

“Quickie Divorce”: Legal Impediments in Malaysia

Daleleer Kaur Randawar and Sheela Jayabalan

Faculty of Law, Universiti Teknologi MARA, 40450 Shah Alam, Selangor, Malaysia

e-mel:dolly_uitm@yahoo.com

Abstract

A marriage is a sacred union between a man and a woman which brings about intense happiness, an experience of positive emotions with a deep level of life satisfaction. Couples who enters into a contract of marriage, definitely intends to make their marriage a successful long lasting marriage. However, not all are fortunate enough to enjoy a long lasting marriage. Some are even more unfortunate to suffer a breakdown of marriage in the early years of the marriage, which is within two years of their marriage. Divorce can be ugly at the best of times, but when it happens at an initial stage of a marriage, which is within two years of a marriage, the court often becomes even more aggressive and adversarial. Only in exceptional circumstances would a marriage be dissolved within two years of the marriage. This article attempts to explore to what extent the courts will grant a divorce on the exceptional circumstances. Discussion will explore as to how the law reconciles and expends these exceptional circumstances in marriage which petitions for divorce within this specified period. Research methodologies applied are analysis of the primary and secondary materials and comparative study. Analysis of the data will be done via examining statutory provisions and case law. Discussion reveals that although there is a need to prove exceptional circumstances in order to petition within two years of marriage, in reality it may be difficult to bring the case to court unless these exceptional circumstances is proven.

Keywords: Marriage, Divorce, Time, Exceptional

Introduction

A marriage is a sacred union between a man and a woman which brings about intense happiness, an experience of positive emotions with a deep levels of life satisfaction. According to Lord Penzance ‘I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others’. (Hyde v Hyde and Woodmansee, 1886 LR 1 P & D 130) A husband and wife should live together for all eternity. “Till death do us part” is the famous vow in the standard Christian marriage rite. However, to our surprise, people change and this casts doubt on the idea of eternal marriage. Not many couples grow old together in a marriage. Some are quite unfortunate to experience a breakdown of marriage within two years of their marriage. A breakdown of marriage can be very devastating and painful for some. A divorce becomes even more painful when it happens at the very initial stage of a marriage. Any couple would not want to experience a divorce.

In Malaysia, parties are only allowed to petition for a divorce after two years of a marriage. Only on exceptional circumstances, courts will allow a petition of divorce within two years of a marriage. Thus, this article attempts to explore to what extent the court will grant a divorce on the exceptional circumstances. Discussion will explore as to how the law reconciles and expends these exceptional circumstances in a marriage which petitions for divorce within the two years period.

Grounds to Petition for Divorce

Law Reform (Marriage and Divorce) Act 1976 (hereinafter referred as LRA) provides for grounds to petition for a divorce by way of conversion, by mutual consent and the irretrievable breakdown of marriage. The LRA provides that where one party to a marriage has converted to Islam, the other party who has not converted may petition for a divorce. (Section 51 LRA) This section prohibits any petition before the expiration of the period of three months from the date of the conversion.

(Section 51 LRA)

Divorce by mutual consent occurs whereby both the husband and wife mutually agrees to end their marriage by presenting a joint petition to the court. (Section 52 LRA) The court being satisfied that proper provision has been made for the support, care and custody of the children may grant a decree of divorce as it thinks fit. (Section 52 LRA) In spite of that, this joint petition can only be done after the expiration of two years from the date of their marriage.

Under irretrievable breakdown of marriage, the court hearing such a petition must be satisfied that the alleged facts to have cause or lead the marriage to irretrievably broken down and that it is just and reasonable to grant a divorce. (Section 53 LRA) The alleged facts as proof of breakdown of marriage are set out as following: (Section 54(a);(b);(c);(d) LRA)

- a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
- b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
- 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.

The Law on Divorce with regards to “Specified Period”

The general rule is that no petition for divorce may be presented to the court unless at the date of presentation of the petition two years have expired since the date of the marriage. (Kamala M. G. Pillai, 2009) The LRA clearly prohibits any petition for a divorce from being presented within two years of a marriage. It is stated in Section 50(1) of the LRA states that no petition for divorce shall be presented to the court before the expiration of the period of two years from the date of the marriage (hereafter in this section referred to as “the specified period”) The specified period refers to the period of two years from the date of the marriage. (Mimi Kamariah Majid, 1999) This prohibition under the LRA provides a restriction to the parties in a marriage to petition for a divorce within two years of their marriage.

