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ANNOTATIONS AND ARTICLES/ANNOTATIONS ET ARTICLES

CASES REPORTED/DÉCISIONS PUBLIÉES

(CASES REPORTED CONTINUED ON THE BACK COVER)

CARSWELL

[Indexed as: **Rudiger-Prybylski v. Mudric**]

KIM-MIA RUDIGER-PRYBYLSKI (Plaintiff / Applicant) and DRAGISA GILE MUDRIC (Defendant)

DRAGISA GILE MUDRIC (Plaintiff) and KIM-MIA RUDIGER-PRYBYLSKI (Defendant)

Alberta Court of Queen's Bench

Trussler J.

Heard: August 8, 2002

Judgment: August 27, 2002

Docket: Edmonton 4803-118764, 4801-110012, 2002 ABQB 778

Gordon H. Andreiuk, for Plaintiff
Jeffrey D. Wise, for Defendant

Family law — Divorce — Practice and procedure — Pleadings — Amendment — Wife issued statement of claim in Edmonton — Grounds of divorce in wife's claim were living separate and apart for one year — Parties reconciled for more than 90 days — Husband subsequently issued statement of claim in Calgary — After husband filed claim, wife applied to amend her claim to include new separation period — Application granted — Wife was entitled to amend her claim and prior filed action took precedence — Divorce Act made no provision for what happened to proceeding that was commenced when there was reconciliation of more than 90 days — No procedural bars to amending claim — Claim filed by husband was deemed to be discontinued — Husband's action was consolidated into wife's action — Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

Family law — Divorce — Grounds — Living separate and apart — Interruption of separation — Wife issued statement of claim in Edmonton — Grounds of divorce in wife's claim were living separate and apart for one year — Parties reconciled for more than 90 days — Husband subsequently issued statement of claim in Calgary — After husband filed claim, wife applied to amend her claim to include new separation period — Application granted — Wife was entitled to amend her claim and prior filed action took precedence — Divorce Act made no provision for what happened to proceeding that was commenced when there was reconciliation of more than 90 days — No procedural bars to amending claim — Claim filed by husband was deemed to be discontinued — Husband's action was consolidated into wife's action — Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

Annotation

In her decision *Rudiger-Prybylski v. Mudric*, Madam Justice Trussler addressed the issue of whether a reconciliation of more than 90 days nullifies a statement of claim for divorce where the basis claimed is one year of separation. This was an issue in Alberta where the case was heard, because of the difference in practice between the two cities of Edmonton and Calgary. The Calgary courthouse and Calgary practitioners historically had never

amended the separation date on a statement of claim for divorce following a reconciliation of more than 90 days where the basis claimed was one year of separation. A new statement of claim would always be issued. In contrast, the Edmonton courthouse has permitted the separation date to be amended, and there was a mixed practice among Edmonton practitioners about whether to issue a new statement of claim. Justice Trussler made it clear that the first statement of claim is to be used and that leave to amend the separation date is to be obtained.

It seems like a picayune issue, but issuing a new statement of claim can cause mischief and be used unfairly, as was the case in *Rudiger-Prybylski v. Mudric*. When the parties separated a second time following a reconciliation of more than 90 days, the lawyer for Mudric at the time issued a new statement of claim and obtained an ex parte order against Rudiger-Prybylski which took months to sort out. The order was obtained on an ex parte basis although Rudiger-Prybylski had counsel who was eventually contacted.

Similarly, the writer has been advised of a similar Calgary case before the courts where the defendant's new counsel has taken the position that the statement of claim is a nullity and there is no jurisdiction to proceed further under that statement of claim because the parties had reconciled at one point for more than 90 days — this despite the fact that the defendant's prior counsel had earlier accepted the continued use of the original statement of claim.

In summary, the uncertainty in the *Divorce Act* concerning the effect of a reconciliation of more than 90 days on a statement of claim for divorce where the basis claimed is one year of separation was creating mischief within the court system and divorce practice.

In her decision, Madam Justice Trussler does not go into the issue of whether Parliament had intended the one-year separation basis for divorce to be treated differently from the other two bases of adultery and mental/physical cruelty, as Justice Ryan-Froslie had done in *Pickering v. Pickering*, 2001 CarswellSask 263, 15 R.F.L. (5th) 159 (Sask. Q.B.), nor does she go into the issue of whether a statement of claim based on a one-year separation would be a nullity if the separation date were not amended, as Justice Czutrin had commented in *Ramirez v. Ramirez*, 1995 CarswellOnt 1989 (Ont. U.F.C.). Interestingly, Justice Trussler pointed to s. 3(2) of the *Divorce Act* for the proposition that the latter statement of claim should have been discontinued automatically. Justice Trussler wrote that "[s]ection 3(2) of the *Divorce Act* would purport to determine which Statement of Claim has precedence". I believe she was obliged to use the word "purport" because the Nova Scotia Court of Appeal had earlier found, in *Cavanagh v. Cavanagh*, 1999 CarswellNS 101, 47 R.F.L. (4th) 271 (N.S. C.A.), that this subsection of the *Divorce Act* applies only where there is a competition between statements of claim issued out of different provinces.

