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*Judgment: approved by the Court for handing down*
*(subject to editorial corrections)*

| *Ref: HIGF3570* |
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| *Delivered:* 18.01.2002 |


**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**BETWEEN:**

**ANTHONY JOSEPH DOORIS**

**Appellant;**

**-and-**

**ROSALEEN TERESA VERONICA DOORIS**

**Respondent.**

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**HIGGINS J**

This is an appeal from a decision of District Judge Collins sitting as a deputy County Court Judge in the divorce county court for the Division of Fermanagh and Tyrone, whereby the appellant's undefended petition for divorce was dismissed on the merits. The parties married in Newtownbutler on 8 January 1968. There are two children of the marriage both now aged over 18 years. On 6 March 2001 a petition in the name of the appellant (the petitioner) was issued alleging that the marriage had broken down irretrievably and citing as the reason that the parties to the marriage "have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a

decree being granted". The particulars also alleged that "the parties to the marriage reside at the same address, however they have been living separate lives since May 1997 and there has been no resumption of co-habitation since that date". The petition therefore prayed that the marriage be dissolved and that a separation agreement dated 29 September 2000 be made an order of the court. The petition recited that the petitioner is by occupation a company director and the respondent a housewife and that they last lived together as husband and wife at 5 Rathview, Sligo Road, Enniskillen and that at the date of the issue of the petition both resided at that same address. Thus at the hearing of the petition the petitioner required to prove that the parties had lived apart for a continuous period of at least two years prior to the 6 March 2001, that is from 6 March 1999. The petition was received by the respondent on 14 March 2001 at 5 Rathview, Sligo Road, Enniskillen and the acknowledgement of service with written replies to the questions asked, completed on the same date. The respondent signified her consent to a decree being granted on the ground that they had lived apart for two years and that the court would not be required to consider her financial position after divorce as a separation agreement was already in place. The petition was set down on 8 May 2001 and heard on 14 June 2001 and dismissed on the same date. Notice of Appeal to the High Court from the Dismiss in the County Court was given on 15 June 2001. On 10 July 2001 a Notice of Appeal of the same date was filed in the Court of Appeal. The Grounds of Appeal cited were –

The District Judge erred in law in that –

[a] she failed to take into account the following matters:

From in or about May 1997 the Petitioner and the Respondent had ceased to recognise the marriage as subsisting and neither the Petitioner nor the Respondent had any intention to return to the other spouse

[b] In support of the contention at (a), the District Judge did not give sufficient consideration to the following practical arrangements between the parties:

1. Marital intercourse between the parties had ceased.
2. The Petitioner and the Respondent slept in separate bedrooms.
3. The Petitioner was absent from the matrimonial home for approximately 200 days each year.
4. The Petitioner and the Respondent did not socialise together and therefore there was no society between them nor was there a recognition of a continuing relationship between them

[c] The District Judge gave undue weight to the following matters:

1. On occasion, the Respondent included the Petitioner's clothing in her laundry.
2. On occasion, the Petitioner and the Respondent ate meals at the same table.

Provision is made in the Matrimonial Causes (NI) Order 1978 for appeals from a divorce county court. Article 48(9) as amended by the County Courts (NI) Order 1980 provides:

> "(9) Without prejudice to Article 61 of the County Court (NI) Order 1980 (cases stated), rules of court shall make provision for an appeal to the Court of Appeal from any decree or order made by a divorce county court in the exercise of the jurisdiction conferred by any provision of this Order (other than Article 34,35, 38 or 40) or from the dismissal of any petition or application under such a provision (other than as aforesaid), upon a point of law, a question of fact or the admission or rejection of any evidence."

Thus an appeal from a divorce county court against the dismissal of an undefended petition lies to the Court of Appeal and not the High Court. The current rules are the Family Proceedings Rules (NI) 1996 Rule 5.1 of which provides -

> "5.1. R.S.C. Order 58(4) and Order 59 shall apply with the necessary modifications to an appeal to the Court of Appeal under Article 48(9) of the Order of 1978 or Article 40(2) of or paragraph 10 of Schedule 1 to the Order of 1989 from a decree or order of a judge in divorce county court proceedings as if the reference to the High Court in Order 59 rule 10(1) were a reference to a divorce county court."

