

HONG KONG / JUDGMENT

TK v. MJBL

COURT

Family Court

DECIDED

19 April 2013

CASE / FILE NUMBER

FCMC1551/2012

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bjbj FCMC 1551/2012 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NO. 1551 OF 2012

BETWEEN TK Petitioner and MJBL Respondent

Coram: HH Judge C.K. Chan in Court Dates of Hearing: 17-19 April 2013 Date of Judgment: 19
April 2013

J U D G M E N T (Divorce Petition)

This is a trial of the petitioner wife (the wife s petition for divorce dated 10 February 2012. The
respondent husband (the husband) opposes the petition.

Background

The parties married in 2005. Before marriage, the parties already had a son, now aged 10. After marriage, the wife had given birth to another son, now aged 4. Both children are now residing with and being looked after by the wife. On 10 February 2012, the wife issued a petition for divorce based on 2-year separation. According to her, the parties started to separate on 19 October 2009, which was more than 2 years before the presentation of the petition for divorce. She asked for a decree of divorce to be granted based on her petition. The husband filed an Answer on 29 October 2012 denying the date of separation. He said the parties only started to separate as from 2 February 2012. As there was no separation of 2 years before the presentation of the petition, he asked for the petition for divorce to be dismissed. As the parties failed to reach any consensus at the pre-trial review, the petition was therefore adjourned to today for trial. The Law The only ground on which the court will grant a decree of divorce is when it is satisfied that the marriage has broken down irretrievably: s11 Matrimonial Causes Ordinance, Cap. 179 (). In

order to prove the irretrievable breakdown of the marriage, the petitioner has to prove any one or more of the five facts as listed in s11A of MCO. One of the facts as contained in s11A(2)(d) is:

- (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. Therefore, if the petitioner can prove to the satisfaction of the court that the parties have already separated as from 19 October 2009, the court will be satisfied with the irretrievable breakdown of the marriage and thus a decree of divorce will be granted. The Issue Therefore, the only issue in this trial is whether the parties have separated as from 19 October 2009, i.e. for a period of more than 2 years before the presentation of the petition on 10 February 2012.
- The Wife's Evidence** The wife has given evidence in court. According to her, the parties relationship had been tense for quite some time. In November 2008, the wife returned to Nepal shortly after the birth of the younger son. While she was in Nepal, and on 19 October 2009, she decided to separate with the husband. She called the husband, who was then working in Hong Kong to say that she would not continue to live with him. According to her, the husband agreed to that suggestion. Therefore, the wife viewed the parties separation as starting from that day. The wife went on to say that in April 2011, she decided to return to Hong Kong as she wanted to find a job and earn a living here. As she had no where to stay, she decided to stay in the husband's flat at 3rd Floor, 59A, Public Square Street, Yau Ma Tei, Kowloon. She said during this period of time, the parties slept in different beds; they did not have sexual or social relationship; they had separate arrangements in taking meals and doing their own laundries. In short, there was no resumption of marital relationship despite the fact that both parties were living in the same flat. According to her, the husband hit her during an incident on 24 January 2012 causing her to leave the flat. On 3 February 2012, she made a report to the police and a statement was taken from her. In support of her evidence, the wife has called a friend to be her witness () who basically said that the wife had told her of the separation as from 19 October 2009.
- The Husband's Evidence** The husband elected to give evidence. He said he had all along been a responsible husband. He said there was no separation as from 19 October 2009. He did not admit there was such a telephone conversation on that day. He said after the wife's return from Nepal in April 2011, they had maintained normal marital relationship. He said they had sexual relationship, once or twice a week. They would cook meals for each other or taking meals together. He said there was an argument in January 2012 after which the wife left the matrimonial home. The wife also made a report to the police on 3 February 2012. The husband treated that as the date of their separation. The husband has also called his friend Mr T to testify in court. According to Mr T, he was a colleague and a good friend of the husband. Although he did not visit the husband's home very often, he knew the husband was living with the wife and 2 children at his home in Yau Ma Tei. He said he once saw them together outside their home.
- Discussion** Witnesses Despite the fact that both parties have called witness to support their respective cases, it is clear that their evidence do not advance the parties cases any further. For the wife's witness, what she knew about the parties relationship was purely hearsay from the wife. This was what she said in her affirmation:

