Tan Lee Tiang
v
Chia Thuan Hwa

[1993] SGHC 256

High Court — Divorce Petition No 1439 of 1993
K S Rajah JC
27 October 1993

Family Law — *Grounds for divorce — Living apart — Wife claiming that parties lived under same roof but led separate lives and ran different households — Whether husband and wife had been "living apart" — Sections 88(3)*(d) *and 88(3)*(e) *Women's Charter (Cap 353, 1985 Rev Ed)*

Words and Phrases — *"Living apart" — Sections 88(3)*(d) *and 88(3)*(e) *Women's Charter (Cap 353, 1985 Rev Ed)*

not convinced parties really lived separately under one roof

Facts

Tan Lee Tiang ("the wife") married Chia Thuan Hwa ("the husband") on 6 January 1983 and they lived and cohabited at the matrimonial home with their two children. On 18 June l993, the wife filed the divorce petition stating that the marriage had broken down irretrievably as the parties had lived apart for a continuous period of at least three years immediately preceding the presentation of the petition. The husband consented to the decree *nisi* being granted. The wife's evidence was that: (a) while she and the husband slept in the same bedroom, they did not share the same bed; (b) the husband slept on the bed while she and the children slept on the floor; (c) she and the husband ceased marital relations about three years prior to the filing of the petition; (d) they ceased to communicate with each other for three years and that there was absolutely no community life; (e) they took their dinner at separate times at the premises; and (f) they ceased to go out together with the children as a family. In November 1992, the wife left the husband.

Held, dismissing the petition:

(1) Husbands and wives taking turns on the bed, floor or sofa or at the dining table only added up to living apart if it was clear that the parties at some point became separate households and were not co-operating with each other and safeguarding the interests of the marriage and caring and providing for the children. The uncommunicated unilateral ending of recognition that a marriage was subsisting marked the moment when "living apart" commenced. If the parties stayed together for the sake of the children then they were saying that they were endeavouring to fulfil the responsibilities that s 45 of the Women's Charter (Cap 353, 1985 Rev Ed) ("the Charter") placed upon them both. The evidence was that it was only in November 1992 that the wife left although she could have done so earlier. Sexual intercourse was not the sole basis of a marriage so that its absence was not decisive in determining that there was no *consortium vitae*: at [9], [23], [33], [34], [38] and [39].

(2) The breakdown of a marriage could not be determined by reference to s 45 of the Charter or against a checklist. Section 88 of the Charter required the court to apply both an objective and subjective standard in deciding whether or not to allow a petition. The subjective standard required the court to consider the content of the marital relationship of each couple. The objective standard required the court to consider whether it was just and reasonable in all the circumstances and whether it would be wrong to dissolve the marriage. Where the parties were living under the same roof, it was necessary for the parties to lead independent evidence to prove that they were in fact living as separate households under one roof. However, no evidence was led to show why the parties slept in the same bedroom or lived under the same roof or why the floor was preferred. The wife's evidence could not be believed. It would have been wrong in the circumstances to say that the parties were living apart. The marriage had not broken down irretrievably by reason of the parties having lived apart, and the marriage subsisted till as late as November 1992: at [35], [36], [37], [43] and [47].

Case(s) referred to

Bell v Bell [1979] FLC 90–662 (refd)

Hopes v Hopes [1949] P 227; [1948] 2 All ER 920 (refd)

Leong Kwek Keong v Lee Ying Kuan [1990] 1 SLR(R) 112; [1990] SLR 228 (folld)

Pavey, In the Marriage of (1976) 10 ALR 259 (refd)

Russell v Russell (1976) 9 ALR 103 (refd)

Santos v Santos [1972] Fam 247; [1972] 2 All ER 246 (refd)

Tulk v Tulk [1907] VLR 64 (refd)

Legislation referred to

Women's Charter (Cap 353, 1985 Rev Ed) ss 88(3)(*d*), 88(3)(*e*) (consd); ss 45, 88, 94, 106, 121, Part VII

Family Law Act 1975 (Cth) s 49

Matrimonial Causes Act 1973 (c 18) (UK) ss 1, 2(6), 5

Mok Wing Chee (Chung & Fong) for the petitioner;
Lim Yee Kai (K K Yap & Partners) for the respondent.

27 October 1993

K S Rajah JC:

1 This is an appeal against my decision dismissing the petition for divorce on the ground that the marriage had broken down irretrievably as the parties had lived apart for a period of three years and the respondent had given his consent. The petitioner married the respondent at the Singapore Registry of Marriages on 6 January 1983. After the marriage, the petitioner and the respondent lived and cohabited at diverse addresses and lastly at 10A Dix Road, Singapore 1954.

