

Divorce

Melnyk v. Melnyk, [2010] MBQB 121

Facts:

Patricia and Fred married in 1985. They had two children, a son and a daughter. In 1994 Fred admitted that he had had an affair with a co-worker. The marriage was not the same after that. Patricia would sleep with their 3 year-old daughter or on the couch. There was also a lot of shouting. But, Patricia continued to do the cooking, cleaning and laundry. She and Fred shopped together. The financial arrangements stayed the same. Patricia and Fred socialized with family and friends as before.

On December 6, 2006, Patricia moved into a basement bedroom. On August 11, 2007 Patricia and the daughter moved into a home owned by Patricia's male friend. Patricia started divorce proceedings in January 2008. Patricia said she and her husband separated on August 11, 2007 when she and the daughter moved out. Fred said they separated December 2006, when Patricia moved to the basement and that they were living separate and apart under the same roof. Fred also claimed that Patricia told him in December of 2006 that they were separated.

The Issue:

The judge had to decide when Patricia and Fred actually separated because it affected property division.

The Decision:

The judge reviewed previous cases dealing with living separate and apart under the same roof. Those cases focused on the physical living arrangements as well as whether one or both had formed the intention to live separate and apart, "thereby destroying the consortium of the married relationship."

The judge believed Patricia. The judge found that Patricia and Fred had shared the family accommodation from the date of their marriage up until August 11, 2007 when Patricia and the daughter moved out. Patricia and Fred did not share a bedroom and rarely had sex, but they communicated, shared meals, exchanged gifts and entertained visitors. Patricia continued to do the cooking, cleaning and laundry. Their financial arrangements stayed the same until August 2007. The judge decided that they were not living separate and apart under the same roof.

Discussion Questions:

- 1) Do you agree with the judge's decision? Why?
- 2) Think of a fact situation where a husband and wife would be living separate and apart under the same roof.
- 3) Looking at the grounds for divorce based on the breakdown of the marriage, are there any other grounds either Patricia or Fred could have used to apply for a divorce at any other time in their marriage?

Relevant Law:

Divorce Act

Sections 8

Resources:

You can read the entire case at:

<http://canlii.ca/t/29wmq>

You can find the *Divorce Act* at:

<http://laws-lois.justice.gc.ca/eng/acts/d-3.4/>

Relevant Law:

Divorce Act

Divorce

8 (1) A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage.

Breakdown of marriage

(2) Breakdown of a marriage is established only if

(a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; or

(b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,

(i) committed adultery, or

(ii) treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouse.

Calculation of period of separation

(3) For the purposes of paragraph (2)(a),

(a) spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other; and

(b) a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated

(i) by reason only that either spouse has become incapable of forming or having an intention to continue to live separate and apart or of continuing to live separate and apart of the spouse's own volition, if it appears to the court that the separation would probably have continued if the spouse had not become so incapable, or

(ii) by reason only that the spouses have resumed cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose.