HONG KONG / JUDGMENT

M v. L

[2019] HKFC 133

COURT
Family Court

DECIDED
22 May 2019

CASE / FILE NUMBER
FCMC943/2016

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bjbj
FCMC 14921 of 2017
Consolidated with FCMC 943/2016 and FCMC 5284/2018
[2019] HKFC 133
IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
MATRIMONIAL CAUSES
NUMBER 14921 of 2017

BETWEEN
M Petitioner
and
L Respondent

(By Order of Deputy District Judge David Cheung dated 23 October 2017 action FCMC 943/2016 was consolidated with FCMC 14921/2017)
(By Order of Deputy District Judge David Cheung dated 19 June 2018 action FCMC 5284/2018 was consolidated with FCMC 14921/2017)
Coram: Deputy District Judge M. Lam in Court

Date of Hearing:	13 and 14 March 2019 Date of Witten Closing Submissions of the Petitioner: 26 March 2019 Date of Witten Closing Submissions of the Respondent: 21 March and 1 April 2019 Date of Handing Down Judgment: 22 May 2019 ----------

JUDGMENT

(Defended Petition and Cross-petition)

Introduction

AUTONUMOUT This is a defended divorce. Both parties recognize that the marriage has broken down irretrievably. The wife seeks a decree based on two-year separation whereas the husband seeks a decree based on adultery. The actions and pleadings AUTONUMOUT The parties married on 30 December 2005. No child was born to the husband during the marriage. They are domiciled in Hong Kong. Both of them are engineers. AUTONUMOUT The wife initially petitioned for divorce on the basis of 2-year separation since April 2013 (the First Petition) under action FCMC942/2016 on 23 January 2016 (the First Action). The husband defended the petition by filing an answer on 25 February 2016 (the First Answer). He pleaded that up to 8 September 2015 the couple were still living together in Hong Kong, that the wife moved out of the matrimonial home on 9 September 2015 (the Departure Date) and from then onward, they had lived separately. He prayed for the petition be dismissed with costs to him. AUTONUMOUT On 23 October 2017, the learned Deputy District Judge David Cheung gave an order for further conduct of the First Action including, inter alia, : -

(a) leave to the wife to file a new petition for divorce on the ground of two-year separation since 10 September 2015 (the Alleged Date);

(b) the new action be consolidated with the First Action;

(c) the First Action be stayed from the date of filing of the new petition for divorce by the wife; and when the court pronounces decree nisi in the new action, the First Action be dismissed;

(d) leave to the husband to withdraw the First Answer and to file a fresh Form 4 within 14 days after service of the new petition;

(e) There be no order as to cost of the First Action. (the First Consolidation Order AUTONUMOUT On 15 November 2017, the wife issued a new divorce petition (the Wife s Petition) based on two-year separation since at least from the Alleged Date under action FCMC14921/2017 (the Wife s Action). The husband defended the petition by filing an answer on 21 December 2017 (the Husband s Answer). He denied separation for lack of agreed or deed of separation (the Agreement Argument). He further prayed for the Wife s Petition be dismissed due to a false statement contained therein, namely the wife s statement that she resided in a specified flat on a specified floor in Heng Fa Chuen (the Said Address) (the Address Argument). AUTONUMOUT The parties filed and served witness statements shortly afterwards. The second pre-trial review was fixed to 19 June 2018 to allow another round of exchange of witness statements. AUTONUMOUT On 4 May 2018, the husband issued a divorce petition based on adultery (the Husband s Petition) under action FCMC5284/2018

(the Husband s Action). No particulars of adultery were provided. The wife resisted the petition. She urged for dissolution of the marriage solely on two-year separation. AUTONUMOUT By Order of Deputy District Judge David Cheung dated 19 June 2018, the Wife s Action and the Husband s Action were consolidated as one action with the Husband s Petition be treated as the Cross-Petition. AUTONUMOUT Subsequently, the husband was allowed not to name the person alleged to have committed adultery with the wife in this action. AUTONUMOUT On the first day of trial, by consent of the parties, leave was granted to the husband to amend the Husband s Petition by giving particulars of the adultery, namely, the birth registration of a girl with the date of birth on X September 2017, her mother being the wife and the father not the husband, with cost of and occasioned by the amendments be paid by the husband to the wife, to be taxed if not agreed. The wife then filed consequential amended answer and witness statement. AUTONUMOUT The trial proceeded on the same day as scheduled. In the middle of the trial, the husband produced further document. The issues in dispute AUTONUMOUT Chronologically, the issues to be determined are: -

(a) whether a decree based on two-year separation as prayed in the Wife s Petition should be granted,

(b) If the answer to (a) is positive, whether the Court should further make inquiries into the husband s allegation of adultery under the Husband s Petition.

