

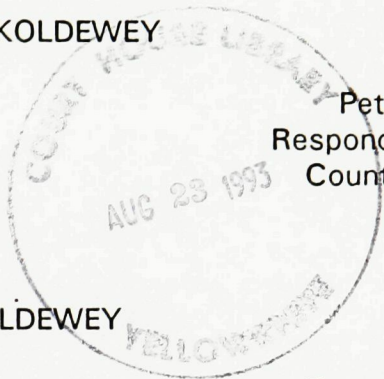
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BURKHARDT JOHANN KOLDEWEY

- and -

MARIE ROBERTA KOLDEWEY



Petitioner and Respondent to the Counter-petition

Respondent and Counter-petitioner

Application (by husband) to sever the divorce issue from the matrimonial property issues in a divorce action granted. Application (by wife) for interim injunctive and declaratory relief dismissed with costs in any event of the cause. Costs may be fixed by appointment.

Heard at Yellowknife on February 24th 1993

Judgment filed: April 13th 1993

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Petitioner: Katherine R. Peterson, Q.C.  
and Respondent to the Counter-petition

Counsel for the Respondent: Ms. Glennis M. Munro  
and Counter-petitioner

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THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

PLAINTIFF

BURGARDT JOHANN KOLBEY  
NATHAN CLARON

Respondent to the  
Counter-petition

vs

vs

MARY-ANNE SHAM ENLY  
MARIE ROBERTA KOLBEY

Respondent and  
Counter-petitioner

REASONS FOR JUDGMENT OF THE

JUDGE M.M. DE WERRDT

Application by husband to assist the divorce with the matrimonial property issues  
in a divorce action granted. Application (if wife) for interim injunctive and declaratory  
relief dismissed with costs in any event of the cause. Costs may be taxed by  
agreement.

Heard at Yellowknife on February 20th, 1983

Judgment filed April 19th 1983

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. DE WERRDT



Katherine R. Peterson, Q.C.

Counsel for the Plaintiff  
and Respondent to the  
Counter-petition

Ms. Glenn M. Wynn

Counsel for the Respondent  
and Counter-petitioner

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BURKHARDT JOHANN KOLDEWEY

- and -

Petitioner and  
Respondent to the  
Counter-petition

MARIE ROBERTA KOLDEWEY

Respondent and  
Counter-petitioner

REASONS FOR JUDGMENT

The husband in this divorce action asks for an order severing the divorce itself from the matrimonial property issues. The wife opposes that and asks for interim injunctive relief coupled with declaratory relief which she says she requires to protect her interests in the matrimonial property pending final judgment respecting all the issues raised in the pleadings. And the husband opposes the wife's application.

However, it is evident that the divorce itself is not contested. Both parties ask for this relief in their pleadings on grounds based upon paragraph 8(2)(a) of the Divorce Act, R.S.C. (2nd Supp.) c.3. And those grounds are not in dispute.

3 The husband initiated this action by filing his petition for divorce on March 8th 1988. Besides the divorce, he sought an accounting and division of the matrimonial property. On October 23rd 1989 the wife filed her answer and counter-petition, in which she agreed to a judgment of divorce being granted and, in principle, to an accounting and division of the matrimonial property.

4 Against that agreement in principle there are to be contrasted the highly contested questions as to what constitutes the matrimonial property, how it is to be divided, and whether the husband should be obliged to pay anything over and above, by way of support for the wife. It is in this context that the wife's present application must be viewed. Her notice of motion asks for relief as follows:

1. That the Petitioner, Burkhardt Johann Koldewey shall be required to settle or resolve, by Court Order or otherwise, all matters in the within action prior to his departure from the Northwest Territories;

2. That the Petitioner Burkhardt Johann Koldewey shall keep the Respondent's counsel apprised of any and all changes in residence, address, telephone numbers, and places of employment until the within matters are resolved and all appeal time periods have been exhausted;

3. That the Petitioner Burkhardt Johann Koldewey shall forthwith provide to the Respondent and to the Court a statement of the exact amount, location and manner of ownership, registration and or possession of same, including any and all bank accounts, annuities, insurance policies, trust funds, investments, stocks, bonds, term deposits, savings accounts, registered savings plans, and any other personal or real property, both tangible and intangible, corporate, real and/or contingent including receivables, book debts, and claims made or to be made.

