

2002 CarswellAlta 950, 2002 ABQB 727, 322 A.R. 242

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Thurber v. Thurber

Paula Thurber (Plaintiff / Applicant) and Lee Thurber (Defendant)

Alberta Court of Queen's Bench

McMahon J.

Heard: August 2, 2002

Judgment: August 6, 2002

Docket: Calgary 4801-113650

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Counsel: *Ms Diann P. Castle*, for Applicant

Subject: Family; Constitutional

Family law --- Constitutional issues — General.

Family law --- Divorce — Practice and procedure — Miscellaneous issues.

Cases considered by McMahon J.:

Allman v. Northwest Territories (Commissioner) (1983), [1984] N.W.T.R. 65, 50 A.R. 161, 8 D.L.R. (4th) 230, 1983 CarswellNWT 36 (N.W.T. C.A.) — followed

Allman v. Northwest Territories, [1984] N.W.T.R. xxxix, 53 A.R. 160n, 55 N.R. 394n, [1984] 1 S.C.R. v (S.C.C.) — referred to

Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44, 2000 CarswellBC 1860, 2000 CarswellBC 1861, 2 C.C.E.L. (3d) 165, 81 B.C.L.R. (3d) 1, 190 D.L.R. (4th) 513, [2000] 10 W.W.R. 567, 23 Admin. L.R. (3d) 175, 2000 C.L.L.C. 230-040, 260 N.R. 1, (sub nom. *British Columbia (Human Rights Commission) v. Blencoe*) 77 C.R.R. (2d) 189, 141 B.C.A.C. 161, 231 W.A.C. 161, [2000] 2 S.C.R. 307, (sub nom. *British Columbia (Human Rights Commission) v. Blencoe*) 38 C.H.R.R. D/153 (S.C.C.) — followed

Canadian Egg Marketing Agency v. Richardson, 1998 CarswellNWT 118, 1998 CarswellNWT 119, 166 D.L.R. (4th) 1, (sub nom. *Canadian Egg Marketing Agency v. Pineview Poultry Products Ltd.*) 57 C.R.R. (2d) 1, (sub nom. *Canadian Egg Marketing Agency v. Pineview Poultry Products Ltd.*) 223 A.R. 201, (sub nom. *Canadian Egg Marketing Agency v. Pineview Poultry Products Ltd.*) 183 W.A.C. 201, [1998] 3 S.C.R. 157, 231 N.R. 201 (S.C.C.) — considered

Danson v. Ontario (Attorney General), 43 C.P.C. (2d) 165, 73 D.L.R. (4th) 686, [1990] 2 S.C.R. 1086, 50 C.R.R. 59, 41 O.A.C. 250, 112 N.R. 362, 1990 CarswellOnt 366, 74 O.R. (2d) 763 (note), 1990 CarswellOnt 1004 (S.C.C.) — considered

Godbout c. Longueuil (Ville), (sub nom. *Godbout v. Longueuil (City)*) 152 D.L.R. (4th) 577, (sub nom. *Godbout v. Longueuil (Ville)*) 219 N.R. 1, 1997 CarswellQue 883, 1997 CarswellQue 884, (sub nom. *Godbout v. Longueuil (City)*) 47 C.R.R. (2d) 1, 43 M.P.L.R. (2d) 1, (sub nom. *Longueuil (City) v. Godbout*) 97 C.L.L.C. 210-031, [1997] 3 S.C.R. 844 (S.C.C.) — considered

Jadavji v. Jadavji, 2001 BCSC 767, 2001 CarswellBC 1235 (B.C. Master) — referred to

Jadavji v. Jadavji, 2001 BCSC 1027, 2001 CarswellBC 1619 (B.C. S.C.) — referred to

Koch v. Koch, 43 Sask. R. 230, 23 D.L.R. (4th) 609, 1985 CarswellSask 299 (Sask. Q.B.) — followed

MacKay v. Manitoba, [1989] 6 W.W.R. 351, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385, 99 N.R. 116, 61 Man. R. (2d) 270, 43 C.R.R. 1, 1989 CarswellMan 184, 1989 CarswellMan 332 (S.C.C.) — considered

Miron v. Trudel, 10 M.V.R. (3d) 151, 23 O.R. (3d) 160 (note), [1995] I.L.R. 1-3185, 13 R.F.L. (4th) 1, C.E.B. & P.G.R. 8217, 181 N.R. 253, 124 D.L.R. (4th) 693, 81 O.A.C. 253, [1995] 2 S.C.R. 418, 29 C.R.R. (2d) 189, 1995 CarswellOnt 93, 1995 CarswellOnt 526 (S.C.C.) — followed