2 The petitioner is a sales executive and the respondent is a businessman. There are two children. The children are six and four years old respectively. There were no other proceedings in respect of the marriage. The marriage was said to have broken down irretrievably as the parties had lived apart for a continuous period of at least three years immediately preceding the presentation of the petition from early 1990. The respondent's consent to a decree *nisi* being granted was given.

Separate households in one bedroom

3 The particulars of living apart were to the effect that although the parties had been living under the same roof they had, in fact, been leading separate lives and running different households.

4 The parties slept in the same bedroom but according to the petitioner did not share the same bed. The respondent slept on the bed. The petitioner and the children slept on the floor in the same bedroom. The parties, it was claimed, ceased to have marital relations about three years ago, had ceased to communicate with each other for three years and there was absolutely no community life.

5 The respondent would have his dinner with his parents, with whom the parties were residing. The petitioner would take her dinner alone later in the evening. The parties had ceased to go out together with the children as a family and took the children out separately. In November 1992 the petitioner left the respondent. She said she did so as she was unable to tolerate living with the respondent. The petition was filed on 18 June 1993.

6 The children were four and six and in the nature of things would have been closer to the mother and the mother closer to them. The prayers, however, were for the respondent to be granted custody and:

> (a) the petitioner be allowed overnight access on alternate weekends from Saturday morning at 10.30am to Sunday evening at 5.00pm; and
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> (b) the petitioner be allowed weekday access including overnight access if the following day is a public holiday and during the school vacation for up to half the number of weekdays in a month.

7 Notwithstanding the prayers for access and custody, I was satisfied that it would be a painful parting for the petitioner.

8 The respondent gave his consent to the effect that they had lived apart for a continuous period of at least three years immediately preceding the presentation of the petition, *ie* since sometime in early 1990. In the statement as to the arrangements for the children, the petitioner said that the children were residing with the respondent at 10A Dix Road, Singapore 1954 but the petitioner and the respondent supported the children financially. The uncontested petition was heard for some 15 minutes as I

wanted to satisfy myself that the parties had in fact lived separate and apart as separate households, so that the parties could be found as a fact to have lived apart for a period of three years.

9 The petitioner is a sales executive and is contributing to the maintenance of her children and no doubt did so when, according to her, she slept on the floor with her children. All that the respondent had to do was to roll off his bed to be with his wife and children. Husbands and wives not having their meals together after a tiff or quarrel is part and parcel of married life. Taking turns on the bed, floor or sofa or at the dining table can only add up to living apart if it is clear that the parties at some point became separate households and were not co-operating with each other and safeguarding the interests of the marriage and caring and providing for the children.

10 In *Santos v Santos* [1972] 2 All ER 246, the Court of Appeal considered a wife's undefended petition on the basis of two years' separation and her husband's consent. The judge dismissed the petition because, on three occasions since the separation, the wife had stayed with her husband for a short while. The wife appealed. The Court of Appeal considered the meaning of "living apart". Sachs LJ delivering the judgment of the whole court said at 248 and 255:

> … a very important issue as to the meaning of the words 'living apart' … Does this relate simply and solely to physically not living under the same roof, or does it import an additional element which has been referred to in various terms – 'absence of consortium', 'termination of consortium', or an 'attitude of mind' – phrases intended to convey either the fact or realization of the fact that there is absent something which is fundamental to the state of marriage. …
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> …
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> 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 … 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 … 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 … 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 recognize the marriage as subsisting …

11 Under the Matrimonial Causes Act 1973 (UK), the court hearing a petition for divorce must not hold the marriage to be broken down irretrievably unless the petitioner satisfies the court of one or more of the facts set out therein. One of the facts that must be proved to the satisfaction of the court is that the parties to the marriage had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition or for a continuous period of five years.

12 The duty of the court under the Matrimonial Causes Act 1973 is to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent and grant a decree when it is satisfied that the marriage had broken down.

13 There is no requirement under s 1 of the Matrimonial Causes Act 1973 for the court to consider all the circumstances, including the conduct of the parties to the marriage and the interests of those parties and of any children, and whether it would be, in all the circumstances, wrong to dissolve the marriage except in the case of a petition for divorce where the petitioner alleges five years' separation and the respondent opposes the grant of a decree on the ground that the dissolution of the marriage would result in grave financial or other hardship and that it would, in all the circumstances, be wrong to dissolve the marriage. (See s 5 of the Matrimonial Causes Act 1973.)

