

Date: 1998 07 15
Docket: 6101-02962

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LOLITA CHING

Petitioner

- and -

GENARO ENRIQUEZ

Respondent

MEMORANDUM OF JUDGMENT

- [1] This is an application for a divorce judgment without oral evidence.
- [2] The parties were married in the Philippines on September 19, 1982. They have been separated since 1983. A legal separation was granted on the petition of the Petitioner by the Regional Trial Court, National Capital Judicial Region, Branch 122 - Kalookan City on January 20, 1991. It seems that the Respondent did not contest or appear at the proceeding.
- [3] The Petition for Divorce was filed in this court on April 21, 1998. An order was obtained for substitutional service on the Respondent by publication in a Manila newspaper. The Respondent was noted in default on July 14, 1998.
- [4] The Petitioner now applies for a divorce judgment and requests that the time for the divorce to take effect be abridged to 7 days from the 31 days prescribed by s.12(1) of the *Divorce Act*.
- [5] No corollary or other relief is requested save for the divorce judgment.

[6] Section 12(2) of the Act states the following:

12 (2) Where, on or after rendering a judgment granting a divorce,

- (a) The court is of the opinion that by reason of special circumstances the divorce should take effect earlier than the thirty-first day after the day on which the judgment is rendered, and
- (b) the spouses agree and undertake that no appeal from the judgment will be taken, or any appeal from the judgment that was taken has been abandoned,

the court may order that the divorce takes effect at such earlier time as it considers appropriate.

As counsel for the Petitioner noted in her Memorandum, the two sub-sections of s.12(2) act disjunctively and both must be satisfied before the Court will exercise its discretion to abridge the time for the divorce to take effect.

[7] Rule 23 of the Northwest Territories Divorce Rules provides:

23. An agreement and undertaking referred to in paragraph 12(2)(b) of the Act must be in writing, signed by the parties and accompanied by affidavits of execution.

No agreement and undertaking has been provided in this case. Since I expect that counsel can obtain the required document from the Petitioner, the real issue is the inability to obtain the agreement and undertaking from the Respondent, whose precise whereabouts are unknown.

[8] Counsel for the Petitioner asks that I infer that the Respondent would not object to the time being abridged because the parties have been separated for so long and the Respondent has not contested any of the proceedings.

[9] It does not appear to me, however, that I have any discretion to dispense with the requirements of s.12(2)(b). The discretion given to the court is a discretion to order that the divorce take effect at an earlier time, but only upon the requirements of the statute being met: *Baia v Baia et al* [1970] 3 O.R. 165 (H.C.J.).

[10] Nor do I think the Court can infer from the Respondent's inaction an agreement and undertaking not to appeal, particularly in a case where the Respondent was not personally served with the petition for divorce. No case has been cited to me as authority for this proposition. I note that in *Baia v Baia*, despite *viva voce* evidence having been given by the parties that they agreed and undertook as required under what was then s.13(2) of the Act, Wright J. still required that written agreements and undertakings be filed.

[11] Having considered the matter and because the s.12(2)(b) requirements have not been fulfilled, I am of the view that I do not have jurisdiction to grant the relief requested.

[12] Because s.12(2)(b) has not been fulfilled, I need not address s.12(2)(a). I will simply note that the Petitioner in her affidavit referred to no circumstances which might be considered special other than the length of separation. In counsel's Memorandum there was reference to a planned re-marriage. All of the circumstances which a petitioner wishes the Court to consider should be referred to in the petitioner's affidavit.

[13] Although the Petitioner's case is a sympathetic one, for the reasons given I am not able to assist her. The Divorce Judgment will issue with the usual 31 day period before it becomes effective.

[14] Dated at Yellowknife, this 15th day of July, 1998.

V. A. Schuler
J.S.C.

To: Elizabeth Hellinga,
Counsel for the Petitioner

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MEMORANDUM OF JUDGMENT OF THE
HONOURABLE JUSTICE V. A. SCHULER