Moysa v. Alberta (Labour Relations Board), 34 C.P.C. (2d) 97, [1989] 1 S.C.R. 1572, [1989] 4 W.W.R. 596, 60 D.L.R. (4th) 1, 96 N.R. 70, 67 Alta. L.R. (2d) 193, 97 A.R. 368, 89 C.L.L.C. 14,028, 40 C.R.R. 197, 1989 CarswellAlta 86, 1989 CarswellAlta 616 (S.C.C.) — considered

New Brunswick (Minister of Health & Community Services) v. G. (J.), 1999 CarswellNB 305, 1999 CarswellNB 306, 26 C.R. (5th) 203, 244 N.R. 276, 177 D.L.R. (4th) 124, 50 R.F.L. (4th) 63, 66 C.R.R. (2d) 267, 216 N.B.R. (2d) 25, 552 A.P.R. 25, [1999] 3 S.C.R. 46, 7 B.H.R.C. 615 (S.C.C.) — followed

Vaugeois, Re, 1999 CarswellAlta 69, (sub nom. *Vaugeois v. Red Deer (City)*) 169 D.L.R. (4th) 744, (sub nom. *Vaugeois v. Red Deer (City)*) 60 C.R.R. (2d) 183, 50 M.P.L.R. (2d) 276, (sub nom. *Vaugeois v. Red Deer (City)*) 240 A.R. 89, 1999 ABQB 30 (Alta. Q.B.) — considered

Winmill v. Winmill, [1974] 1 F.C. 686, 5 N.R. 159, 47 D.L.R. (3d) 597, 1974 CarswellNat 56, 1974 CarswellNat 56F (Fed. C.A.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 6 — considered

s. 6(2) — considered

s. 7 — considered

s. 15 — referred to

Charte des droits et libertés de la personne, L.R.Q., c. C-12

art. 5 — referred to

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Generally — considered

s. 3(1) — considered

MOTION by plaintiff for declaration that section of Divorce Act was unconstitutional.

McMahon J.:

1 This is an application for a declaration that section 3(1) of the *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.) (hereinafter "the *Divorce Act*") is unconstitutional. The section currently reads:

3.(1) A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse *has been* ordinarily resident in the province *for at least one year immediately preceding the commencement of the proceeding* [emphasis added].

2 The Applicant, Ms. Thurber, argues that the one-year ordinary residence requirement in section 3(1) of the *Divorce Act* violates sections 6 and 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 (hereinafter "the *Charter*"). The Applicant seeks to have the words "has been" replaced with "is" and the words "for at least one year immediately preceding the commencement of the proceeding" struck such that the section would read:

3.(1) A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse is ordinarily resident in the province.

3 Neither Mr. Thurber nor the federal or provincial attorneys general appeared on this motion. Mr. Thurber was served with the Applicant's notice of motion on June 26, 2002 and filed a Demand of Notice on July 10, 2002. The Attorneys General of Canada and Alberta were also given the requisite notice of the Applicant's intention to challenge section 3(1) of the *Divorce Act*. The decision of the Crown not to respond to a *Charter* challenge to federal legislation was distinctly unhelpful to this Court.

FACTS

4 The only evidence before the Court on the application is found in an affidavit sworn by Joanne Anquist, a legal researcher for the Applicant's counsel, and an affidavit sworn by the Applicant outlining the bare facts set out below.

5 The parties were married May 25, 1991, and separated September 25, 1999. The parties lived in the

Province of Ontario during the marriage. Mr. Thurber left Ontario for Nova Scotia in May 2001. Ms. Thurber moved to Alberta in August 2001. Mr. Thurber subsequently moved to Alberta in December 2001. Although either party could have filed for divorce in Ontario before they left the province, neither party did. Notwithstanding the fact they have been separated for nearly three years, as neither party has been ordinarily resident in Alberta for one year, pursuant to section 3(1) of the *Divorce Act*, neither party can file for divorce in Alberta. Indeed, neither party can file in any Provincial Court nor in Federal Court until they have been ordinarily resident in a province for one year: *Winmill v. Winmill*, [1974] 1 F.C. 686 (Fed. C.A.); *Jadavji v. Jadavji*, 2001 BCSC 767 (B.C. Master), aff'd 2001 BCSC 1027 (B.C. S.C.). I note that the Federal Court has jurisdiction in divorce proceedings in only very limited circumstances: *Winmill*, *supra*.

