SC CIV 74 002

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

NEIL GREGORY ORSER,

Petitioner

- and -

ANNE ELIZABETH ORSER,

Respondent

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE W. G. MORROW

This matter came on before me as a Petition and Counter-Petition for divorce. The Petitioner husband sought a divorce and costs against the co-respondent named in the pleadings and served with special notice as called for under our Rules. The Respondent wife in her answer and counter-petition sought a divorce, custody of the infant Alan, maintenance for herself and the infant, a lump sum payment, and costs. At the opening of the trial counsel stated that custody of the infant child was abandoned as he was now self-sufficient.

After hearing the evidence adduced I gave each party a decree nisi to be made absolute after three months. All other issues including the allegation of cruelty by the Respondent, were reserved pending receipt of written submissions just now received by me from counsel.

The issues to be resolved therefore are:

(1) Cruelty alleged as against the petitioner.

(2) Maintenance claimed by the Respondent.

(3) A lump sum payment sought by the Respondent.

(4) Costs.

The parties were married in 1950 at Yellowknife and except for the recent period when the Respondent has taken up residence in British Columbia, the parties have lived continuously at Yellowknife in the Territories.

Beginning his life by operating a service station at Yellowknife, the Petitioner has engaged in construction work, acted as a clerk for one of the large gold mines operating in Yellowknife, worked in the evenings as a janitor, as a supervisor at one of the schools, and finally in 1961 acquired what he calls the Coke plant, an operation devoted to bottling and distributing soft drinks.

From the time the Petitioner took over operation of the Coke plant, the other jobs or positions he had held were dropped, and he has latterly acquired other businesses more as investments. The Petitioner could best be described now as being a small entrepreneur holding interests in such things as a laundry and dry cleaning plant, a land development company busy constructing and operating apartment blocks, a cafeteria,

and a travel agency. Some of these interests have been in partnership with other persons, one of these former partners being Noel Potgieter, the co-respondent referred to in the pleadings. Throughout the whole period, and the same applies at the present time, the Coke plant is the main interest and main source of income of the Petitioner. The other interests may be looked upon primarily as promising possible future income but do not add materially to the petitioner's present income position, the cafeteria even costing him money. Certain aspects of these operations will be examined in more detail later.

During the early years in particular, there can be no doubt that the Petitioner worked hard, put in long and strenuous hours, and accumulated enough with which to purchase the Coke plant, although he still owes on the original price. The position, throughout, seems to have been one of not drawing the full income in any year but allowing it to accumulate, to be available for working capital as it were, but in latter years, the Petitioner said they had received a good living with good winter holidays from his operations.

What might be called the matrimonial home, is registered in the joint names of the Petitioner and the Respondent, but according to the Petitioner was bought by the Coke company as a manager's residence. According to him on the suggestion of the bank it was not placed in the Company's name and also he

decided to put it in both names as some security for his wife. The Company has made all payments, including mortgage installments, on the house and he is charged $225.00 per month rent by the Company. The Company also bought the furniture.

There have been four children from the marriage, all of them now self-sufficient.

Under cross-examination particularly, the Petitioner agreed that the Respondent had contributed help, other than her usual wifely duties, by working part time (before she had children), on weekends, made some money from baby-sitting, all of which went into the family pot. Later after the Coke plant was acquired the Respondent helped on bottling days and kept the Company's accounts.

The income tax returns produced at the trial showed in the neighbourhood of a mean income per year of $20,000.00. The Petitioner's own estimate of his net worth as of the date of trial is about $400,000.00 but he has outstanding debts near $28,000.00; the Coke plant owes $15,000.00 on the original purchase price, and his land development Company has a very heavy capital indebtedness. The above net worth includes the house valued at $35,000.00, $2,000.00 furniture, and airplane worth $18,000.00 (in the name of the Laundry Company).

The Petitioner was 20 and the Respondent 19 years of age when they became married.

According to the Respondent, for almost two years, until her children began to arrive, she worked at the Bay, and later worked in the Coke plant. All her money went into the common fund. In addition to helping on bottling days and doing the books she helped clean the plant two to three days a week. This continued until 1968 when she purchased a Beauty Salon in Yellowknife. The money she used was from a bank loan backed by the Petitioner. In 1971 this business was sold for $12,000.00. At no time was the Petitioner called upon to pay anything towards the bank loan. After giving some small sums of money to certain of her children, the Respondent has taken $5,000.00 to pay on a house in British Columbia, as a down payment, and she still holds approximately $2,000.00 in the bank. Her investment in this house today is worth some $6,000.00.

The Respondent remembers signing the mortgage on the Yellowknife house and thought she signed a bank note but is not sure.

According to the Respondent, and the Petitioner does not seriously contest this part, the marriage was a good marriage until 1961. Following this date she noticed a change and suspected that her husband was having relations with another woman. By 1964 this relationship became apparent to her by reports received from the other woman's husband, the petitioner agreeing. The marriage began to decline rapidly, with name calling. In 1969 she suggested a divorce and according to her, her husband agreed at first. But nothing came of this.

Later In 1971 (August) after the Petitioner had been away, on his return she "snarled at him" and he wouldn't talk to her for two weeks. Later she returned for a short period of time after he had sent a neighbour to talk to her. Her suspicions of the Petitioner continued and finally in October 1973 she ceased living with him and went directly to Parksville, British Columbia, where she is presently living with the Petitioner's former partner, Noel Potgieter. She assists Mr. Potgieter in running a laundromat. His two daughters live with them. He is divorced. Her affair started with Potgieter in the summer of 1970. She stated emphatically that the Petitioner admitted his relations with the other woman mentioned above. There was no rebuttal called on behalf of the Petitioner.