4. Granting an Order freezing any and all assets above-mentioned in their existing state (including assets names in Schedule "A" attached hereto) and in their respective locations pursuant to Rule 422 of the Rules of Court of the Northwest Territories;

5. In addition or in the alternative, granting a writ of attachment to be levied upon any and all assets held solely or jointly by the Petitioner Burkhardt Johann Koldewey pursuant to Rule 490 of the Rules of Court;

6. In addition or in the alternative, granting an injunction against the Respondent's transferring, selling, disposing of any and all assets held solely or jointly by him, pending resolution of the within matters, pursuant to Rule 451 of the Rules of Court and pursuant to the Judicature Act of the Northwest Territories;

7. Granting a stay of action of the Petitioner's within divorce proceedings pending resolution on any and all financial and other matters between the parties;

8. Setting a date for a *viva voce* trial and an accounting of all financial and related contributions and transactions of the parties in the within action, including an inspection of documents and financial records and cross examination on same;

9. Costs of the within application and cross application;

11. (sic) Such further order as this Honourable Court deems meet and upon such directions as this Court may require.

Taking each of these claims in the order presented by the notice of motion, I conclude as follows:

1. It is neither necessary nor appropriate to restrict the husband's movements as requested by the wife, even if, as she alleges, he is pursuing doctoral studies outside Canada and has acquired German citizenship. Unless for purposes of a possible trial or examination for discovery, neither of which has yet been scheduled, the presence of the husband in the Northwest Territories will not be required. I leave aside any question of the jurisdiction of this Court to restrict the husband's movements as the wife requests. That point was not argued. The effectiveness of any such restriction as a means of protecting the wife's interests has yet to be

shown, at least with reference to her claims to a share of any matrimonial property. No precedent for such a very extraordinary measure of restraint upon a party in litigation has been mentioned. I doubt that any can be found. This head of relief is completely without merit.

2. Nor is there, as yet, any demonstrated need to compel the husband to provide information on his whereabouts, addresses, or employment, to the wife's solicitors, at this stage in the proceedings, in which he is (and has throughout been) represented by solicitors carrying on the practice of law within the Northwest Territories. The material on file shows that if anyone in this action has been evading service of process it has been the wife, not the husband. By her most recent affidavit, it appears that she was herself in Ontario on February 4th 1993. There is no merit whatsoever in this head of relief.

3. That the wife should ask the Court to compel the husband to disclose information which she has not yet sought to obtain by normal methods of discovery in an action such as this (in which she filed an answer to the petition together with her counter-petition all several years ago) suggests that her application is deficient not merely because it is obviously

premature but even more so because it ignores the normal avenues open to her to obtain that information pursuant to the **Rules of Court**. This head of relief must therefore be denied also, at least for the time being.

4. If one translates the reference in the wife's notice of motion to "freezing", so that one reads this head of relief as being for an injunction against the husband to restrain him from disposing of any matrimonial property in which the wife claims to have an interest, one is still left to ask what that property might be, since there is no Schedule "A" attached to the notice of motion. Assuming the property to be described (however vaguely in part) in Exhibit "A" to the wife's affidavit sworn on February 4th 1993, I am not satisfied that the wife's interests in that portion of the property which is within the Northwest Territories are at all in jeopardy, given the requirements of the **Land Titles Act**, R.S.C. 1985, c. L-5, and the apparent state of title to that portion of the property. Nor am I at all satisfied that she has shown an arguable case in support of her claims against the remainder of the real property referred to in her affidavit. Considering her own conduct in this action, to which I have already referred, I am unpersuaded that the equitable relief which she now seeks ought to be granted to her. She has

quantified her claims in monetary terms which show clearly that her loss, if any, arising from this Court's refusal of this injunctive relief, is susceptible to full compensation in damages payable to her by the husband. In all the circumstances, this head of relief must therefore be denied.