Unlike the High Court the hearing of undefended petitions for divorce in a divorce county court are not recorded and therefore no transcript of the evidence or the judgment of the District Judge was available. Accordingly the District Judge was requested to and supplied her note of the evidence (and a copy of her original handwritten notes) together with a note of her reasons for dismissing the petition. I set out her judgment in full.

"This husband's Petition was grounded on two years separation and consent, with acknowledgement of service signed by the Respondent. The facts established were as follows:

The parties were married on 8. 1. 68 when he was aged 20 and she was aged 19. They were still living together but they slept in separate bedrooms as marital relations had ceased between them.

No special arrangements were made to divide up the house between them, beyond the Petitioner husband having his own separate study and the Respondent wife having her own bedroom and bathroom.

She did the cooking and cleaning, they both ate together in the kitchen at mealtimes, she did his laundry and he paid all the household bills. They were both on civil terms with each other.

He spent some 200 days a year working away from home but would return home for the remaining 165 days whereupon the above arrangements obtained.

Held:

This couple had reached an age and a stage in life where each slept apart and attended to their separate toilette but broke bread together in a state of harmonious coexistence.

She washed his clothes, cooked his meals and generally left him to his own devices.

He spent long periods away from the matrimonial home but always returned home, sat at the table to eat with her and paid all the household bills.

The necessary degree of separation had not been established. On the contrary, the state of affairs described by the Petitioner amounted to a peaceful accommodation being reached between them which was indicative of some degree of society and mutual regard.

> Perhaps not the felicitous meeting of minds one might hope to find in a happy marriage but equally not a unilateral or consensual withdrawal from the actual state of matrimony by either or both.
>
> Not a great marriage perhaps but a subsisting one.
>
> Petition dismissed.
>
> The parties entered into a 'clean break' separation agreement, dated 29 September 2000. A copy of this was before the divorce county court but not opened. Substantive Clause 1 recites that the parties have agreed and declared that they will continue to live separate and apart as if unmarried and free from marital control. Clause 5 recites that the husband will be entitled to reside in the former matrimonial home for as long as his full-time employment is primarily in Northern Ireland and clause 6 that after the expiry of two years living apart, each party would be at liberty to issue divorce proceedings on that ground. "

Article 3 of the Matrimonial Causes (Northern Ireland) Order 1978 provides that a petition for divorce may be presented to the court, by either party to a marriage on the ground that the marriage has broken down irretrievably. By Article 3(2) a 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 facts set out in Article 3(2)(a)-(e). Article 3(2)(d) is the relevant one which states:

> "(d) That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (hereafter in this Order referred to as 'two years separation') and the respondent consents to a decree being granted."

Article 3(3) of the Matrimonial Causes (Northern Ireland) Order states:

> "On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent, and, subject to paragraph (4), the court shall not grant a decree of divorce without considering the oral testimony of the petitioner."

And Article 3(5) of the Matrimonial Causes (Northern Ireland) Order states:

> "If the court is satisfied on the evidence of any such fact as is mentioned in paragraph (2), then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, subject to Articles 4(2), 5(3) and 7, grant a decree of divorce."

Article 4(5) and (6) state:

> "(5) In considering for the purposes of Article 3(2) whether the period for which the respondent has deserted the petitioner or the period for which the parties to a marriage have lived apart has been continuous, no account shall be taken of any one period (not exceeding six months) or of any two or more periods (not exceeding six months in all) during which the parties resumed living with each other, but no period during which the parties lived with each other shall count as part of the period of desertion or of the period for which the parties to the marriage lived apart, as the case may be.
>
> (6) For the purposes of Article 3(2)(d) and (e) and this Article a husband and wife shall be treated as living apart unless they are living with each other in the same household, and references in this Article to the parties to a marriage living with each other shall be construed as references to their living with each other in the same household."

Rule 2.40 of the Family Proceedings Rules (Northern Ireland) 1996 state that subject to certain exceptions, any fact required to be proved by the

evidence of witnesses at the trial of a cause begun by petition, shall be proved by the examination of witnesses orally.

