

5/ Dissolution of Marriage - Absence of cohabitation
effect on dissolution of marriage - whether resumption
of cohabitation being resumed.
Decree nisi granted Silver v Silver (1955) 2 All ER 1229 affirmed.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN FAMILY DIVISION

SUIT NO. F.D. 1992/B.155

Case referred to
Silver v Silver (supra)

BETWEEN

RUPERT ADOLPHUS BENJAMIN

PETITIONER

AND

DIANA DELORES BENJAMIN

RESPONDENT

Mrs. Jennifer Rowe of Alton E. Morgan and Co.,
Attorneys-at-law, for the Petitioner

Heard: 6th May and 3rd June, 1993

HARRISON J. (Ag.)

This is a husband's un-defended petition for dissolution of his marriage on the ground that the marriage has broken down irretrievably.

The evidence at the hearing of this petition revealed:

- 1) That the parties were married on the 24th July, 1990 at 19½ Slipe Pen Road, Kingston, by a Deputy Civil Registrar of Marriages.
- 2) That the respondent was a resident of the United States of America at the time of the marriage.
- 3) That the marriage was influenced by family members as it was their belief that by virtue of the respondent's residence in the United States of America this would have helped the petitioner to migrate to the United States of America.
- 4) That after one week of the marriage the respondent returned to the United States of America.
- 5) That the parties did not cohabit either within the jurisdiction or elsewhere.

- 6) That the respondent returned once to the Island in 1991 in order to attend a reggae show.

The petitioner further testified that at present no marriage relationship exists between himself and his wife and that there was no hope of a reconciliation.

Section 5 of the Matrimonial Causes Act, deals with suits for dissolution of marriages. It states inter alia:

"5(1) A petition for a decree of dissolution of marriage may be presented to the Court by either party to a marriage on the ground that the marriage has broken down irretrievably."

Separation has been defined in section 6 of the abovementioned Act as follows:

"6(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 of the parties.

(2) The parties to a marriage may be held to have separated and 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."

The question to decide then, is what effect if any, does the absence of the parties cohabiting have on the dissolution of the marriage? Section 5(2) of the Matrimonial Causes Act is relevant. It states inter alia, that:

"...subject to subsection (3), in proceedings for a dissolution of marriage the ground shall be held to have been established, and such decree shall be made if, and only if the Court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceeding the date of filing of the petition for that decree."

Subsection (3) provides as follows:

"A decree of dissolution of marriage shall not be made if the Court is satisfied that there is a reasonable likelihood of cohabitation being resumed."

The above subsection in my view, envisages a situation where the parties are cohabiting but there is a period of separation intervening. If there is real likelihood of the resumption of cohabitation the Court ought to be wary about decreeing the marriage dissolved. A fortiori, if there has been no cohabitation then the Court will look to see if section 5(2) has been complied with, that is, "... that the parties

have separated and thereafter lived separately and apart for a continuous period of not less than twelve (12) months immediately preceeding the date of filing of the petition ..."

The evidence before me has revealed that the parties separated one week after their marriage and that the petition was filed on the 1st day of September, 1992. Clearly, the petitioner would have satisfied the requirements of section 5(2). He has stated that there is no hope of them cohabiting in the future.

Now, was this a "sham marriage", that is, where the parties go through this form of marriage purely for the purpose of representing themselves married to the outside world with no intention of cohabiting?

The inference which can be drawn from the petitioner's testimony was that the marriage was one of convenience. It was to enable him easy access to the United States of America, the wife being resident there. All his plans of emigrating seem to have "evaporated into thin air". Is it therefore worth the while sustaining this marriage? I think not. There is no evidence to the contrary that the parties did not freely enter into the marriage contract, otherwise he would have most likely relied on a ground of nullity. It is my view and I so hold that they voluntarily entered into this contract of marriage with the intention of becoming man and wife. Their marriage has indeed broken down irretrievably and ought to be dissolved. In the words of Collingwood, J. in Silver v. Silver [1955] 2 All. E.R. 1229, "I can see no social advantage in insisting on the maintenance of a union which has been a mere travesty from the beginning." These words are quite apt in the present situation and I adopt them. Accordingly, there will be a decree nisi granted on the ground that the marriage has broken down irretrievably.