

- any marriage with the passage of time: *G and G (1978) FLC 90-498*
- To determine separation need to compare the relationship before and after the alleged breakdown: *Todd and Todd (No 2)*
- A substantial breakdown as distinct from a complete breakdown of the matrimonial relationship is required: *Falk and Falk*
- Residual elements of the former relationship may still exist: *Spanos and Spanos (1980) FLC 90-871*
- Separation Under The One Roof
 - *S49(2)*
 - *Hodges and Hodges (1977) FLC 90-203* and *Falk and Falk*
 - It is a matter of fact and degree in every case
 - Sleeping arrangements: *Watkins v Watkins (1952) CLR 161* and *Caretti and Caretti (1977) FLC 90-270*
- “check list test”: *Pavey and Pavey*
- “two household test”: *Wiggins and Wiggins (1976) FLC 90-004*
- “divisible tasks test”: *Hodges and Hodges; Falk and Falk*
- Residing together for the sake of the children: *Potter and Potter (1976) FLC 90-146* and *Pavey and Pavey*
- Does the separation have to be apparent to the world at large?
 - *Fenech and Fenech (1976) FLC 90-035*
 - *McLeod and McLeod (1976) FLC 90-043*
- Requirement of corroboration?
 - *Pavey and Pavey*: corroborative evidence may be required to support an application for divorce based upon separation under the one roof; dependent upon the circumstances of each case.
- Resumption of Cohabitation
 - *s50* enables separated parties to resume cohabitation for one period of up to (but not including) 3 months without this annulling any prior period

- of separation for the purposes of satisfying the conditions of *s48(2)*
- A resumption of cohabitation involves a substantial resumption: *Todd and Todd (No 2)*
- The resumed relationship need not be precisely the same as that which existed between the parties prior to separation
 - Photo theory – photos don’t have to be identical but similar
- A mere settling of differences with an intention to resume cohabitation is not a resumption of cohabitation: *Clarke and Clarke (1986) FLC 91-778*
- Question of fact and degree in every case: *Perry and Perry (1952) P 203* cited with approval in *Feltus and Feltus (1977) FLC 90-212*
- A resumption of cohabitation involves a bilateral intention between the parties: *Mummy and Mummy (1942) P 107* cited with approval in *Feltus and Feltus*
- The bilateral intention must be acted upon: *Todd and Todd (no 2)*
- Acts that do not constitute a resumption of cohabitation
 - Casual acts of sexual intercourse: *Feltus and Feltus; Todd and Todd (No 2); Bell and Bell (1979) FLC 90-662*
 - Occasionally socialising together: *Saunders and Saunders (1976) FLC 90-096*
- Parties must only resume cohabitation on 1 occasion:
 - *s50(1)* and *Keyssner and Keyssner (1976) FLC 90-075*
- Reasonable likelihood of Cohabitation being resumed
 - A Court can not make a divorce order if there is a reasonable likelihood of cohabitation being resumed: *s48(3)*
 - The relevant time for the operation of *s48(3)* is the date of the hearing and not the date of filing of the application.
 - Meaning of “reasonable likelihood of cohabitation being resumed”:

- There must be a bilateral intention to resume living together: *Todd and Todd (No 2)*
- Bilateral intention may not always be necessary: *Bates and Sawyer (1977) FLC 90-319*
- No likelihood of a reconciliation:
 - One party had formed an intention to marry another person: *Painter and Painter (1962) FLR 370*
 - A long period of separation by itself would indicate the improbability of a reconciliation: *Baily and Baily (1862) 3 FLR 476*
 - The insanity of the first wife and the existence of a proposed second wife: *Koufalakis v Koufalakis (1963) 4 FLR 310*
- Counselling Requirement for short marriages
 - An application for divorce shall not be filed within the period of 2 years after the date of the marriage unless a certificate evidencing counselling is filed with the application: *s44(1B)* or leave of the court is granted under *s44(1C)*
 - It is insufficient for one party alone to undergo counselling: *Nuell and Nuell (1976) FLC 90-031*
 - What is meant by “have considered a reconciliation?”
 - The effect of *ss44(1B)(a)* and *(b)* is to imply that some reciprocal communication, though not necessarily discussions, must take place between each party and the counsellor.
 - Court can give leave to file application for divorce with no accompanying certificate if it is satisfied that there are special circumstances: *s44(1C)*
 - What is meant by “special circumstances”:
 - Court is satisfied that marriage has completely broken down: *Nuell and Nuell*
 - The parties had been married for over 2 years by the time of the

- hearing: *Birch and Birch (1976) FLC 90-088*
- “facts peculiar to the particular case which sets it apart from other cases”: *Philippe and Philippe (1978) FLC 90-433* and *Malyszko and Malyszko (1979) FLC 90-650*
- Requirements for proper arrangements for Children
 - 4 elements of *s55A*:
 - Court must be “satisfied” concerning arrangements
 - Arrangements must be “proper arrangements in all the circumstances”
 - Arrangements must be “for the care, welfare and development of ...children”
 - Arrangements must “have been made”
 - A child en ventre sa mère is not a “child” for the purposes of *s55A*: *Diessel and Diessel (1980) FLC 90-841*
 - Arrangements must be proper within the factual situation under consideration: *Opperman and Opperman (1978) FLC 90-432*
 - Arrangements do not have to be bilateral: *Clarke and Clarke (1961) 2 FLR 7*
 - A court may declare that it is satisfied that there are circumstances by reason of which a divorce order should take effect even though it is not satisfied proper arrangements have been made: *s55A(1)(b)(ii)*
- Divorce Order
 - A divorce order does not of itself end the marriage. The divorce only occurs when the divorce order takes effect
 - A divorce order takes effect one month from the making of the order or from the making of an order under *s55A* whichever is the later: *s55*
 - The parties can remarry once the divorce order has taken effect: *s59*

Children

- Dispute Resolution