Leong Kwek Keong
v
Lee Ying Kuan

[1990] SGHC 8

High Court — Divorce Petition No 1690 of 1986
Chan Sek Keong J
21 February 1990

Family Law *— Divorce — Petition of divorce on fact of living apart — Requirements in proving "living apart" — Petitioner sleeping at parents' place but spending waking hours with family — Whether there was breakdown in marital relationship — Whether intention to terminate marriage existed — Section 88(3)*(e) *Women's Charter (Cap 353, 1985 Rev Ed)*

Facts

This contested petition for divorce was presented by the husband ("the petitioner") relying on the fact of living apart for four years under s 88(3)(*d*) of the Women's Charter (Cap 353, 1985 Rev Ed). Though the petitioner moved out of the matrimonial home in or about July 1982, he returned to the matrimonial home every day to spend time with the family. He would have his dinners at home and his clothes were washed at home. He continued to do the things which he normally had done before he left. He continued to have sexual intercourse with the respondent as if his marital life had not ended. The respondent became pregnant and a child was born in 1984. The petitioner did not sleep in the matrimonial home but spent most if not the whole of his non-working or non-sleeping hours with the family.

Held, dismissing the petition with costs:

(1) "Living apart", which is a similar concept to "living separately" in other jurisdictions, meant more than physical separation. It could only occur where one or both of the spouses formed the intention to sever or not to resume the marital relationship and act on that intention, or alternatively act as if the marital relationship had been severed: at [14].

(2) On the evidence before the court, 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. He was only living apart from the wife in the very narrow sense that he was not sleeping at home by choice. The *consortium vitae* was never destroyed at any time during the first year. On the facts of the case, the parties were living in the same household and had resumed cohabitation by the resumption of regular sexual intercourse; they had not lived apart during the first year of the petitioner leaving the matrimonial home: at [17] to [19].

Case(s) referred to

Abercrombie v Abercrombie [1943] 2 All ER 465 (refd)
Marriage of Todd (No 2), The (1976) 25 FLR 260 (folld)
Mouncer v Mouncer [1972] 1 WLR 321; [1972] 1 All ER 289 (folld)
Piper v Piper (1978) 8 Fam Law 243 (distd)
Santos v Santos [1972] Fam 247 (folld)

Legislation referred to

Women's Charter (Cap 353, 1985 Rev Ed) s 88(3)(e) (consd);
ss 88(3), 88(3)(d), 88(7)

Yu Chuan Lun (Yu Chuan Lun) for the petitioner;
Chern Yew Tee (Lawrence Chua & Partners) for the respondent.

21 February 1990 Judgment reserved.

Chan Sek Keong J:

1 This is a contested petition for divorce presented on 3 November 1986 by the petitioner/husband on the ground of four years' separation under s 88(3)(*d*) of the Women's Charter (Cap 353, 1985 Rev Ed) ("the Charter").

2 The parties were married on 18 March 1975. They have three children, two girls and a boy aged respectively ten, eight and six when the petition was filed in November 1986. At that time, the respondent was living with the children in the matrimonial home in Bedok Reservoir Road, whilst the petitioner was "living" with his parents at Selegie House.

3 Like many other marriages, the couple had their disagreements on many matters resulting in quarrels. A few instances were related to the court. For example, the respondent complained that the petitioner lacked any sense of discipline and responsibility as he would watch video films from the moment he got up in the morning until he went to work, and that he would allow the children to do what they liked. For example, when she wanted the daughters to continue their piano lessons, he objected on the ground that they had no talent and were not happy about being compelled to learn the piano. The petitioner has alleged that the quarrels started very early on in the marriage, whereas the respondent has alleged that things were normal until April 1978.

4 Things came to a head in or about July 1982. One evening, the petitioner told the respondent to dress the two daughters so that he could take them out for dinner. She instructed the maid to do it. He got very annoyed when the maid failed to dress the daughters properly. He chided her and told her he wanted to talk things over but she refused as she wanted to watch television. Nevertheless they went out for dinner but he finally decided that, as he said, "Enough is enough". Next morning, he took most

of his belongings and drove to the respondent's aunt's house to stay for a few days. He went there and not to his parents' house because he had always confided in the respondent's aunt in respect of his domestic problems. After that, he moved in to "live" with his parents.

5 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. The evidence relating to the lifestyle of the petitioner after he left the house is as follows. Commencing from that day and for about a year on, the 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. On Saturdays and Sundays, he would also spend most of his waking hours with the family. On Saturdays, he would fetch the respondent home from her work, take her out for lunch and then they would return to their home. On Sundays, he would come to the flat early in the morning and fetch the respondent and the children to attend mass, after which he would take them out for lunch and then back home. Sometimes, they would go out for entertainment and recreation in the same way they had been doing before he left the flat. He would leave the flat at about 10–11pm each night after the children had gone to bed. He did not cease communicating with the respondent on domestic matters.