PRELIMINARY ISSUE

6 The Applicant attempted to file a Statement of Claim for divorce in this jurisdiction on April 19, 2002. The Statement of Claim was rejected as neither Ms. Thurber nor Mr. Thurber had been ordinarily resident in the jurisdiction for one year at that point. On June 12, 2002, the Applicant was granted a *fiat* allowing her Statement of Claim to be filed notwithstanding the fact that the one-year ordinary residence requirement in section 3(1) of the *Divorce Act* had not yet been met. She comes before this Court on a Notice of Motion filed pursuant to her divorce action.

7 If the Applicant's motion had been opposed, there may have been the argument that the procedure used to bring this matter before me was incorrect. As the Applicant has not complied with section 3(1) of the *Divorce Act*, it is not clear that the Court has jurisdiction to hear her application as it is pursuant to divorce proceedings. Nevertheless, particularly given my decision on the substantive issues, I am prepared to assume that this matter, that is, the interpretation of section 3(1) of the *Divorce Act* only, is properly before me and that the Applicant has standing to challenge the constitutionality of this legislation.

ISSUES

1. Does section 3(1) of the *Divorce Act* violate section 6 of the *Charter*?
2. Does section 3(1) of the *Divorce Act* violate section 7 of the *Charter*?
3. If section 3(1) of the *Divorce Act* violates either section 6 or section 7 of the *Charter*, is it saved by section 1 of the *Charter*?

ANALYSIS

1. Does section 3(1) of the *Divorce Act* violate section 6 of the *Charter*?

Section 6 of the *Charter* states:

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
- (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the

right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly funded social services.

8 The Applicant argues that the effect of section 3(1) of the *Divorce Act* is to prevent a person from moving to and taking up residence and pursuing the gaining of a livelihood in another province because it requires that person to remain in a province for one year if they wish to file for divorce. This, she states, is a violation the rights guaranteed under section 6(2) of the *Charter*.

9 The Applicant argues further that "[t]he mobility right, is not just a right of citizenship, it is a human right." She contends that this may include "the right to access legal services across the country." Thus, a person is discriminated against when they relocate to a new province because, but for the residency requirement, they would be entitled to file for divorce.

10 The case law however, does not support this position. The Saskatchewan Court of Queen's Bench has addressed this section of the *Divorce Act* in *Koch v. Koch* (1985), 43 Sask. R. 230 (Sask. Q.B.). The Court held at paragraph 4 that the thrust of section 6(2) of the *Charter* was to protect the right of citizens to pursue a livelihood anywhere in Canada and that the section cannot be extended to protect the right to move to any province and get a divorce.

11 Similarly, the Northwest Territories Court of Appeal addressed residency requirements in the context of section 6(2) of the *Charter* in *Allman v. Northwest Territories (Commissioner)* (1983), 50 A.R. 161 (N.W.T. C.A.), leave to appeal to S.C.C. refused, [1984] 1 S.C.R. v (S.C.C.). There, the applicants challenged legislation that placed a three-year residency requirement on those who wished to vote in certain plebiscites. They argued that the legislation discriminated against them on the grounds of residence. At paragraph 23, the Court upheld the decision of the Trial Judge who noted that the applicants had experienced no difficulty in taking up residence and pursuing a livelihood in the territory as a result of the legislation. The effect of the legislation was simply to limit the applicants' ability to vote in certain plebiscites, not their ability to take up residence and pursue a livelihood. Thus, as section 6(2) protects only the right to take up residence and pursue a livelihood anywhere in Canada, and as the legislation had not interfered either of these rights, it did not violate section 6(2) of the *Charter*.

12 This interpretation of the scope of section 6 of the *Charter* is supported by the Supreme Court of Canada's leading decision in *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 (S.C.C.). At paragraph 67, the Court stated that "the focus of the analysis in s.6 is...the purpose and effect of the particular regulation, and whether that purpose and effect infringes the right to be free from discrimination on the basis of residence *in the pursuit of a livelihood*" [emphasis added]. There is no evidence that the purpose of section 3(1)

of the *Divorce Act* is to limit a person from moving to another province or from gaining a livelihood there. It is to prevent a person from filing for divorce until they have been ordinarily resident in the province of their choice for one year. Nor is there any evidence before me which would indicate that the effect of section 3(1) is to prevent the mobility of persons within Canada or to impair their ability to pursue a livelihood in the province of their choice. For the reasons set out in *Koch*, *supra* and *Re Allman et al.*, *supra*, I find that section 3(1) of the *Divorce Act* does not violate section 6(2) of the *Charter*.