Similar restriction is also available in cases involving conversion wherein under section 51 of the LRA, it is clearly stated that no petition shall be presented before the expiration of the period of three months from the date of the conversion. Likewise, even dissolution by way of mutual consent must be done after the expiration of two years of their marriage. The rationale for this is the need to provide for a restriction and a useful safeguard against irresponsible or trial marriages. This directly also discourages an attitude that divorce is not the last resort but obvious way out when things goes wrong. Only in exceptional circumstances would a marriage be dissolved within two years of the marriage.

Nevertheless, a judge may allow the presentation of a petition for divorce within the specified period on the ground that the case is one of exceptional circumstances or hardship suffered by the petitioner. (Section 50(2) LRA) However, in determining the application the judge shall have regard to the interests of any child of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties during the specified period. (Section 50(2) LRA).

With the existence of this restriction, couples are not allowed to simply rush into a divorce. Almost everyone will suffer some form of disappointment and frustration within the first few months of a marriage. The romance in a marriage will seem to fade within time. In a marriage, all married couples will go through a period of adjustment. This period of adjustment starts from the end of the honeymoon and may last to two years depending on individuals. This restriction requires couples to survive through this period of adjustment and only in exceptional circumstances the courts are to entertain any divorce petitions.

The Meaning of Exceptional Circumstance or Hardship

It seems to suggest that, although with the existence of this strict rule concerning specified period, judges may at times allow a divorce petition to be filed within two years of marriage. Section 50 of the LRA explains that a married couple cannot ask for a divorce within two years of marriage. However, on certain exceptional circumstances, courts may allow married couples to petition for a divorce within two years of a marriage. (Norliah Ibrahim, Najibah Mohd. Zin, 2011) Does this show some sort of leniency on the part of the judges? Judges based their reasoning on certain exceptional circumstances or hardship suffered by the petitioner. The issue that arise is what is meant by the term ‘exceptional circumstances and hardship’?

Position in England

It is seen that the meaning of this terms seems to differ in every cases depending on the facts of the case and on the judges as well. In determining ‘exceptional circumstances and hardship’ English cases are mostly referred by judges. However, it must be noted that in England divorce was governed by the Matrimonial Causes Act, 1937 whereby the restriction period to petition for a divorce was three years. Between 1937 and 1984 a petition could not be brought within the first three years of the marriage, unless it was shown that the case was one of exceptional hardship suffered by the petitioner or one of the depravity on the part of the respondent. (Probert, 2003) In 1984 Parliament accepted that this provision was unsatisfactory, not least because it involved the making of distressing and humiliating allegations in more than a thousand cases each year. (Probert, 2003) But it was though desirable to retain some restrictions on the availability of divorce early in marriage so as, symbolically at least, to assert the state’s interest in upholding the stability and dignity of marriage, and to prevent divorce being apparently available within days of the marriage ceremony. (Rebecca Probert)

The later legislation accordingly provides (see Section 3 of the Matrimonial Causes Act 1973) that no petition for divorce shall be presented to the court before the expiration of the period of one year from the date of the marriage. (Probert) Hence, the later Act which is the English Matrimonial Causes Act 1973, provides under section 3 that divorce must not be presented within 1 year of the marriage.

The law draws its basis from the English case of *Bowman v Bowman*, ([1949] 2 All ER 127) wherein a wife sought leave of the court on the ground of exceptional hardship suffered by her or exceptional depravity on the part of the husband, within the meaning of Matrimonial Causes Act, 1937, section 1(1) to present a petition for divorce although three years has not passed since the date of the marriage. In her affidavit, she alleged depravity of the husband and one of which alleged hardship which would be suffered by her by reason of the fact that a material witness was about to leave the United Kingdom. That witness’s evidence would not be available except on commission unless the petition was presented immediately. The trial court granted leave to the wife looking at the departure of material witness from the United Kingdom and the conduct of the husband as exceptional hardship suffered

by her. The husband appealed. The Court of Appeal affirmed the trial court’s decision.