Madam Justice Trussler's decision clarifies a point of practice for all divorce practitioners and should eliminate the mischief referred to above.

Gordon H. Andreiuk

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
s. 3(2) — considered
s. 8 — referred to

s. 8(3)(b)(ii) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to
R. 11(1) — referred to
R. 110(1) — considered
R. 130(1) — considered
R. 131 — referred to
R. 244.1 [en. Alta. Reg. 160/93] — considered

APPLICATION by wife to ammend claim.

***Trussler J.*:**

1 This application is the result of there being two Statements of Claim for Divorce and Division of Matrimonial Property with the same parties.

2 The wife issued the first Statement of Claim out of the Judicial District of Edmonton on September 29, 2000. The husband issued the second Statement of Claim out of the Judicial District of Calgary on June 25, 2001. Between the issuing of the first and second Statement of Claim the parties reconciled for more than 90 days.

3 Section 3(2) of the *Divorce Act* would purport to determine which Statement of Claim has precedence. It provides:

> (2) Where divorce proceedings between the same spouses are pending in two courts that would otherwise have jurisdiction under subsection (1) and were commenced on different days and the proceeding that was commenced first is not discontinued within thirty days after it was commenced, the court in which a divorce proceeding was commenced first has exclusive jurisdiction to hear and determine any divorce proceeding then pending between the spouses and the second divorce proceeding shall be deemed to be discontinued.

4 The grounds for divorce in the first Statement of Claim are break down of marriage on the basis of the spouses having lived separate and apart for at least one year immediately preceding the determination of the divorce proceedings were living separate and apart at the commencement of the proceeding as set out in section 8 of the *Divorce Act*. The difficulty that arises is created by Section 8(3)(b)(ii) which states that:

> (b) a period during which the spouses have lived separate and apart shall not be considered to have been interrupted or terminated
>
> (ii) by reason only that the spouses have resumed cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose.

5 The Divorce makes no provision for what happens to a proceeding that has been commenced when there has subsequently been a reconciliation of more than ninety days. Furthermore the *Rules of Court* give no guidance. It is obvious that the grounds for divorce are no longer valid but the Statement of Claim continues to exist.

6 The practice of the Court has been to allow the parties to continue with Statement of Claim filed prior to the reconciliation as long as the Statement of Claim is amended to reflect the new separation date and the amended Statement of Claim is served. This practice is subject to Rule 244.1 that provides that if nothing is done to materially advance an action for a five year period, the action will be dismissed on application by the defendant Rule 11(1) that requires a Statement of Claim to be served within one year of issuance.

7 There are no procedural bars to amending the Statement of Claim. Rule 130(1) allows a plaintiff to amend pleadings once without leave. The amended pleadings must be served. A defendant could invoke Rule 131 and, if successful, the pleadings would be deficient and one of the parties would have to file a new Statement of Claim with a new separation period.

8 In addition Rule 110(1) appears to require that leave be obtained before amending the Statement of Claim to plead a new separation date although the Court has not been requiring leave.

9 In this application the wife amended her Statement of Claim but the amendment occurred after the husband filed a new Statement of Claim in the Judicial District of Calgary.

10 I am of the view that the wife was entitled to amend her Statement of Claim and that the prior filed action takes precedence. If leave was required to make the amendment it is hereby granted. As a result the Statement of Claim filed by the husband is deemed to be discontinued. If the husband had wanted to proceed and the wife took no steps the husband could have filed a counterclaim in the wife's action and proceeded on the counterclaim. Such a step would ensure that there was not a multiplicity of proceedings.

11 In this situation there have been applications under both actions and orders granted under both actions. As a result, to simplify matters, and to keep the status quo, the husband's Calgary action will be consolidated into the wife's Edmonton action. The parties live in the cities where their actions were filed. As a matter of fairness while all applications and the trial will be held in Edmonton, any examinations for discovery will be held in Calgary.

12 As this application involved consideration of a point of practice that required clarification no costs will be awarded.

Application granted.