(c) If the answer to (b) is positive, whether a decree based on adultery should be granted. The legal principles AUTONUMOUT The sole ground for granting a decree of divorce is that the marriage has broken down irretrievably: section 11 of the Matrimonial Causes Ordinance, Cap.179 ( ). AUTONUMOUT Proof of irretrievable breakdown can be demonstrated by establishing one or more of the facts set out in section 11A (2) of MCO. Section 11A (2) of MCO provides that: - 11A.Proof of ground for petition

(2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(c) that the parties to the marriage have lived apart for a continuous period of at least 1 year immediately preceding the presentation of the petition and the respondent consents to a decree s being granted;

(d) that the parties to the marriage have lived apart for a continuous period of at least 2 years immediately preceding the presentation of the petition;

(e) that the respondent has deserted the petitioner for a continuous period of at least 1 year immediately preceding the presentation of the petition. AUTONUMOUT The Wife s Petition is based on section 11A(2)(d) of MCO in which the wife claims the parties had lived apart for a continuous period of at least 2 years before the presentation of the Wife s Petition, since at least from the Alleged Date. AUTONUMOUT Section 11C (1) of MCO provides that:

(1) For the purpose of this Part, a husband and wife shall be treated as living apart unless they are living with each other in the same household. AUTONUMOUT To constitute living apart, even if the wife can prove that the parties have not physically lived together in the same place, she still has to prove that she has ceased to recognize the marriage as subsisting and intended never to return to the husband. Her state of mind needed not be communicated to the husband. See Santos v Santos [1972] Fam 247. AUTONUMOUT In a petition for divorce on two-year separation, the court should not inquire into whose fault it was that the marriage had broken down. Matters of fault between the parties should not be considered. See Chapman v Chapman [1972] 1 WLR 1544. AUTONUMOUT With these principles in mind, I now turn to consider the facts of this case. The First Issue AUTONUMOUT Having considered all the oral and documentary evidence together with the submissions of both parties, I am of the view that the wife has satisfied the requirements as prescribed by section 11A(2)(d) of MCO. She succeeds in proving that the parties have lived apart at least from the Alleged Date with the following reasons. AUTONUMOUT The fact that the wife moved out of the matrimonial home on the Departure Date was admitted by the husband during trial. It was also evidenced by an email sent by the wife on the Departure Date notifying the husband that she was moving out on that date and she would live with her friend from then on. AUTONUMOUT Even though the husband seeks to argue that the wife only intended to live apart from him temporarily as worded in the said email, there is solid evidence to show that what she had termed to be temporary separation has eventually become permanent separation as elaborated below. AUTONUMOUT There are a number of electronic text messages which support the wife s case that the separation started from the Alleged Date. In her electronic text message to the husband dated 2 August 2016 (the Wife s August Message), the wife stated that: - the parties had formally separate v TW[_N N !kZZ the Wife s October Message), she stated that the relationship between the parties had completely come to an end for long. The husband s acts, emails, WeChat messages and letters were well received by her. She however did not find it necessary to reply, and would not further answer him. AUTONUMOUT Apparently these two messages together with some other messages produced by the parties demonstrate that the parties had separated for almost one year before August 2016 and the wife had unequivocally told the husband that their relationship had already come to an end. AUTONUMOUT Not only the husband has never disputed the contents of such messages, the long-standing separation has actually been worded in his own messages: -

