Institute of Law Research and Reform

The University of Alberta
Edmonton, Alberta

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# REPORT ON JOINDER OF DIVORCE PROCEEDINGS WITH OTHER CAUSES OF ACTION

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INSTITUTE OF LAW RESEARCH AND REFORM

# Report on Joinder of Divorce Proceedings with other Causes of Action

In the course of its study of family law, the Institute has included the subject of family courts. One incidental matter that came to our attention was that of joinder of divorce proceedings with other causes of action between husband and wife. We undertook to examine this topic with a view to furnishing to the Alberta judges the information we have gathered and to making a recommendation.

## A. JURISDICTION FOR MAKING DIVORCE RULES

Section 19 of the Divorce Act (1967-68, c. 24 (Can.)) permits the making of rules relating to divorce proceedings by two alternate bodies. Firstly "a court or court of appeal may make rules of court applicable to any proceedings under this Act within the jurisdiction of that court. . . ." Section 19(2), however, goes on to state that: "Notwithstanding subsection (1) the Governor in Council may make such regulations as he considers proper to assure uniformity in the rules of court made under this Act". It is significant to note that section 19(2) further states that: "any regulations made under this subsection prevail over rules of court made under subsection (1)", namely, by the courts.

At an early stage following the enactment of the new Divorce Act the Chief Justices agreed that an effort would be made to have uniform divorce rules. A meeting was held, attended by representatives of the Bench in the provinces, for the purpose of drafting the divorce rules.

A set of rules was drafted and it was agreed by the Chief Justices that substantially similar rules would be adopted in each province.

B. THE RULE AS IT APPEARS IN EACH PROVINCE

Among the divorce rules proposed was one which restricted the scope of divorce proceedings. The Ontario rule which was to be the prototype for all provinces was Rule 778 and reads as follows:

> No claim except for corollary relief under the Divorce Act (Canada) or for alimony or for the maintenance or custody of children shall be joined with a matrimonial cause.[1]

The corresponding rule in Alberta provides:

> Rule 563(3)
>
> No cause of action except for corollary relief under sections 10 and 11 of the Divorce Act shall be joined with a divorce action.[2]

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[1]See Gentile v. Gentile, Unreported (March 13, 1970) (Ont. S.C.) (claim for alimony may be joined with divorce cause pursuant to Matrimonial Causes Rule 778 (Ontario)); Hamvas v. Hamvas [1970] 1 O.R. 528 (application for declaration that a separation agreement is not binding cannot be joined in divorce proceedings).

[2]See Wagner v. Wagner (1970) 73 W.W.R. 474 (Alta. S.C.) (action for partition and sale of matrimonial home may be brought concurrently with proceedings for divorce).

In the province of Ontario (Rule 778), in Manitoba (Rule 708),[3] in New Brunswick (Rule 3),[4] and in Nova Scotia (Order LXXI Rule 3), all have the same wording as originally proposed.

The Newfoundland Rule 7 is framed as follows.

> No cause of action except one for corollary relief by way of an order under sections 10 and 11 of the Act shall be included in a Petition.

The Provinces of Saskatchewan, P.E.I. and B.C. have provisions in their respective rules for joining certain other matters with leave. The two related rules in Saskatchewan are as follows:

Saskatchewan Rule 587

> No claim except for corollary relief under the Divorce Act or for alimony or for maintenance

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[3]See Grini v. Grini (1969) 68 W.W.R. 591, 594 (Wilson J.? "Respondent has not seen fit to present, as part of her case, an application for relief under The Child Welfare Act. This could have been done. ... I see no reason why a claim to corollary relief beyond the jurisdiction of the court under the Divorce Act may not be tried with, or immediately following, proceedings under that statute."). See also Mercury v. Mercury, infra, footnote 5.

[4]See White v. White, Unreported (November 25, 1970) (N.B.C.A.) (respondent cannot amend counter-petition for divorce in order to claim, in the alternative, a judicial separation).

> or custody of children[5] and except those referred to in Rule 480 with leave of the Court to be obtained ex parte or otherwise as the Court may direct shall be joined in a Petition for Divorce.
>
> and Rule 480
>
> All actions for nullity of marriage, restitution of conjugal rights, jactitation of marriage, judicial separation[6] or dissolution of marriage, shall be commenced by Writ of Summons and except as in this order otherwise provided, the practice and procedure shall be the same as is provided for actions so commenced in the Court.