5. The wife's allegations as to the husband absconding from the Northwest Territories are not only disputed by the husband, they appear to be at variance from the facts. The issues arising from the material filed by the parties in that connection are certainly not capable of resolution without a proper trial of those issues. At all events, the wife relies on this aspect of her application merely in the alternative, suggesting that she herself has relatively less confidence in it than in the rest, which I have found, so far, to lack any merit. Rule 490, on which she relies, requires a second affidavit - which has not been filed. The failure to comply with this requirement is enough, in itself, to oblige me to dismiss the wife's application for a writ of attachment under that Rule.
6. In addition to the other reasons for refusing the injunctive relief sought on behalf of the wife, as already outlined, there is the additional reason that there is nothing in her counter-



petition revealing her intention to claim any such relief in this action. Nor has she sought to amend the counter-petition to include a claim for such relief. And she has not sought in any way to deal with the usual requirement of security for any damages which may flow from the issuance of such an interim injunction, as she requests in what is purely a property dispute, as distinct from a matter involving the wife's personal security or freedom as in **Peterson v. McPherson** (1991) N.W.T.R. 178, 32 R.F.L. (3d) 333 (S.C.). The injunctive relief requested by the wife must therefore be refused, there being no merit in her claim to it.

7. This is not a case of the wife having shown that she is entitled to support for herself as a divorcing spouse pursuant to section 15 of the **Divorce Act**, R.S.C. 1985 (2nd Supp.), c. 3. She has made no claim for any such support, either in her answer to the husband's petition or in her counter-petition. There is therefore no reason to stay the divorce from being granted or to decline to sever the divorce issue from the remaining issues before the Court in this action. There are no children of the marriage. There is accordingly a complete absence of any merit in the wife's application for a stay of the divorce proceedings.

8. If documents are still to be made subject to any requirements of production for inspection, and if examinations for discovery are still to be held, it is plainly too early to set this action down for trial on the property issues between the parties. The wife's application to have a trial date set is therefore premature and must be dismissed, for the time being, for this reason.

#### Conclusion

6 Before concluding, and by way of reasons for declining to make any interlocutory order, as requested by the wife, declaring that the husband holds the matrimonial property, or any portion of it, as a constructive trustee of that property for the benefit of the wife, I think that I need only say that such a declaration would in my opinion be in the nature of a final order which, as held by the Court of Appeal in **Royal Oak Mines Inc. v. C.A.S.A.W. Local No. 4 et al.**, unreported, January 21st 1993 (CA 00393), is inappropriate at this stage of an action. See Sarna, **Law of Declaratory Judgments**, [1978] (Carswell) at page 176, where it is said that:

... there appears to be no statutory support for the idea of temporary **declaratory** judgments similar in nature to the interim injunction. (emphasis added here)

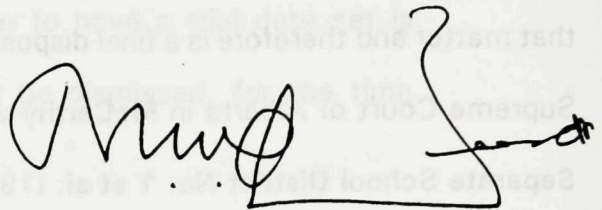
7 I find nothing to the contrary in **Ontario Medical Association et al. v. Miller et al.** (1976), 14 O.R. (2d) 468 (C.A.), on which counsel for the wife relies. Nor do I find any support for her position in **Hudson v. Tremblay**, [1931] S.C.R. 624, [1932] 2 D.L.R.

720, which clearly illustrates the principle that in general only a judgment or order which determines the principal matter in question is to be regarded as final: **Shubrook v. Tufnell** (1882), 9 Q.B.D. 621 (C.A.). To declare that the wife has an interest in property held by the husband, whether by virtue of a constructive trust or otherwise, is determinative of that matter and therefore is a final disposition by the Court. The Appellate Division of the Supreme Court of Alberta in **McCarthy v. Board of Trustees of Calgary Roman Catholic Separate School District No. 1 et al.** (1980), 100 D.L.R. (3d) 498 held that declaratory relief cannot properly be granted on an interlocutory application, at least where there is any likelihood of a dispute as to the facts. I respectfully agree. See also **26 Halsbury (4th)** paras. 504 and 505. The facts in question are in dispute here.

As already indicated above in reference to head 7 of the wife's notice of motion, this is an appropriate case in which to sever the divorce issue from the property issues as requested by the husband. His application for an order to that effect succeeds. And since there is no merit in any of the enumerated heads of relief sought by the wife, her application fails.

Costs on a solicitor-client basis are sought on behalf of the petitioner on the basis that there is no significant evidentiary or legal foundation for the relief sought. Certainly, the petitioner should have his costs of these applications in any event of the cause. However, before deciding whether to grant those costs on a simple party and party basis (and as to what scale of such costs) or on a solicitor-client basis, I am

prepared to hear counsel for both parties. They should obtain an appointment for that purpose from the Clerk of the Court.

