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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY M.974/83

Special Consideration

1292

BETWEEN L RUSSELL
Appellant

A N D P RUSSELL
Respondent

Reported (1984) 7 NZ Fam Rep 193

Hearing : 2nd October 1984

Counsel : G.P. Curry for Appellant
B.P.C. Carter for Respondent

(amending legislation due)

Judgment : 16 October 1984

JUDGMENT OF BARKER, J.

This is an appeal under Section 174 of the Family Proceedings Act 1980 ("the Act") against an oral judgment given by Judge Kendall in the Family Court at Auckland on 30th June 1983. After a defended hearing, the learned District Court Judge made an order dissolving the marriage of the parties. Counsel believe that this is the first appeal to this Court against an order of dissolution of marriage since the new regime for family law came into force on 1st October 1981. I shall refer to the parties as "the husband" and "the wife".

The parties were married on 1965. They have two adopted twin daughters born 1968. They separated in 1974. Since then, the wife has lived mainly in Auckland and the husband on his farm at Paparoa in Northland. The husband has living with him another lady by whom he has two children, born in . The wife asserted in evidence that, despite their separation of, then, almost years, she still wished to resume to return to her husband; she would be willing to accept the two children of his de facto

relationship as if they were her own. She gave evidence of various statements of the husband during the term of the separation which still gave her hope of reconciliation.

The other lady involved - a Miss M - gave evidence; she had lived with the husband since 1979; occasional separations from the husband had been caused by what she described as the interference by the wife. However, she stated in evidence, which was apparently accepted by the District Court Judge, that her relationship with the husband was excellent and that they intended to marry.

The learned District Court Judge followed a decision of Judge Mahony in Martinovich v. Martinovich, (1983) FLN 88 which held that the fact of living apart for 2 years in itself establishes irreconcilable breakdown; that unless there is a reasonable possibility of reconciliation under Section 19(2) of the Act, the marriage must be held to be irreconcilably broken down. He noted that the question of irreconcilable breakdown is rarely justiciable.

Because of their importance, I state the relevant sections of the Act:

Section 39:

"(1) An application for an order dissolving a marriage may be made only on the ground that the marriage has broken down irreconcilably.

(2) In proceedings for an order dissolving a marriage the Court shall hold that the ground for the order has been established only where the Court is satisfied that the parties to the marriage are living apart, and have been living apart for the period of 2 years immediately preceding the filing of an application for an order dissolving the marriage."

Section 19(2):

"In all proceedings under this Act between a husband and wife for the dissolution of their marriage, where it appears to the Court from the nature of the case, the evidence, or the attitude of the husband and wife, that there is a reasonable possibility of a reconciliation between them, or of conciliation between them on any matter in issue, the Court may -

(a) Adjourn the proceedings to afford the husband and wife an opportunity for reconciliation, or for conciliation; and

(b) Nominate a counsellor or, in special circumstances, any other suitable person, to explore the possibility of reconciliation or, if reconciliation does not appear to be possible, to attempt to promote conciliation."

In Martinovich's case, Judge Mahony was faced with a husband who stated that he still loved his wife despite a separation of some 3 years, and a wife who said that she had no intention of ever returning to the husband. The learned Judge considered English and Australian authorities. In both of these jurisdictions, a "no fault" divorce system operates with the sole ground, "that the marriage has broken down irretrievably"; the expression in Section 39(1) is "that the marriage has broken down irreconcilably".

That learned District Judge considered that, because the sole ground of irretrievable or irreconcilable breakdown was rarely justiciable, each of the three Acts set out operative provisions which become matters of proof before a dissolution can be granted. He considered the key to the proper construction of Section 39 lay in the words "living apart"; he then reviewed a number of decisions under the earlier New Zealand legislation; in particular Sullivan v. Sullivan, (1958) NZLR 912. He concluded, in my view correctly, that the words "living apart" have the same meaning as under earlier legislation. Both a physical and mental element has to co-exist. Cases showed that the parties should not necessarily be considered to be "living apart" just because they were not living under the same roof. For example, the husband could be a seafarer or a person posted abroad for the purposes of

his employment. Likewise, under the old law, cases occurred at times where parties lived completely separate lives under the same roof; in some extreme circumstances, these were considered to be "living apart". I had occasion to review the cases in another context in Furmage v. Social Security Commission, (1978) 2 NZAR 75.

With respect to Judge Mahony in the Martinovich case and to Judge Kendall who followed him in the present case, I consider that the correct interpretation of Section 39(1) and (2) is as stated in two recent decisions of the Family Court; first, Judge Bisphan in F v. F, (1982) NZFLR 449, 450:

> "I am satisfied upon a reading of s.39 that before the Court can proceed to consider whether the marriage has broken down, a condition precedent must exist, namely that the parties to the marriage are living apart and have been living apart for a period of two years immediately preceding the filing of the application. Section 39(2) cannot, in my view, be interpreted as if the living apart for two years, in itself, establishes irreconcilable breakdown. If that was so, it would make s.39(1) superfluous. The Court must first be satisfied as to the prerequisite living apart and then turn to a consideration of irreconcilable breakdown."

