

**In re Nelson v. Nelson**

Jackett P.—Ottawa, January 28, 1971.

*Divorce—Jurisdiction—Petitions for divorce commenced by husband and wife in different Provinces on same day—Application for directions—Terms—Divorce Act, 1967-8 (Can.), c. 24 s. 5(2)—Divorce Rule 1 (Exchequer Court).*

MOTION.

*J. W. G. Lawrence* for petitioner.

No one *contrâ*.

JACKETT P.—This is an *ex parte* application in respect of the court's jurisdiction under s. 5(2) of the *Divorce Act*, 1967-68 (Can.), c. 24.

According to the material submitted in support of the application, a petition was presented to the Supreme Court of Ontario at Brantford, Ontario, on July 18, 1969, whereby Karen Nelson seeks a divorce and other relief against Wayne Robert Nelson, to whom she was married at Brantford on February 4, 1960, and, on the same day, a petition was presented at Kitimat, British Columbia, to the Supreme Court of British Columbia, by Wayne Robert Nelson seeking a divorce and other relief against Karen Anne Nelson, to whom he was married at Brantford on February 4, 1960. It appears from the material that each petition has been served on the opposing party and that the only step that has been taken in either action since the petition was the filing by Karen Anne Nelson of an "Answer" to the petition in the Supreme Court of British Columbia on August 12, 1969.

Each petition would seem to be based upon the respondent's alleged desertion of the petitioner in March, 1966. The wife has, by the reply filed in the British Columbia proceeding, denied such desertion. As far as appears, the husband has not filed any document in the Ontario proceeding denying that he deserted his wife.

Section 5(2) of the *Divorce Act* reads, in part, as follows:

(2) Where petitions for divorce are pending between a husband and wife before each of two courts that would otherwise have jurisdiction under this Act respectively to entertain them and to grant relief in respect thereof,

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(b) if the petitions were presented on the same day and neither of them is discontinued within thirty days after that day, the Divorce Division of the Exchequer Court has exclusive jurisdiction to grant relief between the parties and the petition or petitions pending before the other court or courts shall be removed, by direction of the Divorce Division of the Exchequer Court, into that Court for adjudication.

It appears from s. 5(2)(b) that, if the petitions were presented on the same day, and if neither of them was discontinued within thirty days after that day, this court has exclusive jurisdiction to grant relief between the parties.

It also appears from s. 5(2)(b) that the first step to be taken, where it is proposed to seek such relief in this court, is that the petitions pending in the other courts be removed, by a direction of this court, into this court for adjudication. In this connection, reference should be made to para. 1 of the rules adopted by this court under s. 19 of the *Divorce Act*. That rule reads as follows:

1. (1) Where a person desires to make an application for a direction under subsection (2) of section 5 of the *Divorce Act* that petitions of divorce pending before other courts be removed into the Divorce Division of the Exchequer Court for adjudication, he may apply *ex parte* to the Divorce Division for directions as to the time when, and the place where his application may be made returnable, as to the persons to be served with notice of his application, and as to the minimum length of the period of service.

(2) As *ex parte* application under paragraph (1) shall be supported by an affidavit as to all the facts material to the order for directions sought thereby.

(3) Such application shall be governed by the Exchequer Court Rules as though it were an application to the Court.

An application has now been made to this court by the solicitors for the wife in the Ontario petition "for directions as to the time when and the place where, the persons to be served with notice of application and the minimum length of the period of time of service for trial of the within matter being an action originally commenced in the Supreme Court of Ontario . . ."

As I understand the matter, no steps can be taken in this court until there has been a direction under s. 5(2)(b) of the *Divorce Act* removing the petitions into this court for adjudication. I propose, therefore, to treat the application as being an application under para. 1 of the rule quoted above for directions as to the time when and the place where an application for such a direction may be made returnable, as to the persons to be served with notice of such application, and as to the minimum length of the period of such service.

It is to be noted that the solicitors for the wife are in Brantford, Ontario, and that the solicitor for the husband is in Kitimat, British Columbia. It would also appear from the two petitions read together that

neither of the parties can afford any unnecessary expense in connection with the matter. It would therefore appear to be advisable, if at all possible, to avoid the necessity of an application in connection with this preliminary matter which would involve personal appearance by counsel. I propose, therefore, to grant to the applicant leave to make an application under s. 256 of the General Rules of this court, which rule reads in part as follows:

(1) An application to the Court or the Registrar on behalf of any party to any action, suit or other proceeding may, if the party, by letter addressed to the Registrar, so requests, and if the Court or the Registrar, as the case may be, considers it expedient, be disposed of without personal appearance of that party or a solicitor on his behalf and upon consideration of such representations as are submitted in writing on his behalf or of a consent or consents executed by the other parties.

(2) A copy of the request to have the motion considered without personal appearance and a copy of the written representations shall be served on the opposing party with the copy of the notice of motion that is served on him.

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My order will be that the applicant, Karen Anne Nelson, may apply under s. 5(2)(b) for an order directing that both petitions be removed into this court for adjudication by sending an appropriate notice, by registered mail, to Wayne Robert Nelson at his address as set out in the British Columbia petition, which is 998 Lakelse Lake Road, Terrace, British Columbia, and to his solicitor, Peter W. Ewert, at his address as set out in the British Columbia petition, which is 366 City Centre, Kitimat, British Columbia. The notice should indicate that, if Wayne Robert Nelson objects to such an order being made, he may, within thirty days of the date of service, communicate the grounds of his objection to the Registry of the court by letter or other written communication<sup>1</sup>, a copy of which must be sent to the solicitors for Karen Anne Nelson, or, he may, by a similar communication, make an application for an oral hearing. The notice of the application must be accompanied by a copy of these reasons, a copy of the order, and a copy of the material submitted in support of the application. (Such material may consist in part of the affidavit of James William George Lawrence which has already been filed. There should also be material establishing that neither petition was discontinued within thirty days after the day when the petitions were filed and such other material as counsel may advise.)

Reference should also be made to para. 2 of the rules adopted by this court under s. 19 of the *Divorce Act*, which reads as follows:

2. (1) When the Divorce Division makes a direction under section 5(2) of the *Divorce Act* that petitions pending before other courts be removed into the Divorce Division, it shall, by the direction, specify the province with which the husband and wife are or have been most closely associated according to the facts appearing upon the petitions as contemplated by Section 20 of the *Divorce Act*.

<sup>1</sup> Which should be addressed to

"The Registry,  
Exchequer Court of Canada,  
Wellington Street,  
Ottawa, Ontario."

(2) Subject to paragraph (3), the rules made under the *Divorce Act* by the Court for the province specified under paragraph (1) by an order removing petitions into the Divorce Division, shall be applicable, with necessary modifications, to the future conduct of the proceedings in the Divorce Division.

(3) Either at the time when the application is made for a direction under subsection (2) of section 5 of the *Divorce Act*, or at any subsequent time, an application may be made by any of the parties to the proceedings for a direction providing for a variation in, or addition to, the Rules as determined by subparagraph (2) for the future conduct of the proceedings in the Divorce Division.

I suggest for consideration by the applicant that there should be included in the notice of the application under s. 5(2)(b), an additional application for an order specifying the province with which the husband and wife are or have been most closely associated according to the facts appearing upon the petitions, as contemplated by s. 20 of the *Divorce Act*. My proposed order will authorize such an additional application.

I am making the order without prejudice to the right of the applicant to re-apply for some other order if he is advised that the order that I am making today is not sufficient for his purposes.

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