(1) Cruelty alleged against the Petitioner

The *Divorce Act*.R.S.C. 1970, c. D-8 provides:

> "3. Subject to section 5, a petition for divorce may be presented to a court by a husband or wife, on the ground that the respondent, since the celebration of the marriage,
>
> (d) has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses."

There have been a great many judicial decisions as to the meaning to be attributed to the above section. Some of these pronouncements have insisted on relying on the meaning placed on

"physical or mental cruelty" in the old English case of *Russell v. Russell* 1897 A.C. 395. In other jurisdictions the courts have refused to follow the restricted meaning that has resulted down over the years from this case.

In *Fleming v. Fleming*, (1968) 66 W.W.R. 124, I suggested that armed with the new *Divorce Act* the courts should look ahead rather than back. Justice Wright in referring to the *Russell* decision said: "Its definition is not what the Canadian Parliament has laid down." *Lacey v. Lacey* (1969) 8 D.L.R. (3d) 289, at 295.

Smith, C.J.M. expresses the approach to be taken well in *Galbraith v. Galbraith* (1969) 69 W.W.R. 390 where at page 394 he states:

> "The *Divorce Act* was passed to give effect to a deep-seated and long -expanding public opinion that the law relating to divorce was in an unsatisfactory state, and that to bring it into accord with the needs of the times the grounds upon which divorce might be obtained should be liberalized. This being the case, it seems clear that when Parliament adopted the definition of cruelty in sec. 3(d) of the Act it had no intention of preserving the common-law requirement of physical or mental harm, but was thinking of any conduct which might reasonably be considered to be cruelty and which had the effect of rendering continued cohabitation intolerable. The key element in the definition is the intolerability of continued cohabitation."

In the facts before me in the present case the partners during their common struggle to gain a form of economic affluence

had a good marriage. In later years and, perhaps, because some of the economic pressure had become removed, suspicions in the mind of the Respondent of her husband's unfaithfulness began to develop. These eventually turned out to be true. Divorce was a possibility but she was talked out of it. As yetthere had been no unfaithfulness by the Respondent. But the situation did not improve, rather it continued to deteriorate -- the Petitioner is seen with the suspect woman, and as Mrs. Orser quite frankly says, she doubts if a spouse can ever forgive the other. Eventually of course she herself engages in an extra-marital affair, which still continues and as she says the final intent is marriage again with the new man.

In my view of the evidence the Petitioner's treatment of the Respondent, particularly since 1964, has constituted mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses. Accordingly the Respondent is entitled to a decree of divorce based on Section 3(d) as requested, to be made absolute in three months.

Among the many cases referred to under this heading of argument were the following: *Feldman v. Feldman*, (1970) 75 W.W.R. 715; *Delaney v. Delaney*, (1968) 66 W.W.R. 275; *Quinn v. Quinn*, (1970) 74 W.W.R. 144; *I.C. v. G.C.*, (1969) 9 D.L.R. (3d) 632; *Zalesky v. Zalesky*, (1968) 67 W.W.R. 104; *Knight v. Knight* (1969) 68 W.W.R. 464; *Austin v. Austin*, (1970) 73 W.W.R. 289.

(2) Maintenance claimed by the Respondent

Counsel for the Respondent submits that although it is his client's intention to marry, there is the possibility she may not marry. The fact of the Respondent's adultery is of itself no bar to the award of maintenance, depending on the circumstances; *Omelance v. Omelance*, 1971 3 W.W.R. 601; R.F.L. 293. He asks for $1.00 per month to be awarded.

The circumstances are such that I would have been disposed towards awarding maintenance, particularly if the Petitioner's financial situation, despite his net worth, should make for delay in payment of the lump sum award I am considering. Accordingly the Respondent's right to re-apply for maintenance is reserved for further application as counsel may advise.

(3) A lump sum payment for the Respondent

The title to the home property in Yellowknife is registered in the joint names of the parties. The Petitioner, himself, states that one of the reasons was to give his wife some security. It is my view of the facts that the arrangement with the Company in respect to rent and payments was prompted by accounting objectives. I am satisfied that the Respondent has an equity equal to one half the value of the home subject of course to one-half the mortgage.

In circumstances as are found in the present case, even where as here there is evidence of adultery against the wife, the

court has a very broad discretion in the awarding of maintenance and if seen fit, in directing payment of a lump sum: *Omelance v. Omelance* (supra); *Feldman v. Feldman*, (supra); and *Wener v. Wener*, (1970) 75 W.W.R. 721. It is my conclusion on the facts that this is a proper case for the award to the Respondent of a lump sum amount. The Petitioner has himself assessed his net worth as $400,000.00 but a great deal of this is on the evidence in the form of heavily encumbered assets where it will take many years before he will be able to draw any substantial income from them. I must take this into consideration.

In my overall view I award the Respondent wife a cash payment of $40,000.00, payable within six months. It will be a condition of this award that at the time of payment the Respondent will be required to execute a release and transfer of her interest in the home property.

4. Costs

Petitioner seeks costs against the co-respondent. In the view I have taken of the facts, especially in respect to cruelty, I do not think this is a proper case for awarding costs against the co-respondent.

For the same reasons the Respondent is entitled to costs to be taxed in Column 4, to include discoveries, and with a special

allowance of her actual disbursements incurred in making the trip to Yellowknife from [illegible]rksville and return.

W. G. Morrow.

8 February 1974
Yellowknife, N. W. T.

Counsel:

D. Finall, Esq.,

for Petitioner

W. V. Smith, Esq.,

for Respondent

Co-Respondent, Noel Potgieter
not present or represented.