

2 Nfld. & P.E.I.R. 210

Wilson v. Wilson

Newfoundland Supreme Court, Trial Division

Higgins, J.

Judgment: November 25, 1970

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Counsel: **David C. Day**, for the Petitioner.

Alan W. Carter, for the Respondent.

Higgins, J.:

1 This is a petition for divorce under the provisions of Section 4(1)(e)(i) of the Divorce Act, Canada, on the ground that there has been a permanent breakdown of the marriage between the parties by reason of the fact that they have been living separate and apart for a period of not less than three years immediately proceeding the presentation of this petition. The petitioner alleges that she has not deserted the respondent. The respondent denies the allegation that the petitioner has not deserted him and contends that, since the petitioner has in fact deserted him, the period of separation before she can take action, should be five years, under the provisions of section 4(1)(e)(ii) of the Divorce Act.

2 The petitioner was born at Bay Roberts on March 25, 1917 and the respondent was born at County Mayo, Ireland on October 13, 1919. They were married at St. John's on September 3, 1951. The respondent was a medical doctor at that time practicing as a general practitioner. From 1951 to 1955 the couple lived at Deer Lake and in 1956 at Corner Brook. From 1956 to 1959 they resided at Boston, in the United States of America, during which time the respondent did postgraduate studies in radiology. In 1959 the respondent was engaged by the Provincial Department of Health as a radiologist attached to the hospital at Gander. They resided at Gander from 1959 until their separation in 1966. The respondent stated that he was not satisfied with his position at the Gander hospital. He felt that he was receiving a salary equivalent to only half of what his qualifications could command elsewhere. He did in fact make enquiries as to positions outside of Newfoundland. There is disagreement between the parties on this point. The respondent says that he could have obtained employment in Toronto and in Ireland but that his wife refused to leave Newfoundland. The petitioner stated that she was willing to go anywhere her husband wished except to Ireland. She stated that he never mentioned the possibility of their moving to Toronto. The petitioner stated that during the period they lived at Deer Lake and Corner Brook (from 1951 to 1956) her husband did not seem to be happy with either his work or his home life. After the completion of his postgraduate studies at Boston he accepted the position

at Gander hospital but here again he appeared dissatisfied and complained that his abilities were more suited to a larger centre. Both parties agreed that their marriage had begun to deteriorate for quite sometime before the institution of these proceedings but each assigned a different reason for this. The wife stated that in 1964 the situation in the home became difficult. The husband was dissatisfied with his situation at the hospital. He also complained about her manner of keeping house and referred continually to his desire to leave Gander. The couple took a trip to Ireland the same year and for a while afterwards things were pleasant at home and the respondent seemed to have adjusted himself to things at the hospital and there was a lessening of complaints on his part. Unfortunately this happier state of affairs did not continue and the husband began to drink heavily, mostly in his home. In consequence of this the wife became nervous and her health was impaired. In 1965 as the result of a physical assault on her by her husband the wife left Gander and went to St. John's where for four or five months she lived with her sister and her brother-in-law. On the advice of her brother-in-law she returned to Gander and she and her husband agreed to try to make a go of their marriage. Unfortunately, according to the petitioner, things did not improve and the husband's drinking led to many quarrels. There were occasions when he embarrassed her by his behaviour in company when under the influence of drink. There were incidents outside the home on which I had the evidence of a friend of both parties who described the husband's slapping his wife in the face and making hurtful remarks to her. On another occasion the same witness described how the wife had come to her home in a very upset state and how the husband, who was the worse for drink, had followed her and attempted to assault her. The friend became so alarmed that she telephoned a clergyman who came to her home and the husband calmed down.

3 The husband's version of his marital difficulties was, not unexpectedly, different from his wife's. He stated that from the time of their marriage in 1951 until 1964 his married life was quite pleasant. In 1964 he noticed a change in his wife which he attributed to the outset of the menopause. With the two of them as he put it "cooped up in a small house conflict was inevitable". He complained that his wife had reported to their friends that he was drinking too much and he resented this greatly and regarded it as an act of treachery. He related various incidents of his wife's throwing things at him during quarrels. He had no recollection of the incident described by the petitioner and corroborated by a witness, of having slapped his wife on an occasion when they were visiting this friend's home. With respect to the bruises which had been observed on his wife by the same neighbor the respondent explained that these were probably the result of a fall. He described an occasion when his wife was running down the stairs in their home and fell. She was hysterical and he slapped her a few times on the shoulder to calm her and also, as he put it, to warn her that he was not going to be intimidated by her display of temper. Insofar as his drinking was concerned he stated that he drank almost every day but usually not until after dinner and then only to the extent of three or four drinks. On Saturdays and Sundays he did drink somewhat more. He stated that he might well become inebriated but stressed that he was never "falling down drunk".

4 This situation continued with frequent arguments and mutual recriminations until November 1966 when the petitioner finally came to St. John's where she has since resided with her sister. She is now employed as a stenographer with a business firm at St. John's. Since her separation from her husband she has received no money from him nor has she asked for any. However, she

now asks for maintenance from the respondent.

5 As I said earlier there is disagreement between the parties as to the nature of their separation. The petitioner alleges that she was told by the respondent to leave him and that she was compelled to leave him by his treatment of her. The respondent denies that he ever desired that his wife should leave him and claims that she deserted him without just cause. The petitioner entered in evidence many letters written by her husband. One, dated August 14, 1966, advised her that all was over between them and she should take the necessary steps to get a divorce. This letter was written at a time when the petitioner was living at Happy Adventure in a home which she had purchased in 1964 and which was used as a summer residence. The respondent visited her during that summer (1966) on weekends. His explanation of this letter is that it was written in despair and without any intention that his wife act on it. He claimed that he had made so many overtures for peace and had been rebuffed that he felt he could do no more. All conjugal relations between the parties had ceased in July 1966 and his visits to the wife's residence in Happy Adventure were on the basis of a weekend guest rather than any conjugal reunion.

6 The petition is taken not under Section 3(D) of the Divorce Act but under section 4(1)(e)(i). In essence the position which the petitioner sets up is that her husband's conduct towards her forced her to leave him, and, he had thus constructively deserted her. The respondent maintains that, whilst there may have been occasions when he was at fault there was never any intention on his part of compelling his wife to leave him. As to this I have to observe that it is all very well for him to say now that it was never in his mind that his actions would force his wife to leave him but the evidence satisfies me that the separation of the parties for several months in 1965 should have served as an unmistakable warning of the probable consequence of a continuation of his intemperance with its resulting quarrels and physical violence. The unhappy fact is that for whatever reason, he would not change his attitude and the departure of his wife was the unexpected but not unlikely result.

7 I feel that the wife, in the circumstances, was justified in leaving her husband and that her departure was caused by his treatment of her. It follows therefore that, as she did not desert him, the period of separation beginning in November 1966, is sufficient to allow her to bring the petition under section 4(1)(e)(i) of this Divorce Act. The petitioner has also requested maintenance from her husband. She is now 54 years of age. Her health is not good and, according to the evidence of a medical witness, there is a possibility that she will not be able to continue her present employment for too much longer. Her present salary is \$38.00 a week. She lives with her sister and pays no board but she feels that she cannot continue to take advantage of her sister's generosity indefinitely. She has requested an allowance of \$1,500.00 a year. The husband's income for 1969, according to his evidence, was \$21,000.00. I regard the amount of the petitioner's request as reasonable. She will be granted a decree nisi of divorce. The respondent will pay her maintenance in the amount of \$125.00 a month. The petitioner will have her costs.

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