In P.E.I. Section 3(1) of the Divorce Regulations reads as follows:

> Section 3(1)
>
> No cause of action save for alimony, maintenance, barring of dower or the custody of children shall be joined with a proceeding for Divorce without the leave of a Judge to be obtained ex parte before the service of the Petition, or thereafter, upon notice to all parties who have been served.

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[5] Chantry v. Chantry (1968) 63 W.W.R. 281 (Sask. Q.B.) (Where a petition for divorce is dismissed, the court has no jurisdiction to award custody pursuant to section 11(1)(c) of the Divorce Act, 1968. An order for custody may, nevertheless, be granted pursuant to provincial legislation). For corresponding ruling in Manitoba, see Mercury v. Mercury, Unreported (December 31, 1969) (Man. Q.B.). See also Papp v. Papp [1970] 1 O.R. 331 (Ont. C.A.); Evans v. Evans (1969) 70 W.W.R. 153 (B.C.S.C.).

[6] Compare Henning v. Henning [1971] 3 W.W.R. 159, 160 (Sask. Q.B.) (Bence, C.J.Q.B. : "There is no provision, either by statute or Rule of Court, for a counter-petition for judicial separation in an action under the Divorce Act.").

The comparable rule in B.C. has 4 parts and reads as follows:

> Rule 4(1)
>
> No cause of action except for corollary relief under the Act or for alimony or for maintenance, or for the maintenance or custody of children, may be joined with a divorce action without leave.
>
> Rule 4(2)
>
> With leave of a Judge to be obtained ex parte prior to service of a petition, or under notice after service of the petition, a petitioner may join with a divorce action a cause of action founded under the Equal Guardianship of Infants Act or under the Divorce and Matrimonial Causes Act in force in the Province.[7]

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[7]See Lyon v. Lyon, Unreported (June 30, 1969) (B.C.S.C.) (counter-petition for divorce may be amended by adding alternative claim for declaration of nullity); Strachan v. Strachan (1970) 72 W.W.R. 383 (B.C.S.C.) (interim injunction may be granted to restrain the respondent from molesting the petitioner or returning to the matrimonial home and such injunction may be declared operative until decree absolute or disposition of the matrimonial home); Kraft v. Kraft (1970) 8 D.L.R. (3d) 744 (B.C.S.C.) (action for damages for adultery may be joined with proceedings for divorce); Anderson v. Anderson and Mikolas (1970) 75 W.W.R. 179 (B.C.C.A.) (action for damages for adultery may be joined with proceedings for divorce); subsequent proceedings, Anderson v. Anderson and Mikolas [1971] 1 W.W.R. 79 (B.C.S.C.); Earle v. Earle and Huumonen (1969) 69 W.W.R. 699 (B.C.S.C.) (application under section 5 of Change of Name Act, R.S.B.C., 1960, ch. 50 may be entertained at conclusion of trial wherein divorce granted); MacLeod v. MacLeod (1969) 67 W.W.R. 111, 112 (B.C.S.C.) (Morrow, L.J.S.C.: "A trial on a petition for divorce cannot be tried jointly with a claim by respondent to enforce a settlement under the Married Women's Property Act or under the civil law of Quebec.")

Rule 4(3)

A Respondent may without leave raise in his answer and counter-petition a cause of action or defence founded under the Divorce Act, the Divorce and Matrimonial Causes Act or the Equal Guardianship of Infants Act.

Rule 4(4)

Where a cause of defence or action is joined under sub-rule (2) or (3) a Judge may give such directions as he may consider necessary for the further conduct of the action, including directions on the form of pleadings to be filed and delivered and times for filing and delivery.

In Quebec Articles 208 and 211 of the Civil Code are pertinent to this study.

Article 208

Separation from bed and board carries with it separation of property; divorce carries with it dissolution of the matrimonial regime.

Article 211

Divorce produces its effects only from the date on which a final judgment makes absolute the decree nisi which granted it.

Until such date, the wife may demand the conservatory remedies contemplated in Articles 814 and 815 of the Code of Civil Procedure.[8]

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[8]See Shaffran v. Shaffran [1969] R.P. 101 (Que.) (the court has no jurisdiction in divorce proceedings to authorize the enforcement of property rights or to adjudicate upon the disputed rights of the consorts under their marriage contract).

It is readily apparent that any proceeding regarding forfeiture by the guilty spouse of the gifts contained in the marriage contract could not be decided before the decree absolute, because the decree nisi may be set aside.