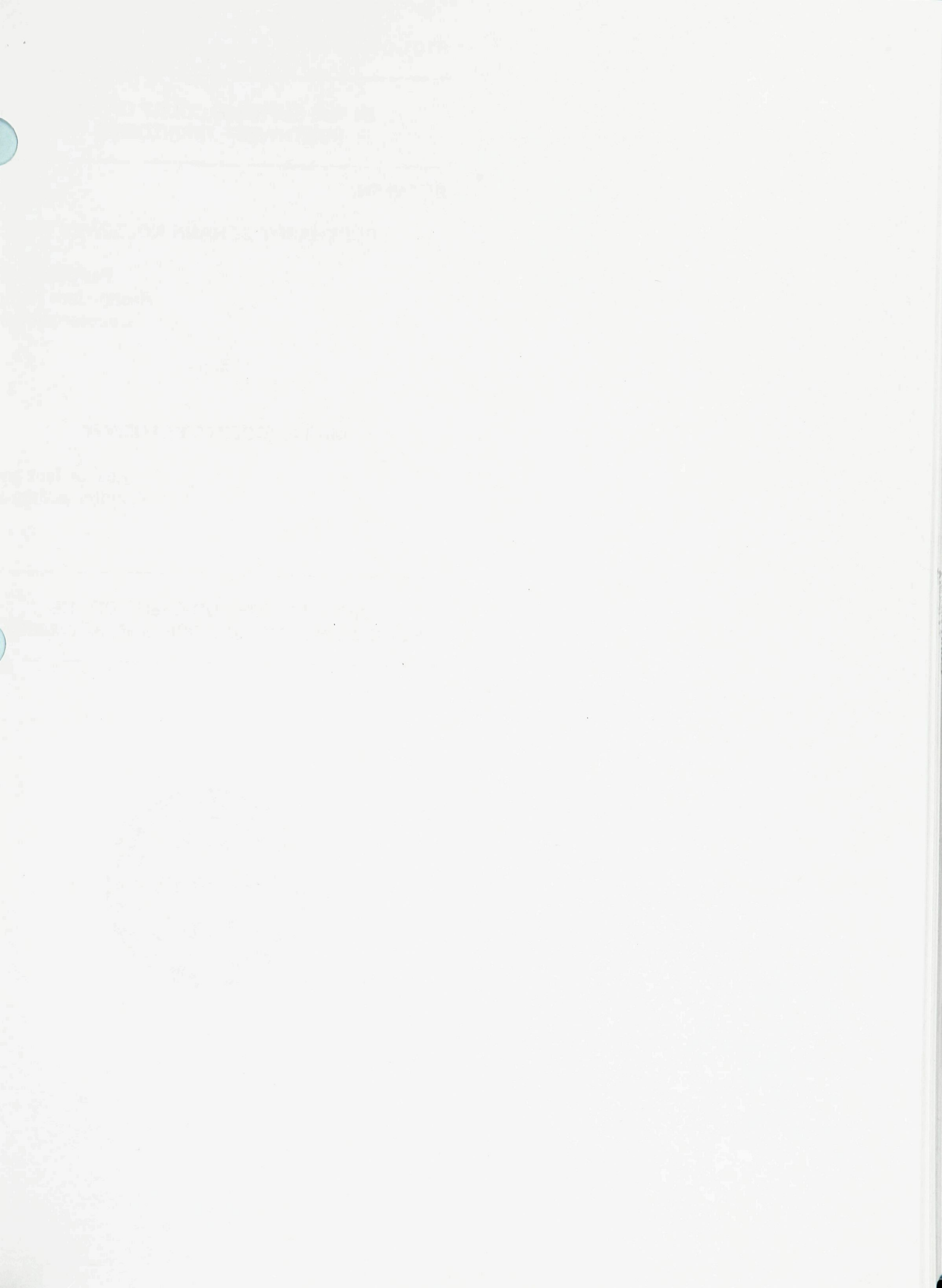


M.M. de Weerd  
J.S.C.

Yellowknife, Northwest Territories  
April 13th 1993

Counsel for the Petitioner: Katherine R. Peterson, O.C.  
Respondent to the  
counter-petition

Counsel for the Respondent: Ms. Glennis M. Munro  
and Counter-petitioner



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REASONS FOR JUDGMENT OF THE  
HONOURABLE MR. JUSTICE M.M. de WEERDT

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