(a) in his message in reply to the Wife s August Message dated 11 August 2016, he wrote that they had not been seeing each other for long and asked to talk to her in person. g}YEN `O1 reasons (for a chat, date, meal, party, medical appointment, family gathering and advice) in the hope that he could be in contact with her again. Such messages had met with no answer until the Wife s October Message which stonewalled any further communication. AUTONUMOUT In my view, the written messages of the parties are clear proof of separation since the Alleged Date as well as the wife s firm position not to return to the husband. She has persistently refused to embark on any form of relationship with the husband despite his repeated instigations. AUTONUMOUT The parties were known for their long-standing separation and breakdown of the marriage as recognized by their mutual friend in the emails in May 2018. The husband s only explanation was that such friend had no communication with the parties for years and did not know much about them. AUTONUMOUT His explanation is unconvincing. I could not ignore the fact that it was indeed the husband who approached the said friend for assistance in salvaging his marriage by describing the said friend as an important and influential mutual friend of the parties. AUTONUMOUT Nor could I forget his pleaded case in the First Action. In the First Answer on 25 February 2016, he pleaded that the wife began to move out of the premises on 9 September 2015 and from then on, the Petitioner and the Respondent have lived separately . At trial, he offered no valid explanation as to why he had proceeded with this pleaded case without amendment until the First Consolidation Order on 23 October 2017. It was only by then that the First Answer was withdrawn following the withdrawal of the First Petition. AUTONUMOUT The husband s own admissions of his meetings with the wife s boyfriend to persuade the latter to leave the wife in August and November 2016 as well as of his ignorance of the wife s pregnancy and the birth of a girl until April 2018 tend to support the wife s case of their continuous separation since the Alleged Date. AUTONUMOUT As to the husband s Agreement Argument and the Address Argument, they could be briefly disposed of. The former is bound to fail. Suffice it to say that the absence of any agreed or deed of separation is no bar to the operation of section 11A(2)(d) of MCO. The law does not require the party intending to separate to seek agreement of the other party for separation. See AFTA v JMA FCMC1087/2014 HHJ Melloy 29 April 2015. AUTONUMOUT Likewise, the Address Argument does not lend any support to the husband s case. The husband s position on this issue is self-contradictory. In his witness statements, he said that the Said Address belonged to a common friend of the parties. The parties had been there together for visit and gathering. So far as he was aware, the wife had never resided there. AUTONUMOUT In court, when the wife reiterated that she had once lived there in 2016 which was her friend s residence, the husband changed to cross-examine her that the Said Address was a fake address which could not be located in Hong Kong. He nevertheless provided neither explanation for such change of position nor justification for any of his allegations. AUTONUMOUT Absent any solid evidence to challenge the Wife s evidence that she once resided in the Said Address in 2016 and only forgot to update her current address in the copy-and-paste exercise when preparing the Wife s Petition, I find no valid basis for the husband s complaint of a deliberate false statement. At any rate, even if, which I do not so find, the

Said Address is a fake address, I fail to see how it could destroy the wife s case of 2-year separation in light of the strong evidence aforesaid. AUTONUMOUT In fact, the husband s frequent change of his case surfaced in the cross-examination. In her witness statements, the wife said that since the Alleged Date, the parties had never engaged in any intimacy relationship or social activities together other than a few discussions relating to divorce (with the last two on 21 January 2016 and 19 May 2016), and the wife s collection of her piano from the husband on 18 May 2016. Notwithstanding that such evidence has never been disputed by the husband, in cross-examination, he dramatically changed to say that he had sex, cohabitation and social activities with her after the Alleged Date. AUTONUMOUT Again, no valid explanation for the sudden change of position was offered. Needless to say, his new case runs counter to the contemporaneous documents and the evidence as elaborated above and is not supported with any particulars or evidence. I do not believe him. AUTONUMOUT The husband s another attack that the wife had deliberately concealed the birth of a girl carries no merit at all bearing in mind matters of fault between the parties should not be considered for petition based on 2-year separation. The wife simply has no obligation to disclose such fact in her petition. AUTONUMOUT Having considered all the evidence and submissions of both parties, I form the view that the evidence in support of the wife s case is compelling. I find that she physically left the husband on the Departure Date (9 September 2015) and lived apart from him at least since the Alleged Date. What had initially termed as temporary separation has subsequently become a permanent separation. The parties had lived apart continuously for more than 2 years before the Wife s Petition. I will grant a decree nisi of divorce based on two-year separation. The second and third issue AUTONUMOUT Given my ruling on the Wife s Petition and that a decree will be granted on two-year separation, this Court will be loathed to conduct further inquiries into the husband s allegation of adultery. I take the view that even if the adultery is proved by the husband, which I have yet so found, it serves no practical purpose for this action. This is a childless marriage. At trial, the husband declared that the adultery was irrelevant to and would not be relied on in the ancillary relief application. AUTONUMOUT In any event, given the birth of the girl was long after the separation of the parties from the Alleged Date, it is difficult to see how it would amount to any obvious and gross misconduct which would affect either party s positions in the ancillary relief application. AUTONUMOUT I share the view of the learned HH Judge Sharon D Melloy in the case of THY v C, HFR unrep. FCMC11061/2014 26 January 2018. It is trite law that issues of the divorce decree per se and of finance are in separate and discrete compartments. The divorce and the ancillary relief proceedings are not inextricably linked. It is absolutely illogical to adopt a position that the best arena to determine and consider issue of the parties marital conduct as adultery is at the trial of the main suit simply because the husband believes those issues require proper determination which may have some bearing on ancillary relief application. AUTONUMOUT In light of my finding on the breakdown of the marriage on the basis of two-year separation, this Court should adopt a sensible and pragmatic attitude with the view to dissolve the marriage as quickly and as painlessly as possible. I seek support from the principles as elaborated in the case of Grenfell v Grenfell [1978] Fam 128 as adopted by the Court of Appeal in the case of SJH v RJH