Thus the parties to a marriage shall be treated as living apart unless they are living with each other in the same household. References to parties to a marriage living with each other shall be construed as references to their living with each other in the same household and as husband and wife. Thus if the parties are living together in the same household they are not living apart (which is the antithesis of living together). The word "household" requires to be contrasted with the word "house" which is not used in the legislation. The word "house" denotes something physical, whereas the word "household" has an abstract meaning. The Oxford English Dictionary defines "household" as – the 'holding' or maintaining of a house or family, as well as the inmates of a house collectively.

Miss O'Grady in her ably presented submissions based on her commendable and well researched skeleton argument, analysed the meaning of the words 'living apart' as considered in various authorities from several jurisdictions. She submitted that the facts relating to the arrangements between the parties, the separation agreement and the long absences of the petitioner abroad combined to justify a finding that the parties did indeed live apart despite living in the same residence. She pointed in particular to the separate bedrooms, the lack of marital relations, the decision to end the marriage as communicated through the separation agreement and the nature and degree of separate accommodation used by them. It is necessary to

consider these matters in the overall context of the living arrangements maintained by the parties always remembering that this court cannot go beyond or behind the findings of fact made in the divorce county court.

In a typical case under Article 3(2)(d) the parties or one of them will have taken up residence in separate accommodation and will thereby have established completely separate households in different locations. In those cases there will be no doubt they are living apart. However it is not uncommon for parties to a marriage, after they believe it has irretrievably broken down, to live under the same roof. The reasons for this may be many, but usually it is for financial reasons, or for convenience or perhaps because neither party wishes to be the one to leave. It is well recognised that even if the parties continue to live under the same roof, for whatever reason, they may nonetheless still be living apart. However, whether they are in every case also living apart, may not be so clear-cut. In such cases the parties seeking the dissolution of their marriage must establish that they are living apart in the sense that they are living in two separate households. This is because the Matrimonial Causes (Northern Ireland) Order provides that a husband and wife shall be treated as living apart unless they are living with each other in the same household - (see Article 4(6)).

Miss O'Grady referred to a number of authorities and in particular to Santos v Santos (in which Sachs LJ reviewed a number of those cases) and to Blair v Blair (Family Division, High Court, Northern Ireland, February 2000 unreported) in which I considered those authorities in the context of the

legislation in this jurisdiction. Unlike many of the other authorities referred to, Blair v Blair presented the identical issue as this case, namely whether the evidence supported the contention of the petitioner that the parties, though living under the same roof, were also living in separate households. In that case I said -

> "Where the parties occupy the same residence then the party to the marriage seeking the dissolution of the marriage is required to establish by evidence that the parties were in fact living apart although living in the same residence. Where the spouses are living under the same roof they can be regarded as living apart only if they are living in two households within the same residence. There must be established a degree of separation necessary to satisfy the court that they are indeed living apart in separate households, albeit under the same roof. In Mouncer -v- Mouncer 1972 1 AER at 289 it was held that they will not be living apart if they share their meals and living accommodation, even though they sleep in separate rooms, no longer have sexual intercourse and largely live their own lives."

Counsel sought to rely on Santos -v- Santos 1972 2 AER 246. In this case the meaning to be attributed to the words "living apart was considered. Sachs LJ reviewed the authorities in England and Wales and in other common law jurisdictions. The issue in that case was whether one party who lived in Spain and the other who lived mainly, but not exclusively, in England, were despite several periods of close cohabitation, living apart. It was held that mere physical separation without more did not constitute living apart. This "something more" they recognised as the consortium vitae (in contrast to divortium a mensa et thoro) which comprised different elements, the presence or absence of which would go to show more or less conclusively whether the

matrimonial relationship does or does not exist - (see the decision of the High Court of Australia in Main -v- Main 1949 78 CLR 636 at 642 citing the observations of Cussen J in Tulk -v- Tulk 1907 VLR 64 at 65, ). To quote the words of Crisp J in Collins -v- Collins 1961 3 FLR 17 at 22:

> "… The court must look for a definite termination of the consortium before the physical fact of being apart can be said to constitute separation."

In Main -v- Main supra the court identified the elements which make up the cosortium as - marital intercourse, the dwelling under the same roof, society and protection, support, recognition in public and in private and correspondence during separation.