6 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 use the respondent's car as before, although he alleged that she had, before his departure, agreed to allow him to use the car as he was maintaining it. According to the respondent, she did not stop or object to the petitioner continuing to use the car as she still regarded him as the husband who was not treating the marriage as at an end. He continued to pay all the expenses of the flathold. He continued to have sexual intercourse with the respondent as if his marital life had not ended. In other words, except for the fact that he did not sleep in the flat, the petitioner was carrying on a normal domestic life.

7 According to the petitioner, he went home only five times a week during this period. The frequency dropped to three to four times a week after the first year. He said that he came home not because he wanted to see the respondent but because he wanted to be with his children. He did not want them to feel "inferior" and he wanted to look after their education. He, however, admitted that he did not tell his daughters that he had left or was leaving their mother as they knew he was not sleeping at home. He also said that during this period, he had sexual intercourse with his wife a couple of times out of compassion and in attempts to reach a reconciliation.

8 The respondent became pregnant in March 1984. The petitioner was very annoyed about the pregnancy as he had been assured that she was

"safe". He did not want the child in their estranged circumstances and, accordingly, requested her to terminate the pregnancy. She refused and he was annoyed, as a result of which he refused to take her out on family outings, and seldom spoke to her. He continued to come home three times a week and followed the same pattern of behaviour described earlier. The petitioner was so annoyed at the respondent's refusal to terminate her pregnancy that when the child, a son, was born in November, he refused to look at or carry him for up to six months. He relented after that period. However, it would appear that he was not sufficiently annoyed as to refuse to do anything in connection with the child. He had fetched the respondent to the hospital early in the morning, and stayed behind until the child was delivered. His explanation for behaving as such was that the respondent had no one to help her and not because he regarded her as his wife. He also said that he fetched the respondent home from work not because she was his wife but because he would have done it for anybody else since it did not cause him any inconvenience.

9 The respondent's version of the events was somewhat different. She testified that she could not remember what they quarrelled about in July 1982, but she was provoked and when he told her that he could not live with her any more, she told him he could leave for good. Subsequently, she pleaded with him on several occasions to come home but he refused. She thought he was an unforgiving person. She, however, maintained that during the first year after he ceased sleeping in the matrimonial home, he came home every day of the week, that he came home five times a week only after January 1983 when he told her he would be spending two nights a week at a French language course, that during the whole of the period until the son was born, he behaved as if they had never separated, that he had his dinners at home, that his washing was done at home, that they went out together with the children and attended family functions as a family, that they had sexual intercourse as frequently as in the past, which was once or twice a week, and that he behaved and acted as if he were still a member of the household.

10 In respect of the pregnancy, she said that she practised the rhythm method and that she thought she was having her safe period at the time the son was conceived. But, she denied that the petitioner did not want the child for the reasons given by him. She said that he did not want the child as he said he could not afford to bring him up, whereupon she said she would pay for all the expenses and also maintain the child. This is what has happened. She also said he took her to hospital for her delivery by prior arrangement a few days before. He also registered his birth. She, however, admitted that after the son was born, he cut her off from his company or companionship but did not object to her visiting relatives and attending family functions, *eg* wedding dinners, birthday parties, together with him and the children.

11 Having seen the parties and heard their testimony, I prefer the respondent's version of the facts to that of the petitioner's. She was, in my view, a more forthright witness, whereas the petitioner was frequently trying to rationalise and explain ordinary events in a way which makes the explanation less credible. I give as examples of this attitude of mind his explanations for fetching the respondent home on Saturdays and for taking her to hospital. Experience would tell us that the more probable reason for these acts would be that she was the wife and he did them because of his marital relationship. Instead, he gave the explanation that he did it because he would have done it for any Tom, Dick or Harry. Another example of his habit of giving a more improbable gloss to events he thought were material to his case was the respondent's evidence that he came home five times a week after January 1983 because he was having French language lessons in the evening and that he told her about it. He denied that he had told her and when asked how she knew, he replied, "Habit". A further example is his evidence concerning the frequency of and the reason for having sexual intercourse with the respondent. He said he had intercourse with her on a couple of occasions during the first year after his departure as part of his attempts at reconciliation. But, he also said that he did it out of compassion for her. If he was telling the truth, I do not see where the compassion was. It is also too much of a coincidence that on the couple of occasions as alleged by him he had intercourse with her, conception took place on one of them, in spite of the fact that the wife was practising birth control. I find his evidence on this aspect of the case hard to believe, given the almost normal married life that he was leading at that time. He was spending most if not the whole of his non-working or non-sleeping hours with the family.

12 On the basis of the evidence of the respondent which I accept in its material aspects, 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 for a period exceeding six months. If the court finds that they had done so, then this period would have to be discounted, in which event, the parties would not have lived apart for a continuous period of four years.

