No Special Consideration

IN THE SUPREME COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. D.473/70
IN DIVORCE

BETWEEN FRANK REGINALD EDWARDS
Petitioner

A N D SUSANNAH DUPOY EDWARDS
Respondent

Counsel: D.H. Stringer for Petitioner
Minute: 13 JUL 1971

MINUTE OF WILSON J.

Motion ex parte for leave to verify the petitioner's case in part by affidavit. The respondent has not filed an answer but has filed an address for service and consents to the order sought. A separation agreement between the parties which is alleged to have remained in full force and effect since its date (6 August 1968) forms the ground on which the petition is based.

In support of his application the petitioner has deposed that he is employed by the Ministry of Works at Turangi at the southern end of Lake Taupo and "if I am required to travel from Turangi to Christchurch to give evidence in my case it will involve me in air fares from Rotorua to Christchurch and return an amount of $53.20. I would also be involved in the loss of not less than three days pay. Accordingly it would be a matter of considerable hardship and expense to me to travel to Christchurch to give viva voce evidence."

Rule 41 of the Matrimonial Proceedings Rules 1964 allows evidence on petitions under the Matrimonial Proceedings Act 1963 to be given by affidavit "with the leave of the Court, or where authorised by these rules." Until fairly recent times the Courts exercised their discretion in this matter sparingly where it was the petitioner whose evidence

it was proposed to tender by affidavit, but latterly, where the petition has been based on a written separation agreement or a separation decree or order the unlikelihood of the existence of any bar has led to a more liberal attitude by the Court in undefended suits. It must not be forgotten, however, that, as a change of status is involved the presence of witnesses (and particularly of petitioners) is normally required, as R.41 states, and that a valid reason is required for dispensing with their attendance. What amounts to a valid reason will vary according to the circumstances and it is for this reason that the Courts do not now insist on such cogent reasons for dispensing with the viva voce evidence of petitioners in undefended suits on the ground of separation decrees, orders or agreements as in other cases and will accept proof of a substantially lower degree of hardship.

Even in these cases, however, the Court will require evidence of some hardship of the petitioner which would result from his personal attendance at the hearing of his petition. The standing of the law is not enhanced by the spectacle of divorces being granted in the absence of the petitioner. It is, after all, his petition and prima facie there is no compulsion on him to present or to prosecute it at any particular time after his right to present it has accrued. Moreover, he has the right to file his petition and/or to have it heard in any Court in the Dominion. See Sim's Divorce Law and Practice (8th edn) p.349 and R.36. These facts will naturally be considered by the Court in relation to a plea of hardship along with the principle that public policy is not served by prolonging the existence in law of a marriage that has irretrievably ceased to be one in fact.

In the instant case the petitioner was resident in Turangi when the petition was filed. He could have filed it in the Hamilton Registry of the Court and given evidence at a hearing in that Court with considerably less expense for travelling and with the loss of not more than one

day's pay. He elected, instead, to file it and have it heard in Christchurch and he says that this will involve him in $53.20 for air fares and the loss of three days' pay. I take liberty to doubt that. From Monday to Friday (inclusive) he could catch an aircraft in Taupo (over 50 miles nearer to his home at Turangi than Rotorua) at 9.10 a.m. and could arrive in Christchurch at 12.05 p.m. He could return the following day, leaving Christchurch at 1.05 p.m. The Court will always make special arrangements for hearing in a case such as this and if a fixture were made for a Friday afternoon the petitioner would probably lose only one day's wages. The return fare from Taupo is $50.80. Rotorua-Christchurch return fare is $59.80 but there is a return flight to Rotorua leaving at 4.15 p.m. daily, so that, if he travelled via Rotorua he could return the same day. I cannot see, therefore, why the petitioner should lose three days' pay by attending to give evidence in person.

The petitioner has sworn that it would cause him "considerable hardship and expense" to attend the hearing of his petition. I have already shown that the expense which he anticipates can be substantially reduced. His statement that he would suffer considerable hardship is a conclusion which is one for the Court to draw on the facts presented to it. Except on the score of expense I have no evidence of any facts from which I can arrive at that conclusion. When reliance is placed on expense to prove hardship it is not sufficient merely to prove necessary expenditure. There must also be evidence of the petitioner's means available to meet that expenditure. I have been given no information at all on this subject (for all I know he may have substantial funds at call), but I note from his petition that he has no dependent children, and from the separation agreement it appears that his liability for the maintenance of his wife is fixed at $12 a week. Even if he has no cash presently available I should think that it would not take him long to save the money necessary to enable him to attend at the hearing of his petition.

The petitioner has failed to prove any hardship. As a result, although the respondent has consented to his application, it is dismissed.

I may add that even if I had been satisfied on the score of hardship I could not accept the proposed affidavit because it contains a statement that cannot possibly be true. In paragraph 6, after referring to the separation agreement dated 6 August 1968 (which is exhibited and properly proved) he continues:

> "That agreement is in full force and has been in full force and effect for a period of not less than three years namely from the said 6th day of August 1968 down to the present time."

This sentence follows, word for word, the allegation in paragraph 3 of the petition. The reference to three years instead of two in the petition is an obvious drafting slip which is readily capable of amendment either before or at the hearing but a sworn statement to that effect cannot be accepted in an affidavit tendered in lieu of oral evidence.

A further defect in the affidavit is its failure to identify properly the marriage certificate. The petitioner merely deposes that a copy of the marriage certificate was obtained by his solicitors and has been filed in the proceedings. (Technically, it is not "filed" but "lodged" - see R. 7(1).) It does not appear that the copy of the marriage certificate so lodged has ever been sighted by the petitioner and this statement appears to be hearsay. It is essential that the document tendered as proof of the marriage be positively identified by a party to the marriage. This could be done, of course, by the respondent if she were prepared to give evidence.

Solicitors:

D.H. Stringer & Co., Christchurch, for Petitioner