This approach has also been followed by Principal Family Court Judge Trapski in Barker v. Barker, (1983) FLN 86 in these words:

> "So far as the law is concerned there is only one ground for the dissolution of marriage in New Zealand. That is set out in s.39(1). It states that an application for an order dissolving a marriage may be made only on the ground that the marriage has broken down irreconcilably. Subsection (2) states a prerequisite to the finding that a marriage has broken down irreconcilably in that it directs that in proceedings for an order dissolving the marriage the Court shall hold that the ground for the order has been established only when the Court is satisfied that the parties to the marriage are living apart and have been living apart for a period of two years immediately preceding the filing of the application. In my view, the primary objective of the inquiry is to establish whether or not the marriage has broken down irreconcilably, but before the Court can

> come to that conclusion, as a prerequisite the Court must find that the parties are living apart and have been living apart for the two years preceding the filing of the application."

In my view, the statements of Judges Bisphan and Trapski are logical and state the correct enquiry that must be undertaken by the Court. It could be that a marriage has broken down irreconcilably but, because of Section 39(2), the Court could not hold that that sole ground for dissolution of marriage had been established because the parties had not been living apart for the two years immediately preceding the filing of the application for dissolution.

Judge Kendall in the present case was satisfied that it had been proved that the parties were living apart for the requisite period and that, for that period of time, there had been a breakdown in the marriage relationship. He then considered that, in those circumstances, the ground for dissolution had been made out.

He next turned his attention to Section 19(2) and said:

> "I must have regard to whether or not I am required to make any order in terms of Section 19(2), as to whether there is a reasonable possibility of reconciliation between them or of conciliation between them on any matter in issue. I have listened carefully to the evidence of both Mr Russell and Mrs Russell and in my view the overriding factor that influences me that there is no possibility of reconciliation is the period of time that has elapsed since the parties separated in 1974 and because of the situation in which the applicant is placed by reason of his domestic relationship. There is in my view, no possibility that an order made under Section 19(2) would promote reconciliation between the parties."

Mr Curry submitted that Section 19(2) is directed towards the Court's role to foster reconciliation and conciliation. He submitted that this role was distinct from the Court's duty under Section 39 to grant a dissolution, when the sole ground for dissolution had been made out. He submitted that it was an error of law to equate a finding of

no possibility of reconciliation with a finding that the marriage had irreconcilably broken down. He relied on the dictum of Bagnall, J. in Ash v. Ash, (1972) 1 All ER 582, 586:

> "The only circumstances in which the court will have to decide under s.2(3) of the 1969 Act whether the marriage has broken down irretrievably must be when one of the spouses is asserting the affirmative of that proposition and the other is asserting the negative. Simple assertion either way it seems to me, cannot suffice. What I have to do is examine the whole of the evidence placed before me, including and giving not inconsiderable weight to the assertions of the parties, and make up my mind, quite generally, whether it can be said that in spite of the behaviour of the husband, and the reaction to that behaviour of the wife, the marriage has not broken down irretrievably."

This dictum was commented upon by Principal Judge Trapski in Barker v. Barker at p.N126 thus:

> "Mr Cooney has helpfully referred me to Ash v Ash (1972) 1 All ER 582 in which it is confirmed that whether or not a marriage has broken down irreconcilably is not simply a matter of assertion by one of the parties, it is a decision which must be made judicially on the basis of the evidence of all the circumstances surrounding the breakdown of the marriage (if there has been one) and what has happened since then, together with the attitude of the parties as expressed to the Court. There is of course the necessity for the Court to look at the question of credibility in this matter just as in any other, so that simple statements made by one party are not necessarily conclusive or binding upon this Court in this or in any other matter. It is a question for the Court to make a finding on the basis of the facts as they are presented to it, interpreting the law and applying that law to those facts."

Mr Carter submitted that the finding of Judge Kendall that there was no possibility of reconciliation, admittedly in the context of Section 19(2), amounted to a finding that, on the totality of the evidence, the marriage had broken down irreconcilably. He submitted that the Judge had not merely made a finding that there was no reasonable possibility of reconciliation, but that, having heard all the evidence, he came to the positive conclusion of irretrievable breakdown.

There was ample - almost overwhelming - evidence on which the District Court Judge could have come to this conclusion. The parties had been separated now for almost 10 years (9 years at the date of hearing before the District Court). Moreover, the husband had been and still is living in a de facto relationship which has produced two children. He has shown, by his application for dissolution, a determination to end what he regards as a failed marriage.

I consider that, although the learned District Court Judge was incorrect in finding that mere proof of living apart for two years entitles the applicant to dissolution, by his finding under Section 19(2), he found not merely that there was no reasonable possibility of reconciliation but that the marriage had broken down irreconcilably.

In coming to this conclusion, I do not ignore Mr Curry's submissions that Section 19(2) has a wider purview than Section 39. However, Section 19(2) in its terms specifically relates to dissolution proceedings. If there is no possibility at all of reconciliation - as distinct from a reasonable possibility of reconciliation - then that amounts to a finding that, in all the circumstances of this case, the marriage must have broken down irreconcilably. It is clear that the District Court Judge went through the Ash v. Ash exercise and came to his view that there was no possibility of reconciliation not merely on the assertions of the parties.

Accordingly, although the District Court Judge did apply the wrong test, in my view, his decision was the only one available on the evidence. One must express some sympathy for the wife who seems very genuine in her desire to retrieve this marriage. However, even under the old system, she would have had grave difficulty in successfully defending a divorce based on the 4 years apart ground.

The appeal is therefore dismissed. In the circumstances, I make no order as to costs. The order made in the Family Court is confirmed. In terms of Section 42(2)(c), the order of dissolution takes effect from the date of delivery of this judgment.

72.9 Bailey J.

SOLICITORS:

Russell, McVeagh, McKenzie, Bartleet & Co., Auckland, for Appellant

Connell, Lamb, Gerard & Co., Whangarei, for Respondent.