14 There are supplemental provisions as to facts raising [the] presumption of breakdown in the Matrimonial Causes Act 1973 for the purposes of ss 1(2)(d) and 1(2)(e) of the Matrimonial Causes Act 1973 of the United Kingdom which reads:

> (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;
>
> (e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (hereafter in this Act referred to as 'five years' separation').

15 It is provided in s 2(6) of the English Act of 1973 that:

> For the purposes of section 1(2)(d) and (e) above and this section 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.

16 Section 49 of the Family Law Act 1975 of Australia provides:

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

17 The only presumption that is enacted in the Women's Charter (Cap 353) ("the Charter") is for presumption of death in s 94 which reads:

> (1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court, if satisfied that such reasonable grounds exist, may make a decree *nisi* of presumption of death and of divorce.

18 In *Leong Kwek Keong v Lee Ying Kuan* [1990] 1 SLR(R) 112, a contested petition, Chan Sek Keong J (as he then was) considered the question whether the parties had "lived apart" and whether there was actual "living apart". The learned judge said at [5] and [6]:

> I have put the word 'living' in quotation marks in respect of the petitioner's long stay out of the matrimonial home as the question before me is whether he had been living apart from the respondent since he left on that day in July 1982 … [T]he petitioner would return every weekday after work to the matrimonial home, have dinner with the family and then he would spend his time supervising his daughters' school lessons. …
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> During this period, the petitioner would have his dinners at home, his clothes were washed at home. He continued to do the things which he normally had done before he left. … He continued to pay all the expenses of the flathold. … In other words, except for the fact that he did not sleep in the flat, the petitioner was carrying on a normal domestic life.

19 In this case the leaving took place in November 1992. Sharing the "matrimonial bed" could have taken place if the respondent had joined the petitioner on the floor or the petitioner kissed and made up.

20 Turning to the law, Chan Sek Keong J said at [12]–[13]:

> … the first issue is whether for the purpose of s 88(3)(*e*) of the Charter the parties were living apart as from July 1982 for a continuous period of at least four years immediately preceding the presentation of the petition. If the petitioner fails to satisfy the court that the separation began earlier than 10 September 1982, the petition must fail. If the parties have lived apart as from the date he left her, then the second issue arises as to whether, for the purpose of s 88(7), the parties resumed living with each other …

> It is to be noted that s 88(3)(*e*) uses the expression 'lived apart' whilst s 88(7) uses the expression 'living with each other'. …

21 The words "lived apart" are common to ss 88(3)(*e*) and 88(3)(*d*) and the decision of Chan Sek Keong J applies with equal force to the construction of the words "lived apart" in both limbs of the section.

22 Chan Sek Keong J also considered the question whether one party alone can bring about the separation or living apart and said that in *Santos v Santos* ([10] *supra*), the Court of Appeal had held that one party alone could bring about a separation or a living apart if he intended it to be so or his or her attitude of mind was so. It was not necessary for this unilateral element to be communicated to the other party. The problem was one of proof and the court has to decide whether the party had such an intention. One does not have to be married very long to know, without words being spoken or written down, that a unilateral position has been taken by a spouse, but temporary and permanent positions taken to live apart must be distinguished and proved.

23 The uncommunicated unilateral ending of recognition that a marriage is subsisting marks the moment when "living apart" commences. The principal problem, as Chan Sek Keong J pointed out, is one of proof of the time when the breakdown occurred.

24 The difficulty for a judge was considered and Chan Sek Keong J said (quoting Sachs LJ in *Santos v Santos*) at [16]:

> …
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> > … How, for instance, does a judge in practice discharge the unenviable task of determining at what time the wife of a man immured long-term in hospital or one serving a 15 year sentence changes from a wife who is standing by her husband (in the sense of genuinely keeping the marriage alive until he recovers or comes out) to one who realises the end has come but visits him merely from a sense of duty arising from the past? 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 under heads (*d*) and (*e*) 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 … that only slight evidence is needed – for the nature of the breakdown is so patent.

25 Chan Sek Keong J held that, on the evidence before him, although the petitioner had expressly said to the respondent that he could not live with her any more and confirmed his words by his subsequent refusal to sleep at home, yet, save for his assertions and this refusal, his entire conduct for a year or more was consistent with a continuing recognition of the marriage. In that case, the living apart from the wife consisted of the respondent not sleeping at home by choice.