In Santos -v- Santos supra it was held that it was not necessary for a spouse to communicate his or her decision to live apart to the other party provided they were indeed living separately. The purpose of the fact of separation in this instance, for two years, is to provide evidence that the marriage has indeed broken down irretrievably. This of itself justifies a restrictive interpretation of the words "living apart" by requiring evidence that consortium was at an end during the whole of the period. Where parties remain living in the same residence, evidence is usually given that they live entirely separate lives. This may include - not sharing the same bedroom, living in their own separate quarters within the residence, not eating together, not cooking for one another or not shopping for one another, not socialising together, and not communicating with each other.

Thus in cases in which the parties continue to live under the one roof the question for the court is whether the evidence of the petitioner demonstrates that consortium was at an end and that there was that degree of separateness in their lives which justifies a finding that they were living in two separate households (albeit under the same roof) and were indeed "living apart". Whether the parties are living apart in separate households is very much a question of fact and degree. However the evidence must establish an absence of togetherness which is normally associated with living together in matrimony, as well as the necessary degree of separateness in the manner in which they conduct their lives. Once the fact that the parties are living apart, in that sense, has been established, the court must then go on to consider whether the marriage has irretrievably broken down and decide whether or not to dissolve the marriage.

In this case the parties did not share the same bedroom and the petitioner had his own study in the house. Otherwise they lived much as before. The respondent cooked the meals and cleaned the house and laundered his clothes. They ate together and were on civil speaking terms. He paid all the household bills. Miss O'Grady sought to rely on the fact that the petitioner was absent abroad for many consecutive days in the year. However that fact of itself or in conjunction with the other facts is insufficient to establish that they were living apart. He was abroad on business. Many married couples still do not live apart, despite the fact that one is overseas on business for a substantial period in any year. Their intention to live apart as

expressed in the separation agreement does not alter the fact that he was abroad for business reasons and not to enable them to live apart. The evidence adduced did not establish that degree of separate living which 'living apart' for the purposes of the Matrimonial Causes Order required. Miss O'Grady submitted that the District Judge failed to take into account that the parties no longer recognised the marriage as subsisting and that they had no intention to return to live as spouses. These factors are not relevant to the issue whether the parties are in fact living apart. They are relevant to the issue of irretrievable breakdown once the fact of living apart has been established. That they slept in separate bedrooms and did not have marital relations are facts which are relevant to the issue of living apart, but of themselves are insufficient to prove that they were in fact living apart. The fact that they ate meals together and that the respondent laundered his clothing are facts that are relevant to the issue whether the parties to the marriage are living apart and are required to be taken into consideration. In reaching the conclusion that she did, the District Judge did not err in law in her approach to the facts nor did she give insufficient or undue weight to the facts which she found. We agree with the conclusion which she reached based on the facts which she found. The appeal will be dismissed.

Petitions for divorce grounded on the parties living apart for two years or more in which the parties still live under the same roof require careful consideration, which the District Judge gave to this petition. The degree of separation or separate living required to establish as a fact that the parties are

living apart in different households cannot be overstressed. Various elements will go to prove it. The potential circumstances are so great that it is not possible for this court to state categorically what circumstances will ultimately prove 'living apart in separate households' and what will not. Some factors will be common to most situations, for example, sleeping in separate bedrooms and the absence of marital relations, though the latter could occur yet the parties are in fact living apart. Cases in which the parties have divided the premises into 'his' and 'hers' into which the other does not stray, may, depending on the other circumstances, more easily lead to a conclusion that the parties are in fact living apart in separate households. In petitions grounded on separation for periods of two or five years and in which the parties to the marriage have during the whole or any part of the relevant period lived under the same roof or in the same residence and it is proposed to rely on evidence that the parties were nonetheless living apart, the facts relied upon to establish living apart in separate households for the whole or part of the relevant period should be pleaded separately in the Petition in sequential numbered paragraphs. Thus the court and the parties will be aware of the allegation and what is alleged in support of it.

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**BETWEEN:**

**ANTHONY JOSEPH DOORIS**

**Appellant;**

**-and-**

**ROSALEEN TERESA VERONICA DOORIS**

**Respondent.**

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**J U D G M E N T**

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**HIGGINS J**

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