2. Does section 3(1) of the *Divorce Act* violate section 7 of the *Charter*?

Section 7 of the *Charter* states:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the fundamental principles of justice.

13 In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (S.C.C.) Bastarache J. reiterated the test for making out a violation of a claimant's section 7 rights. At paragraph 47, he stated:

...before it is even possible to address the issue of whether the respondent's s.7 rights were infringed in a manner not in accordance with the principles of fundamental justice, one must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s.7. These two steps in the s.7 analysis have been set out by La Forest J. in *R. v. Beare*, [1988] 2 S.C.R. 387, at p.401, as follows:

To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that the deprivation is contrary to the principles of fundamental justice.

Thus, if no interest in the respondent's life, liberty or security of the person is implicated, the s.7 analysis stops there. It is at the first stage in the s.7 analysis that I have the greatest problem with the respondent's s.7 arguments.

14 The Applicant claims that both her right to liberty and her right to security of the person are engaged by section 3(1) of the *Divorce Act*.

15 The Applicant relies on Bastarache J.'s statement in *Blencoe*, *supra* at paragraph 49 that "individuals are entitled to make decisions of fundamental importance free from state interference" as authority for the proposition that her liberty interest is implicated by the one-year ordinary residence requirement in section 3(1) of the *Divorce Act*.

16 The Applicant argues that the decision to get divorced, like the decision to get married, is one of fundamental personal importance. She relies upon the statement of McLachlin J. (as she then was) in *Miron v. Trudel*, [1995] 2 S.C.R. 418 (S.C.C.) at paragraph 151, that the decision to get married is a "matter of defining importance to individuals."

17 The Applicant's argument then, is that section 3(1) of the *Divorce Act* violates the protection of liberty guaranteed by section 7 of the *Charter*, in that it interferes with the fundamental personal decision to become divorced.

18 It is worth noting that McLachlin J.'s comments in *Miron*, *supra*, were made in the context of a section

15 analysis. There, the Supreme Court of Canada found that marital status, being a result of a decision of fundamental importance, like religion or citizenship, was an analogous ground under section 15 of the *Charter*. No case was brought to my attention where a court has held that the section 7 liberty interest includes a right to a divorce on demand.

19 Even if I were to assume that the analysis in *Miron*, *supra*, applies in the section 7 context, I fail to see how Ms. Thurber's fundamental personal decision to become divorced is interfered with by section 3(1) of the *Divorce Act*. The section does not prohibit or prevent the Applicant from becoming divorced. It merely delays her application to do so until she has been ordinarily resident in the province of her choice for one year.

20 Similarly, the Applicant argues that "the choice of where to establish one's home" is also a fundamental personal choice worthy of protection under section 7 of the *Charter*: *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 (S.C.C.) at paragraph 15 per La Forest J. In *Godbout*, *supra*, the plaintiff was a city employee who, as a condition of her employment, was required to reside within the city. The majority of the Court held that this violated her freedom under section 5 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 which states that "[e]very person has a right to respect for his private life" and declined to consider whether it violated the *Charter* as well. La Forest, L'Heureux-Dubé and McLachlin JJ. held that the residency requirement violated the liberty interest protected under section 7 of the *Charter*.

21 Justice La Forest's minority opinion in *Godbout*, *supra*, has been adopted by this Court in *Vaugeois, Re*, 1999 ABQB 30 (Alta. Q.B.), to strike down a city bylaw which required a person to be resident in that city for six months prior to obtaining a permit to be engaged in the escort business. With respect to my learned colleague, I do not agree that it is appropriate to extend the protection of section 7 of the *Charter* on the facts before me. In *Blencoe*, *supra*, Bastarache J. specifically cautioned at paragraph 54 that "[a]lthough an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom."