It was explained in this case that cruelty, by itself is not exceptional, but if it is coupled with aggravating circumstances, for instance, drunkenness and neglect, or if it is exceptionally brutal or dangerous to health, then, even if it does not depict exceptional depravity on the part of the respondent, it does, at least cause exceptional hardship to the applicant. If it is compounded with perverted lust, it depicts exceptional depravity on the part of the respondent. (See Denning LJ in the case of *Bowman v Bowman* (1949) 2 All ER 127, p. 128-129)

In this case, the wife, in her affidavit in support of her application, charged her husband not only with adultery, but with cruelty and perverted lust. She had consulted a psychiatrist about her husband. There was no clear chance of reconciliation between the parties. (See Denning LJ in the case of *Bowman v Bowman* (1949) 2 All ER 127, p. 128-129)

In another English case of *V v V* ([1966] 3 All ER 493) within two to three weeks of the marriage, the husband seriously assaulted the wife by striking her on the head with a bottle with sufficient force to break it. She left the house subsequently, but upon reconciliation, she returned to the matrimonial home. Within the next month upon returning home, she discovered that the husband had committed adultery on a couch in the matrimonial home. Thereafter, she slept in another room, but two or three weeks later, while she was pregnant, the husband hit her and punched her with sufficient force to cause bruising. She left the house. She applied for leave to present a petition for divorce within the three year period on the grounds of her husband’s exceptional depravity. However, the court dismissed her application for leave. She appealed to the Court of Appeal and the Court granted her the leave to petition for divorce within the three year period on the grounds that the charges against the husband for cruelty and of adultery were of an exceptionally grave nature and there was also no possibility of reconciliation between both parties.

In this case, the Judge explained that this was not a case in which only one matrimonial offence was committed. This husband stands charged not only for cruelty, but also for adultery. Moreover, the charges made (assuming them to be true) were of an unusually serious nature. The cruelty alleged, particularly the assault with the bottle, was of a peculiarly serious character; and; as pointed out, could have involved the husband in criminal proceedings. Moreover, the adultery complained of was committed in peculiarly revolting circumstances. In both

aspects the offences charged are of an exceptionally grave nature. (See also *Wilmer LJ* in the case of *V v V* (1966) 2 All ER 493, p. 495)

Impotency and homosexuality was held to be hardship suffered by a wife in the case of *C v C* ([1979] 1 All ER 556). In this case the wife had petitioned for a divorce on the ground of exceptional hardship and depravity to her by her husband. Just few weeks after the marriage, the husband had become impotent and sexual intercourse ended between the couple. The wife later found out that the husband was a homosexual. The trial court at first refused to allow the petition for divorce. However, the wife appealed and the courts allowing her appeal held that it was hardship suffered by the wife to wait for three years to end the marriage.

Hence, the law is seen to value marriage and impose a stumbling block to the speedy ending of an early marriage. This restriction deters couples from opting out of a marriage soon. On this point, *Bucknill J* in *Fisher v Fisher* (1948) 263 p. 265 quotes:

“The provision that the petition shall not be presented until three years have passed was enacted not only to deter people from rushing into an ill-advised marriage, but also to prevent them from rushing out of marriage as soon as they discovered that their marriage was not as they expected.”

Position in Malaysia

The general law provides that parties can petition for a divorce within the two years of marriage if it can be proved that there are exceptional circumstances of hardship suffered by either party. This two year bar will cause difficulty for couples who face violence, torture and abuse immediately after marriage. Although parties will need to prove exceptional circumstances in order to petition within two years of marriage, in reality it may be difficult to bring the case to court unless these exceptional circumstances exist.

Similarly, in *Kiranjit Kaur Kalwant Singh v Chandok Narinderpal Singh*, (2010) 3 CLJ 724 the plaintiff (wife) applied under Section 50(2) of the LRA seeking permission to present a petition for divorce to the court before the expiration of the period of two years from the date of the marriage to the defendant (husband). The issue to be considered was whether there were exceptional circumstances or hardship allowing the plaintiff to present the petition to the court before the expiration of the two year period.

The court held in this case that the defendant’s conduct had caused deep humiliation and untold embarrassment to the plaintiff since the blog posted by the defendant on the internet operated in a borderless realm and would continue to exist until the creator of the blog removed it. The defendant’s slanderous statement equating the plaintiff to a prostitute and a swindler had damaged the plaintiff’s reputation as a woman and a human being, and would continue to haunt and harass the plaintiff even after the blog is removed from the internet. The experience extended over a period of time from the past into the future. Under such circumstances, interpreting the said provisions in accordance with the modern development of information and technology should be considered. ([2010] 3 CLJ 724-725)

Therefore, in the above case, the court explained that the interpretation of “exceptional circumstances” should not be restricted or limited to just physical or mental abuse or cruelty, but must also include any circumstances or hardship caused by any slanderous statements made on the internet. It was clear that the hardship suffered by the plaintiff was out of the ordinary and fell within the definition of exceptional circumstances as envisaged by both Section 50(2). The court also concluded that the plaintiff suffered mental stress and nervous breakdown due to the said hardship.

