FAMILY

Recent Cases

Family Law—Dissolution of Marriage—Separation under One Roof—Irretrievable Breakdown of Marriage—Proof—Family Law Act 1975 (Cth), ss. 48, 49

The *Family Law Act* 1975 (Cth), in s. 48 (1) provides a single ground for dissolution of marriage: "irretrievable breakdown". The only way in which that ground can be established is by proof "that the parties separated and thereafter lived separately and apart for a continuous period of not less than twelve months immediately preceding the date of the filing of the application for dissolution of marriage" (s. 48 (2)). A decree must, however, be refused "if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed" (s. 48 (3)).

Section 49 (2) of the Act contains a statutory extension of the concept of matrimonial separation, by providing that "the parties to a marriage may be held to have separated and to have 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".

Separation under one roof is not new. It had previously arisen in relation to the element of separation in the law of desertion. In England, Lord Denning propounded the "two households" test in 1948 (*Hopes* v. *Hopes* [1949] P. 227). In Australia, the courts tended to look more deeply into the matrimonial relationship to determine whether it had come to an end or been abandoned (cf. *Tulk* v. *Tulk* [1907] V.L.R. 64, *Johnson* v. *Johnson* [1964] V.R. 604, *Crabtree* v. *Crabtree* (1964) 5 F.L.R. 307, *Morris* v. *Morris* [1972-3] A.L.R. 893). The formulation of s. 49 (2) of the *Family Law Act* 1975 sought to ensure that the courts would continue to act on the principles on which these cases had been decided. A finding that the consortium vitae had come to an end is after all synonymous with saying that the marriage has broken down.

The interpretation of s. 49 (2) and the sufficiency of evidence to establish it came before the Full Court of the Family Court of Australia (Evatt C.J., Demack and Watson JJ.) for the first time in *In the Marriage of Pavey (Husband) and Pavey (Wife)*. The decision is to be welcomed because of the guidance it gives on what often presents difficulties in practice. The Court discussed the considerations to which regard will be had in determining whether separation within the meaning of s. 49 (2) has been established, as well as the standard of proof that is applicable.

Pavey and Pavey was a wife's application for a decree of dissolution of marriage. The parties continued to live in the matrimonial home throughout the relevant period of twelve months, and indeed up to the time of the hearing of the proceedings. During that period the parties slept in separate rooms, and there was little social contact between them. The husband rarely ate with the family. The wife said that she had done the husband's washing and ironing because he "got nasty" if she did not do so. Other family activities, such as watching television, did not involve much association between the parties.

One circumstance that was to assume some significance was the fact that some time before the relevant period, the wife had obtained a maintenance order against the husband in the Magistrates' Court, because he had cut down her housekeeping allowance. He made the payments required under that order throughout the period in question.

On these facts, Fogarty J. had dismissed the application, because there had not been "a sufficiently substantial degree of repudiation of the various matrimonial rights and duties to amount to an abandonment by the parties of their matrimonial relationship", but there had been "a sufficient continuation of at least a minimum of those rights and duties to prevent this being established . . .".

The Full Court saw the essential issue as being whether the marriage had broken down irretrievably. The facts relied on to establish both s. 48 (2) and s. 49 (2) must be looked at in order to determine whether such breakdown has occurred. Common residence suggested continued cohabitation. In such cases, because of the inherent unlikelihood that the marriage had broken down, the court would seek some explanation as to why the parties had continued to live under the same roof. The crucial question was whether there had been "a change in their relationship, gradual or sudden, constituting a separation".

This would lead to a consideration of the central issue, namely the nature of the matrimonial

relationship that had subsisted between the particular parties, and the changes that had taken place in that relationship. The court would have to decide whether those changes are such as to support a finding that the marriage had broken down. The Full Court endorsed the approach of Watson J. (a member of the Court) in *Todd's* case (*No.* 2) (CCH Australian Family Law 75.079) that "what comprises the marital relationship for each couple will vary". Hence the attributes or incidents of the marital relationship that have been variously enumerated appear in the nature of a catalogue or check-list which is valuable, but not to be applied mechanically, including "living 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", again as was stated in *Todd's* case. To these the Full Court added "the nurture and support of the children of the marriage", in view of ss. 43, 61 and 73 of the Act.

The application of these principles should enable the court to answer the question whether there had been a separation, by considering whether "during the marriage, the parties treat as of little importance something which may ordinarily be a significant part of the marital relationship". If so, "that aspect of their life may be of little importance in determining whether they have separated".

The Full Court of the Family Court also endorsed the statement in *Todd's* case that "separation can only occur in the sense used by the Act where one or both of the spouses form an intention to sever or not to resume the marital relationship and act upon that intention, or alternatively act as if the marital relationship has been severed", although in doing so, it preferred to adopt a different terminology. Where *Todd's* case spoke of "destruction of the matrimonial relationship", the Full Court preferred the term "breakdown", because "destruction", like the terms "repudiation" or "sever", when discussing the marriage relationship, had the ring of fault about it. "Breakdown", on the other hand, was in keeping with the wording of the Act. Thus, it is suggested that the device of using irretrievable breakdown as the ground for dissolution and making it provable by separation for twelve months, rather than making that separation itself the ground, as was the case under the *Matrimonial Causes Act* 1959 (Cth) is not as circuitous as at first sight appears. It is more than a mere legal fiction or a device of construction. Under s. 48, proof of separation for twelve months raises a prima facie presumption that irretrievable breakdown has occurred. That presumption is negatived or rebutted if the court is satisfied that there is a likelihood of a resumption of cohabitation.

Where an application for dissolution of marriage involved a period of separation under the one roof, the Full Court said that this should be clearly stated in the application, and a concise statement of the facts relied upon as evidence of breakdown of marriage included. In the past, this kind of case had often turned on such services as cooking, washing and housework performed by a wife, but as more men turned their hands towards those activities their importance would tend to diminish. The indicators that were material in *Pavey and Pavey* were the occupation by the parties of separate bedrooms, the fact that there was little social contact between them, and the maintenance order obtained by the wife against the husband. This last-mentioned element was seen, not as any indication of fault on his part, but of the breakdown of an important aspect of the mutual society and protection that should have existed between the parties.

The other important aspect of *Pavey and Pavey* concerned the standard of proof, and the practice as to corroboration in cases involving s. 49 (2). As to the former, the Full Court came to the conclusion that although the *Family Law Act* 1975 lacked a provision like s. 96 of the *Matrimonial Causes Act* 1959, that "a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the court", the standard of proof under the *Family Law Act* was in fact the same. The Court reached this conclusion by applying the principles laid down by the High Court in *Briginshaw* v. *Briginshaw* (1938) 60 C.L.R. 336. As for corroboration which had been required by some judges in cases involving s. 49 (2), the Court did not wish to lay down an inflexible rule that it was necessary. It was a matter for the individual judge in each case. However, the applicant should always be ready to call such evidence. The Court felt that the primary judge had, inter alia, not attached sufficient weight to the aspect of the order for maintenance against the husband. The appeal was allowed, and the matter remitted to the Court below for granting a decree of dissolution.

The decision is to be welcomed, in view of the large number of applications based on separation under one roof that have been coming forward, some of them based on rather tenuous evidence. *Pavey and Pavey* will, it is hoped, prevent s. 49 (2) from becoming a fictive device for "quickie" divorces, which would have discredited the entire Act, its objects and the philosophy behind it.

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