22 In *Godbout*, *supra*, the applicant could *never* move outside the city limits if she wished to continue her employment with the City. Here, nothing is preventing the Applicant from moving to another province. While the Applicant must reside in the province of her choice for at least one year in order to file for a divorce, this does not engage her liberty interest as protected by section 7 of the *Charter*. The impugned law does not constrain her ability to reside where she chooses, except in a very peripheral way. To find that section 3(1) of the *Divorce Act* engages section 7 would extend the scope of that section in a manner that goes well beyond the existing jurisprudence.

23 The Applicant further argues that section 3(1) of the *Divorce Act* violates the protection for the security of the person guaranteed under section 7 of the *Charter*. She argues, quoting *Blencoe*, *supra* at paragraph 55, that this guarantee "has been held to protect both the physical and psychological integrity of the individual." The Court in *Blencoe*, *supra*, held at paragraph 57 that the guarantee of security of the person entitled citizens to protection from "state-imposed psychological stress." The Applicant suggests that the restraint on getting a divorce imposed by the one-year ordinary residence requirement in the *Divorce Act* may cause "state-imposed psychological stress" because it may force the parties to remain married even though they wish to be divorced and all of the other requirements of the *Divorce Act* have been met.

24 Again, I am not persuaded that the case law supports such an argument. Justice Bastarache's comments in *Blencoe*, *supra*, were derived from cases where the Court dealt with restrictions on one's ability to make funda-

mental decisions about one's own body and well-being. The cases discussed psychological stress in the context of prohibitions on abortion and euthanasia and of circumstances potentially leading to imprisonment. Bastarache J. specifically noted that "not all state interference with an individual's psychological integrity will engage s.7." Further, he stated that the "psychological prejudice must be serious": *Blencoe*, *supra* at paragraph 57.

25 The *Charter's* protection of an individual's psychological integrity is limited to exceptional cases: *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.). In *G.(J.)*, *supra*, Chief Justice Lamer noted at paragraph 59 that "the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensitivity would suffer as a result of government action." He noted again at paragraph 60 that the effect of the state action must be considered objectively and result in "greater than ordinary stress or anxiety."

26 He then found that the state's decision to remove a child from his or her parents' custody could constitute an interference with the parents' psychological integrity. The process not only caused the parent a great deal of stress resulting from the break up of the parent-child relationship, it provided for a gross invasion into the private family sphere and subjected the parent to the stigma of being presumed unfit: *G.(J.)*, *supra* at paragraph 61. "[T]he combination of stigmatization, loss of privacy, and disruption of family life were sufficient to constitute a restriction of security of the person": *G.(J.)*, *supra* at paragraph 62. He went on to say, at paragraph 64, that where the state does not judge a parent's ability or pry into the private parent-child relationship, interference with the custody of the child alone would not be enough to impact the psychological integrity of the parent. That is, it was the fact that the state pried into a private and fundamental relationship and opened it up to public scrutiny and stigma that resulted in the breach of section 7 of the *Charter*.

27 The situation before this Court is not one involving the potential imprisonment of an individual. Nor does it involve the right to make fundamental personal choices about one's body and physical well-being. Nor is it a situation where one's choices or relationships are intruded upon and held up to public scrutiny and stigmatization. With respect, the cases in which the Court developed this doctrine arose out of more serious circumstances than a one-year ordinary residence requirement in order to be able to file for divorce. As Lamer C.J. noted in *G.(J.)*, *supra*, at paragraph 59, to interpret the protection of security of the person too broadly would subject countless state actions to judicial review and risk "trivializing what it means for a right to be constitutionally protected."

28 Moreover, there is no evidence before the Court that Ms. Thurber has suffered any psychological stress at all as a result of this legislation. The courts have stressed the value of a proper factual foundation in the determination of *Charter* issues: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 (S.C.C.); *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (S.C.C.); *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572 (S.C.C.). Given the paucity of evidence as to the impact the legislation has on those seeking a divorce, this is not an appropriate case to extend the meaning of security of the person under section 7 of the *Charter*.

29 As the Applicant has failed to show that her liberty or security of the person interests are impacted by section 3(1) of the *Divorce Act*, there is no need to consider what the principles of fundamental justice might require in this context. No violation of section 7 of the *Charter* has been shown.

3. If section 3(1) of the *Divorce Act* violates either section 6 or section 7 of the *Charter*, is it saved by section 1 of the *Charter*?

30 Given my findings in regards to questions one and two, there is no need to answer this question.

CONCLUSION

31 I find that section 3(1) of the *Divorce Act* does not violate either section 6 or 7 of the *Charter*.

32 The application is dismissed.

Motion dismissed.

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