[2011] HKCA 280 [2012] 4 HKLRD 308, at 11(7).: - As both parties are now of the same view that the marriage has been irretrievably broken down, the Court in exercising its divorce jurisdiction in a modern setting, will be loathed to allow the parties to use valuable court time to litigate on a matter which has no impact whatsoever on the divorce itself and which should be dissolved as quickly and painlessly as possible. As Ormrod LJ observed in Grenfell v Grenfell [1978] 1 All ER 561 at 566 that, There is no point, as I see it, in a case like this in conducting an enquiry into behaviour merely to satisfy feelings, however genuinely and sincerely held by one or other of the parties. To do so would be a waste of time of the court and, in any event, would be running, as I think, counter to the general policy or philosophy of the divorce legislation as it stands today. The purpose of Parliament was to ensure that where a marriage has irretrievably broken down, it shall be dissolved as quickly and as painlessly as possible under the Act, and attempts to recriminate in the manner in which the wife in this case appears to wish to do should be, in my judgment, firmly discouraged. AUTONUMOUT In the premises, I should have the marriage dissolved as quickly and as painlessly. No further investigation into the issue of adultery should be conducted merely to satisfy the husband s feelings or to allow bitter recrimination against the other party. AUTONUMOUT It is noteworthy that by an email message sent by the husband to the wife on 6 June 2018, with a property settlement proposal attached thereto, the husband told the wife that he would agree to have a decree be granted on either of the parties petition once the parties enter into a settlement agreement on distribution of property between them. I should add that grant of decree should not be used as a means of settlement negotiation on the issue of property distribution. AUTONUMOUT For reasons aforesaid, I decline to conduct further inquiry on the issue of adultery which serves no practical purpose and has no impact whatsoever on the divorce itself.

Conclusion

AUTONUMOUT Having considered all the evidence and submissions of the parties, I am convinced that this marriage has broken down irretrievably. I grant a decree nisi of divorce on the Wife s Petition and I make no order to the Husband s Petition. Costs AUTONUMOUT Costs follow the event. I make an order nisi that the husband do pay the wife s cost of and incidental to the main suit, including all cost reserved, with certificate for counsel, on a party and party basis, to be taxed if not agreed. AUTONUMOUT This is a costs order nisi which will become absolute if no application hzCg ph!!! uhWL |u|ul_ |u|u_ |u|ul_ |u|u_ |u|u_ gd-(for variation of this costs order nisi by way of summons is made within 21 days. (M. LAM) Deputy District Judge Mr Austin Yiu, instructed by Patrick Mak & Tse for the Petitioner The Respondent, being unrepresented, appearing in person PAGE - PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V |phdhdhdhdTOK &`#$ [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml $O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q_ jyV` |PZ+ T ""p < 4V O&x$ A8>v ;EUC n 8r *~P(5 .}x E /,EE\} theme/theme/_rels/themeManager.xml.rels 5 6?$Q K(M&$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/

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