13 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". In the context of that section, one must be the antithesis of the other. Now, s 88(7) provides that references in the 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. It follows therefore that the expression "living apart" must also mean "not living in the same household". In *Santos v Santos* [1972]

Fam 247, the Court of Appeal, after reviewing the English and Commonwealth cases, held that the expression "living apart" in s 2(1)(d) of the Divorce Reform Act 1969 did not mean merely physical separation or physically not living under the same roof, but imported the additional element of an intention to terminate the consortium. The court also thought that there was no difference between the expression "living apart" in the New Zealand statutes and the expression "living separate and apart" in those of Australia and Canada. I respectfully adopt this view. I do not see any distinction between the expressions "living apart" and "living separately".

14 The current legal position in Australia is that the Australian courts have now accepted that the expression "separated and thereafter lived separately and apart" in s 48(2) of the Family Law Act 1975 involves the notion of the continuous breakdown of the marriage relationship, and not merely physical separation: see Dickey *Family Law* (1985) at p 160. The classic statement of what constitutes separation for the purpose of the Australian statute is to be found in the judgment of Watson J in *The Marriage of Todd (No 2)* (1976) 25 FLR 260 at 262 where his Honour said:

> 'Separation' means more than physical separation — it involves the breakdown of the marital 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 relationships, and the nurture and support of the children of the marriage.

15 In my view, the above statement of the law applies equally to the concept of living apart and living in the same household under s 88(3) or s 88(7) of the Charter.

16 The evidence in this case shows that for at least the period from the time the petitioner left the matrimonial home, the parties carried on a normal marital relationship and a normal family life. There were only two factors which could be said to have a militating effect on this state of affairs. The first is the petitioner's express words that he could no longer live with the respondent. The second factor, which may be regarded as a consequence of the first, was his determination to sleep outside the matrimonial home. In *Santos v Santos*, the Court of Appeal also held that one party alone could bring about a separation or a living apart if he intended it to be or his or her attitude of mind was so, and further, this unilateral element need not be communicated to the other party. The

problem was one of proof in cases where the court has to decide whether the relevant party had such an intention. At 260–261, Sachs LJ said:

> 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' — as was stated in the *Virginia Law Review* article, vol 52 (1966), p 70. 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, eg on some grave disability becoming known to be incurable, that only slight evidence is needed — for the nature of the breakdown is so patent.

17 On the evidence before me, I am of the view that 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. He was only "living" apart from the wife in the very narrow sense that he was not sleeping at home by choice. I do not think that because he did it by choice rather than by force of other circumstances is conclusive evidence that he intended to terminate the marriage. He was still spending all his free waking hours with her and/or the children. I am of the view that the *consortium vitae* was never destroyed at any time during the first year. He continued to do everything he was doing before he left home. He claimed that as far as he was concerned the marriage was at an end, but this claim, in my view, is not consistent with his behaviour, as he continued to enjoy all the advantages and burdens of his married state. He did not extend his intention to put an end to the marriage to the use of the family car or the cessation of sexual intercourse with the respondent. I do not think that the evidence suggests that the petitioner was visiting the respondent when he came home in the evenings and stayed for dinner for a whole year nor were the acts of intercourse casual acts occurring on his visits. They took place as

if the married state had continued. Apart from saying so, the petitioner had not done anything in the first year after he left home to suggest that he truly and sincerely intended to put an end to the marriage. Counsel for the petitioner submitted that the petitioner's intention in going home so frequently and regularly was because of the children. I do not accept this submission. The evidence showed that his intention was more than that. I think that they were living in the same household as the test was applied in *Mouncer v Mouncer* [1972] 1 All ER 289. I think this is a stronger case than *Mouncer v Mouncer*, so far as the respondent is concerned. The evidence suggests that the parties had resumed cohabitation by the resumption of regular sexual intercourse: see *Abercrombie v Abercrombie* [1943] 2 All ER 465.

18 Counsel also relied on the case of *Piper v Piper* (1978) 8 Fam Law 243 where the Court of Appeal held that "visits" did not result in the creation of two separate households. In that case, the parties who had no children were separated in February 1970 and sold their matrimonial home. From then until May 1975, the husband then visited the wife frequently at her address, spending weekends, sometimes several nights a week and on three occasions a whole week with her. The trial judge held that the proper way to describe the relationship was that the husband was "visiting" the wife on a number of occasions, retaining his own flat, wherever it was and coming as an intimate friend, that he was not really making his home in the wife's flat, and so they could not be said to be living together. The Court of Appeal upheld the decision.

19 The decision of *Piper v Piper* does not preclude me from taking a different view of the facts of this case, and I do so. Here, I am not satisfied that the parties had ever lived apart during the first year of his leaving the matrimonial home. He was living at home, in the sense of living in the same household, although he refused to sleep at home. For the above reasons, the petition is dismissed with costs.

Headnoted by Paul Tan Beng Hwee.