The court in *In the Marriage of Pavey* (1976) 10 ALR 259 agreed with the above statement of law. What is clear is that separation involves an intention on the part of a party to the marriage to sever the matrimonial relationship, coupled with conduct or acts which destroy the *consortium vitae*.

[18] Selby J in *Crabtree v Crabtree* (No. 2) [1964] ALR 820 as quoted by Wilczek J in *In the Marriage of S and T Batty* 10 Fam LR 688 stated that:

“the question of consortium is ... a different matter from that of physical separation. Consortium has been defined as a

partnership or association; but in the matrimonial sense it implies much more than these rather cold words suggest. It involves a sharing of two lives, a sharing of the joys and sorrows of each party, of their successes and disappointments. In its fullest sense it implies a companionship between each of them, entertainment of mutual friends, sexual intercourse – all those elements which, when combined, justify the old common law dictum that a man and his wife are one person. It is not necessary that all these elements should be present to establish the existence of a matrimonial consortium; one or very few may exist and they may show that the matrimonial consortium has not been destroyed; that it is still alive, although in a maimed and attenuated form.”

[19] The court in *Todd (No. 2) supra* explicitly stated that what comprises the marital relationship for each couple will vary. In *In the Marriage of Pavey supra* it was stated at 263 that:

“It is in for this reason that it is difficult to formulate a satisfactory test in cases where the parties live under one roof. As sec. 48 is concerned with the marriage of the parties, it is the content of their marital relationship which must be examined, not a definition of what a marital relationship ought to include. This, of course, does not mean that the various statements about the content of the marital relationship are useless. They do provide valuable checklists in each case, but they cannot be applied mechanically.”

[20] **Wilczek J** in *In the Marriage of S and T Batty supra* held that there must be a point in time, a point of separation, 12 months prior to the filing of the application for dissolution, when it can be said that the matrimonial relationship came in fact to an end or the *consortium vitae* was destroyed or had broken down. It was also held that whether the marriage has broken down, is essentially a question of fact depending on the circumstances of each individual case.

- [21] In the Barbadian case of *Ramsay v Ramsay* No. 165 of 1987 (delivered on October 19th 1987) the Court had to determine whether the wife had fulfilled the requirements of section 27 (2) of the Family Law Act.
- [22] The facts were that the wife filed an application for dissolution of marriage against the husband on May 14th 1987. In it, the wife stated that the marriage had broken down irretrievably and that they separated on February 2nd 1986, and had lived separate and apart from that date. The circumstances in which they last separated were that the husband displayed homosexual tendencies and also confessed his homosexuality to his wife. The husband denied that the marriage had broken down irretrievably; that they separated on February 2nd 1986 and had lived separate and apart from that date. He further denied that he displayed homosexual tendencies and had confessed his homosexuality to his wife.
- [23] The Court found that there was a change in the relationship constituting a separation. The sexual relations of the parties were normal until the wife formed the view that the husband was a homosexual, and the wife acted on her expressed intention by locking her bedroom door and was no longer intimate with her husband. Rocheford J also found that the wife ceased associating with the husband in public or private, cooking and washing for him and started buying her own groceries and paying her own bills.
- [24] Having regard to the evidence and assessing the concepts formulated by Watson J in *Todd (No. 2) supra* the Court found that the marriage had broken down irretrievably, in that the parties separated and had lived separately and

apart continuously for 12 months, and there was no likelihood of cohabitation being resumed.

[25] Chase J in the local decision of *Chase v Chase No. 313 of 1987 (delivered September 18th 1989)* held that the husband's application for the dissolution of marriage failed having made a finding that there was insufficient evidence from the conduct of the respondent/wife to form a unilateral and uncommunicated intention to separate from the applicant and bring the matrimonial relationship to an end.