4. I am a housewife. I understand the situation of the Petitioner, because I am also a mother of two children. When the Petitioner come back to Hong Kong from Nepal in mid Aril 2011, she told me that she had separated with the Respondent since 19th October 2009. Under those circumstances, I will not give any weight to her evidence in deciding on the issue of separation. For the witness of the husband, Mr T, what he could testify was that the husband was living together with the wife and the children. It is common ground that the parties and the 2 children did in fact live under the same roof as from April 2011 to January 2012, but the real issue was whether they were living there as husband and wife. The witness failed to address this point and therefore, his evidence does not advance the husband s case at all. My Assessment of the Parties Evidence As the evidence of the witnesses was not helpful, what was left was the evidence of the parties themselves. It was a case of the wife s words against the husband s. After giving some careful consideration to their evidence, I come to the conclusion that the wife has failed to satisfy this court that there was indeed a separation of 2 years as from 19 October 2009. My conclusion is based on the following facts: In her oral evidence, the wife said the telephone conversation in which she had told the husband of her determination to live apart from him took place in about 6 months after her return to Nepal with the younger son. It is common ground that the wife left in November 2008 and 6 months from then would take us to May 2009, instead of October 2009. When she was confronted with this inconsistency, she explained that she had made a mistake which I found not to be a very convincing explanation. The date of conversation was very specific, namely 19 October 2009. There was no explanation on how the wife could have been so specific about the exact date of conversation. In her oral evidence, the wife said that the parties remained separated because they were living in different households after her return to Hong Kong. She said the husband slept on the floor while she and the sons slept on the bed. That was different from her affirmation in which she said the husband slept in lower deck while she and the son slept in the upper deck. After the incident in January 2012, the wife had made a report to the police and a statement was taken from her. In the statement, the wife said in the early hours of 24 January 2012, she suspected that the husband had a girlfriend which was not admitted. When she urge with the husband, she was hit. It is my view that if the parties really had been separated since October 2009 and they were just living under the same roof for convenience only, there was no reason for the wife to show such concern of the husband s girlfriend, even if there was any. There was evidence to show that the wife had renewed the husband s dependent visa in Hong Kong. This was again inconsistent with the wife s assertion that there was indeed such a separation. On the contrary, the husband maintained all along a simple case that a normal marital life between the parties had continued before February 2012. He was cross examined and his evidence was not shaken.

Conclusion

As the wife has failed to satisfy the court that the parties had indeed separated for a period of 2 years before the presentation of the petition, the petition therefore fails and stands dismissed. Costs I will now deal with the issue of costs. (Discussion re costs) The husband does not claim for costs. There shall be no order as to costs, including all costs reserved. The wife's own costs to be taxed in accordance with legal aid regulations. C. K. Chan District Judge Representation: Ms Carina Chen of Messrs K.Y. Leung & Carina Chen, Solicitors for the Petitioner The Respondent acting 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 gdDy gdDy gdDy yd]SL hky(w`O: gd 5 gdx~< hWNl hx~< hx~< hWNl hWNl mXDX hN]a hN]a hN]a hN]a hN]a gdu gdN]a gdN]a gdN]a jVjC\$ hN]a h(tK gdz< gd(tK tbtPt> h(tK lhlhlhlh^X^XT hy2B hmRF &`#\$ [Content_Types].xml Iw}, \$yi} _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v)I`n 3Vq%#'q x}r :T'ZaG I u3 L+M2 e\O\* \$\*c? )6-r Iqbj#x ,AGm T[XF64 E)`# R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6? \$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> K4ix &'L- (9zd Draft dc_reporter08 Normal.dotm Judiciary Microsoft Office Word Dell Computer Corp. Draft Title <b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{08EA2176-8137-4D0A-9702-0171436ECDB0}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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