It is still not clear in Quebec whether a judge can at the same time exercise divorce jurisdiction and jurisdiction under Article 208 of the Civil Code. The Canadian Bar Association's proposed amendment would be helpful in resolving that problem.[9]

## C. ASSESSMENT OF THE RESTRICTIVE RULES

Since the Rule is not uniformly worded in all of the provinces any assessment or comments cannot be generally applied. And, as is common in most legal matters, the diversity of views held by the Chief Justices, Clerks of

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[9] WHEREAS a petition for divorce, pursuant to the Divorce Act (Canada), is presented to a court having original jurisdiction in a Province of Canada;

AND WHEREAS the parties in divorce proceedings have other rights and remedies available under applicable Provincial laws;

AND WHEREAS it is desirable to ensure that the court hearing the divorce petition be able to exercise concurrent jurisdiction with respect to the other rights and remedies available to the parties;

BE IT THEREFORE RESOLVED that The Canadian Bar Association recommends that the Divorce Act (Canada) be amended by adding, after Section 5 thereof, the following Section 5-A:

> "5-A. Nothing in this Act prevents a Court of a Province from exercising a jurisdiction conferred upon it by the law of the Province concurrently with the divorce petition."

(1970 Proc. CBA 111-112)

Court and practitioners across Canada emphasizes the difficulty in establishing a uniform practice.

It is apparent that the Departments of the Attorney General in each province have a watchful interest in the operation of the Rule but generally there appeared to be a reluctance to express any viewpoint. This was likewise the case with Clerks of the Court with some exceptions. One contended that the present procedure was working very well and expressed grave concern about procedural tangles that would be encountered if matters other than corollary relief were to be joined to the Divorce actions. It was likewise stated that the prescribed petition form was entirely inappropriate for combining other causes of action to the Divorce action.

Understandably the most divergent and most strongly expressed views came from the judges and the lawyers. Since the sampling of lawyers was not large and the number of responses was even smaller there will be no attempt to fashion any kind of consensus. Some lawyers with extensive practices in divorce approved of the restrictive rule. Most appear to resolve related matters by commencing actions concurrently with the Divorce Action and having both actions heard by the same Judge simultaneously. Many lawyers, however, expressed strong disssatisfaction with this procedure and expressed a keen interest in having one court with total jurisdiction in dealing with all matters related to the family. The objections to multiplicity of jurisdictions regarding family problems and the wish for one comprehensive court were unsolicited reactions and evidence a strong underlying dissatisfaction with the existing structure.

The responses from the Chief Justices were very gratifying in that 10 replied and their views were promptly and fully stated. The assessments ranged from the conviction that the legal profession is well adjusted to the restrictive rule and even the proposed Canadian Bar Association amendment is not essential, to an outcry of frustration with the conservative attitudes in dealing with family problems. There was a severe rebuke regarding the preoccupation with jurisdictions and the resulting multiplicity of actions. However, one could safely infer from all the views expressed that the Judges are generally anxious to resolve the matrimonial disputes and related matters as expeditiously as possible.

Several Chief Justices expressed a concern that the Court's jurisdiction under the Divorce Act ended immediately on a refusal to grant the divorce even when the circumstances would seem to require some direction with respect to custody or maintenance. Some suggested that the present Rules should be amended to enable the Court to exercise provincially granted jurisdiction in the family dispute even if the divorce fails.

A very serious question as to jurisdiction was raised by two Judges who contend that the Divorce Act by designating a particular court in each province thereby constitutes that court as a special Divorce Court and thus limits its jurisdiction strictly to the Divorce Act. Such a court they suggest is consequently totally without jurisdiction to deal with matters apart from the Divorce Act, rules notwithstanding. Were it necessary to comment on this suggestion we are of the opinion that the jurisdiction

is vested in the existing court.[10]

D. THE ALBERTA SITUATION

There is little disagreement in Alberta that Rule 563(3) prohibits the joinder of other causes of action to the divorce action apart from the corollary matters of custody, alimony and maintenance. When other matters arising from the family dispute require adjudication it is reasonably well established practice to commence a separate action by Statement of Claim and set both actions before the same judge. It appears that some lawyers have sought and have succeeded in consolidating the two actions. However, there are some serious misgivings as to the propriety of the Order of consolidation. Consolidated pleadings are, for example, inappropriate. It is more common for the judge to hear both actions separately and with the consent of counsel the evidence in one action is applied mutatis mutandi in the other. It is clear, however, that the wording of Rule 563(3) forbids inclusion of other causes of action in the petition itself (the pleading) and probable that it prohibits the proceedings (as distinct from the pleadings) being joined.