In *Tan Ai Hoon v Lim Wei Kiang*, (2016) 8 MLJ 528, the plaintiff/wife applied to present a divorce petition before the expiration of two years from the date of her marriage to the defendant/husband and to be exempted from having the matrimonial dispute referred to a conciliatory body. The exceptional circumstances she relied upon to support the application were that the defendant had forced her to be subject to unnatural sex and that the defendant rarely provided maintenance to her. The defendant denied these allegations and averred that the real reason for the plaintiff’s application was that she had a lover whom she intended to marry. In respect of the allegation regarding the non-provision of maintenance the defendant submitted that the plaintiff was gainfully employed and that she had access to the defendant’s bank account in which his salary was deposited into every month.

The court dismissed the application with costs and held that the allegations of unnatural sex were mere averments by the plaintiff and were not substantiated by any medical or police report. Both the averments regarding unnatural sex and maintenance had been credibly denied by the defendant. Under the circumstances, the plaintiff had failed to prove that there were ‘exceptional circumstances or hardship’ suffered by her. The legislative intent in imposing the two year

bar was to protect the sanctity of marriage as an important institution in society. It was also to give the opportunity to married persons to attempt a reconciliation, no matter how slim the chances.

The cases above illustrate that, the cruelty, hardship, suffering and abuse between husband and wife are eminent factors that determine exceptional circumstances to dissolve the marriage before the expiration of a two year period. The case of *Kiranjit Kaur* has went on further to include modern development of information and technology and accepted it as exceptional circumstances that can lead a dissolution of a marriage within a two year period. On this note, Suraya Othman J in *Kiranjit Kaur Kalwant Singh v Chandok Narinderpal Singh*, (2010) 3 CLJ 724, p. 730 said:

“It is important to observe that the purpose of this general rule under section 50(2) is to curb impetuous and hasty resort by spouses to divorce.”

Moreover, in the case of *Velayutham a/l Balakrishnan v Christina d/o Supramaniam*, (Originating Summons No:24-84-2011), Judicial Commissioner Yeoh Wee Siam said:

“Section 50 of the LRA has been enacted by Parliament with the intention of preserving a marriage. It is not the intention of the Legislature to allow a “quickie” divorce since this would be against public policy.”

Hence, court should cautiously and prudently examine and determine each case bearing in mind the sanctity of marriage and public policy. Above all, a really important issue to be considered in all these cases is whether there are any chances of reconciliation between the parties.

Conclusion

A divorce is always something very stressful and painful to parties. It is clearly seen that the law is fair and does provide for marriages to be dissolved within two years of the marriage. However, to say that this provides for a “quickie divorce”, in which it allows marriages to be dissolved at an initial and early stage of a marriage is not really true. Although there is a need to prove exceptional circumstances in order to petition within two years of marriage, in reality it may be difficult to bring the case to court unless these exceptional circumstances exist. It is important for the courts to maintain strict and difficult rules in allowing quick divorces as this will promote the family systems. Couples must be able to expect changes in their marriage and accept all transition events in a marital system. Well managed and mutual adjustments

forms the foundation for a healthy and loving relationship. This contributes to an environment that supports marriages and the family unit.

References

Bowman v Bowman (1949) 2 All ER 127

C v C ([1979] 1 All ER 556

Fisher v Fisher (1948) 263

Hyde v Hyde and Woodmansee, (1886) L.R. 1 P & D. 130

Kamala Bhaie a/p M G Pillai, (2009), *Family Law in Malaysia*, Malaysia: LexisNexis, p.131

Kiranjit Kaur Kalwant Singh v Chandok Narinderpal Singh, (2010) 3 CLJ 724

Mimi Kamariah Majid, (1999) *Family Law in Malaysia*, Malaysia: Malayan Law Journal Sdn Bhd, p. 152

Norliah Ibrahim, Najibah Mohd Zin, Nora Abdul Hak, Roslina Che Soh, Noraini Md Hashim, Azizah Mohd, Normi Abd. Malek, Mohd Hisham Mohd Kamal, (2011), *Family Law (Non-Muslim) In Malaysia*, (2011), Malaysia: IIUM Press, p.147

Probert R., (2003) *Cretney's Family Law*, London: Thomson Sweet & Maxwell Limited, p. 52

Tan Ai Hoon v Lim Wei Kiang, (2016) 8 MLJ 528

V v V (1966) 2 All ER 493

Velayutham a/l Balakrishnan v Christina d/o Supramaniam, In the High Court in Malaya at Kuala Lumpur (Family Court, Civil Division) (Originating Summons No:24-84-2011), 26 July 2011