

1982 February 6

[A. Loizou, J.]

GORDON FREDERICK CATLIN,

Petitioner,

v.

BERYL CATLIN,

Respondent.

(Matrimonial Petition No. 12/79).

Matrimonial Causes—Divorce—Desertion—Burden of proof—Matrimonial home—Right to decide where matrimonial home shall be.

5 The parties to this petition were married in August, 1964
at a Register Office in England under the provisions of the
Marriage Act 1949. After their marriage they lived at various
addresses in England until they came to Cyprus in April, 1972
and lived in a jointly owned flat at Riviera Court, Famagusta.
They later bought a house at Kanary str. Famagusta, brought
their furniture over from England and arranged to leave the
10 Riviera Court flat and reside at the new house which was big
enough to receive their furniture. This house was ready by
October, 1972 and the petitioner moved and settled therein
but the respondent refused to do so. The parties continued
living apart until the second phase of the Turkish invasion in
15 August 1974 when, together with other British nationals they
were evacuated to Anzio camp at Dhekelia. The petitioner
stayed there with an elderly gentleman, but the respondent and
the two children of the marriage stayed in another hut. In
January, 1975 the respondent left the camp with the children
20 without petitioner's knowledge and consent and the petitioner
continued staying at the camp until 1976, when he went and
lived at a house in Larnaca where he lives until now. It was
later found out that the respondent went to live in the Turkish
occupied area of Cyprus and was not prepared to stay with
25 petitioner allegedly due to his conduct in connection with
their joint bank account.

Upon a petition by the husband for dissolution of marriage on the ground that the respondent has deserted him since November, 1972:

Held, that the legal burden of proof, where a husband petitions for a decree of divorce, is on the husband to prove that his wife deserted him without cause; that on the facts of this case and looking at the totality of the circumstances this burden has been discharged by the petitioner—husband as on the evidence the respondent—wife has deserted her husband without cause since January 1975; accordingly the petitioner is entitled to a decree of divorce on the ground of desertion.

Held, further (after dealing with the principles governing the right of the parties to decide where the matrimonial home shall be—vide pp. 121–22 post), that considering the overall situation prevailing in the Island and the particular circumstances of this case, including the excuse given by the respondent not to join her husband at Larnaca, this Court finds that her refusal to join him is unreasonable.

Decree nisi granted.

Cases referred to:

Dunn v. Dunn [1948] 2 All E.R. 822 at p. 823.

Matrimonial Petition.

Petition by the husband for divorce on the ground of the wife's desertion.

M. Christophides, for the petitioner.

G. M. Nicolaidis, for the respondent.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. This is a husband's petition for divorce on the ground of desertion.

The petitioner and the respondent are both British citizens and were married on the 4th August, 1964, at the Register Office in the County Borough of Liverpool in U.K. under the Provisions of the Marriage Act of 1949. Photocopy of their marriage certificate has been produced as exhibit 1. After the said marriage they lived at various addresses in the United Kingdom until they came to Cyprus on the 1st April, 1972 and lived in a jointly owned flat at 24, Riviera Court, John Kennedy Avenue, Famagusta.

After taking up residence in the said flat they bought a house at No. 15, Canary street, Famagusta. They brought their furniture over from England and it was arranged to leave the Riviera Court flat and reside at the new house which was big
5 enough to receive their furniture. This house was ready by October and the petitioner moved and settled therein but the respondent refused to do so.

They have two children, namely Jennifer-Ann, born on the 6th July 1958 and Timothy Gordon, born on the 21st January
10 1965.

The ground of divorce relied upon in these proceedings is the desertion of the petitioner by the respondent since November 1972, that is the time when the petitioner set up home at Canary street and the respondent refused to follow him, as alleged by
15 him and stayed on at the Riviera Court flat with the children.

After November the petitioner had a nervous breakdown, spent about two weeks at Dr. Kyriakides clinic, then went to London and returned to Cyprus early in 1973. He stayed for a while at the "King George" hotel as the house at Canary street was cold but after a few weeks he went and lived there.
20 It was his version in the witness-box that he tried during 1973, more than once, to go to the flat to see the respondent but he was not allowed in, although the respondent during that time used to go and prepare meals for him at Canary street, but she
25 would not stay there and she would not like the petitioner to go and live with her at the flat. He, however, stated in evidence that he had asked her many times to go and live with him but she refused.

During the first phase of the Turkish invasion he apparently
30 left the house at Canary street which was too near the line of confrontation in that town and when he returned to Famagusta after that phase he was invited by the respondent to the flat for a meal, he asked if he could sleep there but she refused to let him do so and stayed at a flat belonging to an English judge.
35 After the second phase of the Turkish invasion together with other British nationals they were evacuated to Anzio camp at Dhekelia. He stayed there with an elderly gentleman, but his wife, his daughter and son stayed in another hut. The respondent, however, left the camp in January 1975 with her children

without his knowledge and consent, whereas he stayed on at the camp until 1976, when he went and lived at No. 4, The 15th of January street, Larnaca, where he lives until now. The petitioner found out through the special branch of the British Military Police, that she went and lived in the Turkish occupied area. According to the respondent herself, she first went and lived at the "Sarai" hotel in Nicosia, then at the "Altun Tabya" hotel in the old city and then in the house of Henrietta Aizenova, in that town who still lives, according to the respondent, in a refugee camp. She admitted in evidence that she was not prepared to stay with him as she might lose the money which he withdrew from a joint account in England, and in respect of which proceedings have been instituted by her against him and the Bank of Cyprus, with which the money amounting to £25,000.- was lodged in their joint names.

On the evidence before me I have no difficulty in concluding that to say the least, since January 1975, the respondent/wife has deserted her husband without cause. He asked her to join him and she clearly refused to do so. On this finding, and as desertion existed not merely for a period of at least three years, immediately preceding the presentation of the petition, but for more than that, and to be more specific, since January 1975, the petitioner is entitled to a decree of divorce on that ground. I need not therefore deal with the situation as it existed before January 1975.

Counsel for the respondent has invited me to rule that this petition could not succeed because in paragraph 6 of the petition it has not been alleged that there has been constructive desertion but merely desertion since November 1972, and that, as stated in the White Book for the year 1954, p. 2346, constructive desertion had to be clearly pleaded. My aforesaid approach of the case, however, renders a decision on this point unnecessary as in any event even for the period between 1972—1974 what was claimed did not amount in Law to constructive desertion which arises only in the case where it is claimed that one spouse is forced by the conduct of the other to leave home.

A question, however, that may be relevant to be examined in relation to this case, though not expressly raised, is whether the petitioner has discharged the legal burden, which in the case

where a husband petitions for a decree of divorce on the ground of his wife's desertion is upon him to show that she deserted him without cause.

5 In the case of *Dunn v. Dunn* [1948] 2 All E.R. p. 822 Lord Denning had this to say on this issue at p. 823:

10 "The legal burden throughout this case is on the husband, as petitioner, to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the Court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal; and, indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the Court has still, at the end of the case, to ask itself: Is the legal burden discharged? Has the husband proved that she deserted him without cause?"

20 On the facts of the present case and looking at the totality of the circumstances which have been established by the evidence as accepted by me, I have come to the conclusion at the end of the case that this burden has been discharged by the petitioner/husband.

25 The case of *Dunn v. Dunn* (supra) is also helpful on another issue as to who has the right to decide where the matrimonial home shall be and Lord Denning further down in the same page had this to say:

30 "I want to say a word also on the proposition that a husband has the right to say where the home should be, for, indeed, it is the same fallacy in another form. If that were a proposition of law it would put a legal burden on the wife to justify her refusal, but it is not a proposition of law and I am sure Henn Collins, J., in *Mansey v. Mansey* did not intend it as such. It is simply a proposition of ordinary good sense arising from the fact that the husband is usually the wage-earner and has to live near his work. It is not a proposition which applies in all cases. The decision

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where the home should be is a decision which affects both the parties and their children. It is their duty to decide it by agreement, by give and take, and not by the imposition of the will of one over the other. Each is entitled to an equal voice in the ordering of the affairs which are their common concern. Neither has a casting vote, though, to be sure, they should try so to arrange their affairs that they spend their time together as a family and not apart. If such an arrangement is frustrated by the unreasonableness of one or the other, and this leads to a separation between them, then the party who has produced the separation by reason of his or her unreasonable behaviour is guilty of desertion. The situations which may arise are so various that I think it unwise to attempt any more precise test than that of unreasonableness. Views as to unreasonableness may vary, and the decision is essentially one for the trial judge with which this court should not interfere unless the conclusion is one which could not reasonably be drawn. If a wife refuses to join her husband at a place when he is ready to receive her, that is, of course, a factor of great weight, but it is not necessarily decisive".

In this case I have come to the conclusion that considering the overall situation prevailing in the Island and the particular circumstances of this case, including the excuse given by the respondent/wife not to join her husband at Larnaca, I find that her refusal to do so is in the circumstances unreasonable.

For all the above reasons a decree nisi in favour of the petitioner/husband on the ground of desertion by the respondent/wife is granted, but in the circumstances I make no order as to costs.

Decree nisi granted. No order as to costs.