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[10] See: Trombley v. Trombley [1971] 3 W.W.R. 388 (Alta. S.C.); Dame A. v. B. [1970] C.S. 642, 651-652 (Que.) (Puddicombe, J.: "Contrary to the apparent submission that La Cour supérieure (division des divorces) et la Cour supérieure (juridiction générale) constitute two courts, in my opinion the Divorce Act has not created or nominated a new court, it has simply conferred on the Superior Court of Quebec jurisdiction to entertain the petition for divorce and to grant relief in respect thereof."). As to the exercise of divorce jurisdiction by Judges of the County Court in their capacity as local Judges of the Supreme Court, see Reference Re Constitutional Validity of Section 11 of the Judicature Amendment Act, 1970 (No. 4) [1971] 2 O.R. 521 (Ont. C.A.).

In undefended divorce actions it is common practice for counsel to file the Minutes of Settlement which usually deal with the matter of custody and maintenance. The trial judge approves the Settlement and by reference makes the terms of Settlement a part of the Decree Nisi. We are not aware of any challenge having been made to the jurisdiction of the Court to include such matters where both parties agree. It has been noted, however, that a few judges have recently expressly stated that the Decree Nisi will itself contain only the order regarding divorce and the corollary relief and that there will be no mention of the terms of the settlement. Whether this limitation on the Decree Nisi will become general practice in Alberta is as yet too early to determine.

The Alberta laywers express general, but by no means unanimous, dissatisfaction with the rule and the existing practice. There is some concern that the rather specialized divorce procedure with hiatus between the decree nisi and decree absolute would simply not be appropriate for the determination of property rights for example.

## E. CONCLUSION

Section 2(g) of the Divorce Act, 1968, provides that "'petition' for divorce means a petition or motion for a decree of divorce, either with or without corollary relief by way of an order under section 10 or 11". It can be argued that this definition effectively precludes any collateral issues being introduced in the petition for divorce and accordingly there can be no fusion of a petition for divorce with a statement of claim involving some other matrimonial dispute. Section 19(1) of the Divorce Act, 1968,

provides: "A court or court of appeal may make rules of court applicable to any proceedings under this Act within the jurisdiction of that court, including, without restricting the generality of the foregoing, rules of court (a) regulating the pleading, practice and procedure in the court. . . ." It would seem that the aforementioned provision is concerned only with the regulation of pleading, practice and procedure in divorce and that any attempt to permit the joinder of other causes would not fall within the authorization granted pursuant to section 19(1)(a).

It may not, therefore, be possible to revise the form of pleadings in divorce causes so as to admit of the incorporation of other matrimonial issues. Indeed, it may not be desirable to do so, in view of the form of the divorce petition. There is not, however, any valid reason why the proceedings launched by statement of claim and the divorce proceedings launched by petition cannot proceed together even if not formally consolidated. Indeed, in most cases, it is clearly desirable that all issues between spouses be determined at one time. In addition, it seems wrong to deny the judge in divorce proceedings the power to determine issues the determination of which may be critical to his own decision as to the proper remedies in the divorce action. The economic and psychological burden of separate proceedings is difficult to justify. If there is a sound reason for severing the proceedings the court can in the individual case make that determination. Rule 229 would ordinarily be sufficient to authorize trial together. Discovery common to two actions is frequent.

It is recommended that our divorce rules should be amended to restrict non-joinder to non-joinder of pleadings in the petition, so that Rule 563(3) would read:

> "(3) No cause of action except for corollary relief under sections 10 and 11 of the Divorce Act shall be joined in a divorce petition but nothing herein contained shall otherwise restrict the court's powers under Rule 229."[11]

## E. ACKNOWLEDGEMENTS

The research for this report was done by Mr. John Bracco, Barrister and Solicitor of Edmonton. Mr. Bracco made inquiries of the Chief Justices, the Deputy Attorneys General, Clerks of the Court and legal practitioners. The

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[11] 229. Where there are two or more actions or proceedings that

(a) have a common question of law or fact, or

(b) arise out of the same transaction or series of transactions,

or where for any other reason it is desirable to make an order under this Rule, the court may order that the actions or proceedings be consolidated or be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

Institute expresses its thanks to Mr. Bracco and to those persons who answered Mr. Bracco's enquiry. Their names appear in the Appendix.

6 August, 1971

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NOTE: Dr. Kreisel is a member of the Institute but is not a lawyer and has no responsibility for the contents of this report.

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