[26] The applicant and respondent (an American citizen) were married in the United States of America (USA). The parties agreed that the respondent would return to the USA in order to facilitate the education of the two children and to afford the respondent an opportunity to pursue a masters degree. The case for the husband was that the wife formed an intention to abandon the marital relationship when she accepted employment in the US rather than returning to Barbados. However, the wife denied that there was an irretrievable breakdown of the marriage at the date relied on by the husband.

[27] The Court accepted the wife's evidence including: (a) her sexual contact with the applicant during his annual visits to the US; (b) arrangements for their 27th wedding anniversary; (c) her complaints that the applicant spent little time with her during his visits and her concern that he made frequent calls to a particular telephone number in Barbados during his visit to the US. Having regard to the facts, it was held that the parties did not separate in July 1979 and continue to live separately and apart within the provisions of section 27.

- [28] A contrary finding was made by the Court in the Barbados decision of *Stuart v Stuart* No. 331 of 1986 (delivered April 14th 1987). There the Court held itself satisfied that the facts and circumstances of the separation met the requirements of section 27 of the Act and granted the decree of dissolution of marriage.
- [29] In that case, the applicant/husband stated in his application for dissolution of marriage that the marriage had broken down irretrievably. He stated further that he and his wife separated in February 1979 and lived separate and apart from that date. The husband's evidence was that he had left the matrimonial home in 1972 at which time he had moved in with a woman for 5 years. When that relationship was terminated, he subsequently moved in with another woman who had a child for him.
- [30] It was the husband's evidence that he returned to the matrimonial home twice; the last occasion was sometime in 1987 to collect mail and on that occasion, he spent no more than 5 minutes. He denied that his wife performed any matrimonial duties since he left the matrimonial home in February 1979, and that he had sexual intercourse with her. He stated that he had not eaten at the matrimonial home since that date, that he had not given his wife money to maintain the house, and had not gone to any social gatherings with her.
- [31] The Court concluded that the marital relationship was severed and the parties were separated within the meaning of section 27 of the Act, and that there was no likelihood of cohabitation being resumed.

Findings of Fact

[32] On a totality of the evidence and having seen and evaluated the parties, this Court made the following findings of fact:

1. The evidence, such as it is, does not support a finding that between August 2011 and February 2013, or more significantly, in the 12 months prior to February 2013, the parties lived separate and apart for a continuous period of not less than 12 months.
2. The Applicant/Wife had reason to question the Respondent/Husband's faithfulness during the marriage after she made certain discoveries in 2011, and again in 2012. It is clear, however, that she "forgave" him and tried to make the marriage work, until February 2013 when a further discovery made her take her first unequivocal action, firstly, in filing for divorce; and secondly, in withholding the *consortium vitae*.
3. That the parties lived as husband and wife occupying two residences during the period August 2011 and February 2013. There was no destruction of the "consortium vitae", but at times the marriage was strained as a result of the Applicant/Wife's loss of trust in the Respondent/Husband.
4. That the parties separated within the meaning of the Act in February 2013 when the Applicant/Wife unequivocally filed for divorce and thereafter withheld the '*consortium vitae*'.

Disposal

[33] In view of the foregoing, the Application for dissolution is dismissed as the Applicant has failed to discharge her burden of satisfying this Court, on a

balance of probabilities, that the parties lived separate and apart for 12 continuous months prior to the filing of this Application.

[34] It is here noted that the **Family Law Act** at **section 22** enjoins the Court to be especially mindful of its duty and responsibility to do the following:

“In the exercise of its jurisdiction under this Act or any other enactment, the court shall have regard to the following principles:

- (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
- (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;
- (c) ...
- (d) The means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage.”

[35] **Section 27(3)** of the Act significantly and pointedly mandates that a court shall not grant a decree of dissolution if “satisfied that there is a reasonable likelihood of cohabitation being resumed.”

[36] In observing these parties, it was quite evident that the marriage was not “irretrievably broken” and that the parties continue to have a deep connection.

[37] This Court is satisfied that there is a possibility (not necessarily a likelihood) of reconciliation and encourages these parties to explore that possibility.

MARGARET A. REIFER
Judge of the High Court