26 In this case, the "living apart" from the respondent in a very narrow sense appears to be limited to non-communication, the parties sleeping on the bed and on the floor in the same bedroom, and dining one after the other.

27 In *Hopes v Hopes* [1948] 2 All ER 920 at 925, Lord Denning, in a case of desertion and where the parties were sharing the same household, said:

> I find myself in agreement with all the decisions of the divorce division, except, perhaps, *Wanbon v Wanbon*, where the parties were said to be still in one household. If that means that, although living at arms' length, they were still sharing the same living room, eating at the same table and sitting by the same fire, then I cannot agree with the finding of desertion. It is most important to draw a clear line between desertion, which is a ground for divorce, and gross neglect or chronic discord, which is not. That line is drawn at the point where the parties are living separately and apart. In cases where they are living under the same roof, that point is reached when they cease to be one household and become two households, or, in other words, when they are no longer residing with one another or cohabiting with one another.

28 The marriage relationship, for legal purposes, is characterised by the *consortium vitae*. Its elements were well expressed by Cussen J in *Tulk v Tulk* [1907] VLR 64 at 65–66:

> In deciding whether there was at any specified date an existing matrimonial relationship, it is, I think, right to say that such a relationship does not end so long as both the spouses *bona fide* recognize it as subsisting, and in particular it 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. Marital intercourse, the dwelling under the same roof, society and protection, support, recognition in public and in private, correspondence during separation, making up as a whole the consortium vitae, which the old writers distinguish from the *divortium a mensa et thoro*, may be regarded separately as different elements, the presence or absence of which go to show more or less conclusively that the matrimonial relationship does or does not exist. The weight of each of these elements varies with the health, position in life, and all the other circumstances of the parties. When there has been a separation by mutual consent, or by the adverse act of one of the parties, which separation is intended to be permanent or indefinite,

> there can be no desertion till the matrimonial relationship is re-established, and in the case of a separation by adverse act a conditional intention of possible resumption seems to make no difference.

29 In this case, the reasonable likelihood that the resumption of cohabitation may have and did take place from time to time was very great. The evidence of consortium that must be implied from caring and providing for the children and sleeping in the same bedroom was compelling. (See s 45 of the Charter.)

30 The Charter in s 45 spells out some of the rights and duties of husband and wife and requires them to care and provide for the children. A distinction must also be made between living apart and living with each other. In this case the parties were living with each other and caring and providing for their children.

31 The reference to caring and providing for the children in s 45, maintenance of wife and children in Part VII, the court's duty to consider how the children may be affected in s 88(4), the needs of the children when matrimonial assets are divided under s 106, and both husband and wife being required to maintain or contribute to the maintenance of their children under s 121 having regard to the means and station in life of the parties, require the court to give recognition to the fact of the parties having stayed together with the children.

32 In *Russell v Russell* (1976) 9 ALR 103 at 145, Jacobs J said:

> The recognition by society of rights and duties of husband and wife in respect of the children of their marriage and of the relationship of the children of that marriage to their parents springing from their status as children of the marriage lies not on the periphery but at the centre of the social institution of marriage.

33 If the parties stayed together for the sake of the children then they are saying that they were endeavouring to fulfil the responsibilities that s 45 has placed upon them both. The significance of this will vary from marriage to marriage, but it is an important element of a marriage.

34 The parties may have had to sleep in the bedroom to please their parents but their relationship to the children lies at the centre of the marriage, and the evidence is that it was only in November 1992 that the petitioner left, when she could have done so earlier.

Decree considerations

35 The breakdown of a marriage cannot be determined by reference to s 45 or against a checklist. Section 88(4) requires the court, when considering the question whether it would be just and reasonable to make a decree, to consider all the circumstances, including the conduct of the parties and how the interests of any child or children of the marriage may

be affected by the dissolution of the marriage, and empowers the court to make a decree *nisi* subject to such terms and conditions as the court thinks fit to attach.

36 The court is also required to stand back and ask the question whether "in all the circumstances it would be wrong to dissolve the marriage" (see s 88(4)). The facts must be looked at objectively and if it appears to the court that it would be wrong, the petition must be dismissed.

37 Section 88 requires the court to apply both an objective and a subjective standard. The subjective standard requires the court to consider the content of the marital relationship of each couple. The objective standard requires the court to consider whether it is just and reasonable in all the circumstances and whether it would be wrong to dissolve the marriage. The fact of living apart is crucial where the parties rely on having lived apart for three or four years. It is ultimately a question of fact and degree and it is for a judge looking at all the variable components, some present, some absent, to find as a fact whether there has been a "living apart".

38 The fact of sleeping on bed and floor was stressed to mean absence of sexual intercourse. It is an important and significant fact but it is not decisive.

39 In the Australian case of *Bell v Bell* [1979] FLC 90–662, Baker J said:

> Sexual intercourse is only one of a number of elements which accumulatively make up the consortium vitae. It cannot be said that sexual intercourse between partners is the sole basis of a marriage …

40 The differences in the English and Australian provisions and the Women's Charter (Cap 353) requires this court not to rush to legislate a "living apart" where the Legislature in its wisdom has feared to tread. I have to decide what would be "wrong" in this society objectively.

41 The parties resided in a "family home" with their children for many years. It continued throughout the marriage until the petitioner left. The pre-existing state of cohabitation and when it ceased was a fact that pointed to the date when living apart could be said to have begun. It took place in November 1992.

42 The full court in *In the Marriage of Pavey* (1976) 10 ALR 259 at 265 briefly stated the rationale for judges looking at primary facts:

> … In such cases, without a full explanation of the circumstances, there is an inherent unlikelihood that the marriage has broken down, for the common residence suggests continuing cohabitation. Such cases, therefore, require evidence that goes beyond inexact proofs, indefinite testimony and indirect inferences. The party or parties alleging separation must satisfy the court about this by explaining why the parties continued to live under the one roof, and by showing that there

> has been a change in their relationship, gradual or sudden, constituting a separation. For this reason many of the judges of the Family Court of Australia have adopted the practice of requiring corroboration of the applicant's evidence in cases where the parties reside in the same residence. We do not wish to lay down an inflexible rule that evidence from a witness other than the parties to a marriage must be given, but an applicant should always be ready to call such evidence. Whether the judge will require such evidence will depend on the circumstances of each case.

43 No evidence was led to show why the parties slept in the same bedroom and lived under the same roof or why the floor was preferred. I did not believe the petitioner's evidence that the parties, who were sleeping in the same bedroom, eating and living under the same roof with their children, had in fact lived separate lives and that there were two or three different households at 10A Dix Road from 1990. I did not accept her evidence that the respondent had slept on the bed for three years and the petitioner and her two children had slept on the floor and that marital relations ceased three years ago although the parties were determined to project the image of a happy family. The parties, I find, must have been communicating with each other for the petitioner and the respondent to go out with the children, even if they took turns.

44 The petitioner is prepared to contribute to the maintenance of the children even though the young children will go to the respondent.

45 The respondent is a businessman. Being in the same bedroom with the children and the respondent from 1990 to November 1992 was consistent with the marriage subsisting and parties cohabiting.

46 I was unable to accept the evidence that there was "absolutely no community life" when the parties were living and eating under the same roof with their children sleeping in the same bedroom and jointly maintaining the children. The parties' concern for the welfare of the children and their decision to jointly maintain the children as set out in the statement as to the arrangement for children and being in the same bedroom was conduct that showed consideration for the children and the other spouse.

47 On the undisputed evidence, I find as a fact that the husband and wife were co-operating with each other in caring and providing for the children and that they lived under the same roof and slept in the bedroom because the marriage was subsisting. It would be wrong in the circumstances to say that the parties were living apart. I was not satisfied that the parties had lived apart. The marriage had not broken down irretrievably by reason of the parties having lived apart. In my judgment, the marriage was subsisting till as late as November 1992.

48 The consent signed by the respondent to the effect that the parties had lived apart was not evidence given on oath and the respondent did not give evidence or challenge the fact of having slept in the same bedroom.

49 There is one other matter that I should mention. The parties were married on 6 January 1983. The petitioner was a sales executive. The petitioner gave custody of two very young children to the respondent. The respondent is a businessman. There was no prayer for the division of matrimonial assets acquired during marriage, if any.

50 Section 45 of the Women's Charter (Cap 353) provides:

> (1) Upon the solemnization of marriage, the husband and wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for the children.
>
> …
>
> (4) The husband and the wife shall have equal rights in the running of the matrimonial household.

51 The petitioner and the respondent conducted themselves in a manner that would have given any observer and those in the premises the impression that the petitioner was safeguarding the interests of the union by sleeping together with the respondent and children in the same bedroom and were not living apart. The petitioner cared and is caring and providing for the children. I dismissed the petition.

Headnoted by Harikumar s/o Sukumar Pillay.