

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Al-Khouri v. Al-Khouri, 2011 NSSC 122

Date: 2011/03/25

Docket: 1206-6002

Registry: Sydney

Between:

Mahfouz Al-Khouri

Petitioner

v.

Rajaa Al-Khouri

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: January 19, 2011, in Sydney, Nova Scotia

Last Submission: February 10, 2011

Written Decision: March 25, 2011

Counsel: Julia Cornish, Q.C., and William Burchell for the
Applicant
LeeAnne MacLeod-Archer, for the Respondent

By the Court:

I. Introduction

[1] After approximately 35 years of marriage, Mahfouz and Rajaa Al-Khoury separated. The separation was, and is acrimonious. Mr. Al-Khoury wants an immediate divorce so he can marry another woman. Ms. Al-Khoury vehemently disagrees.

II. Issue

[2] The only issue before the court is whether the divorce hearing should be severed from the hearing for corollary relief.

III. Analysis

[3] *Position of Mr. Al-Khoury*

[4] Mr. Al-Khoury seeks a severance and the granting of a divorce judgement for the following reasons:

- a) Mr. Al-Khoury wants to marry his common law partner, who is a Syrian national. His fiancée has a student visa which allows her to remain in Canada, while taking courses at Cape Breton University.
- b) Mr. Al-Khoury never learned to cook or clean. Mr. Al-Khoury wants a wife to attend to these tasks, and to serve him.
- c) In his affidavit, Mr. Al-Khoury raised religious and cultural reasons in support of an immediate divorce.
- d) Mr. Al-Khoury wants a wife to care for him should an illness or medical emergency occur. Mr. Al-Khoury noted past health issues.
- e) Mr. Al-Khoury is concerned that Ms. Al-Khoury is inappropriately delaying the matter. He states that Ms. Al-Khoury cancelled the settlement conference, and also requested the adjournment of the trial in 2010.

[5] On cross examination, Mr. Al-Khoury denied that dowry played any role in his decision to seek a divorce and marry.

[6] *Position of Ms. Al-Khoury*

[7] Ms. Al-Khoury contests the severance for the following reasons:

- a) Ms. Al-Khoury is concerned that Mr. Al-Khoury will delay the trial if the divorce is granted. She states that Mr. Al-Khoury will have less incentive to participate and complete the corollary relief hearing if he is already divorced.
- b) Ms. Al-Khoury raised jurisdictional issues. Mr. Al-Khoury commenced divorce proceedings in both Syria and Canada. The Syrian proceedings were commenced before the divorce proceedings in Nova Scotia. Mr. Al-Khoury has not discontinued the proceedings in Syria.
- c) Ms. Al-Khoury states that a severance will negatively impact on her financial security. Mr. Al-Khoury has no life insurance. If a severance is granted, there could be two wives, albeit one a former spouse, competing for financial aid should Mr. Al-Khoury die before the corollary relief issues are determined.

[8] *Law*

[9] Rule 59.48(1) allows a judge to grant a divorce if she is satisfied that the ground for divorce, and other necessary facts, are proved. Rule 59.48(3) states that unless a judge directs otherwise, a corollary relief order must issue immediately after the divorce order. Rule 59.48(3) therefore provides the court with the discretionary authority to grant a severance.

[10] In **MacIsaac v. MacIsaac** (1996) 150 N.S.R. (2d) 321 (C.A.), Bateman, J.A. discussed the meaning of judicial discretion. She noted that discretion is not unfettered, nor arbitrary. Rather, judicial discretion must be exercised within acceptable limits according to rules of reason and justice.

[11] The leading Nova Scotia case on the granting of severance is **Newman v. Seaman** (1994) 140 N.S.R. (2d) 251 (S.C.). Gruchy, J. stated that a severance should only be granted if there is a valid reason. He also expressed concern about the “unnecessary proliferation of hearings” should severances be granted “as a matter of course” (para. 9).

[12] In **Newman v. Seaman, supra**, Justice Gruchy granted the severance in a case that involved a one year marriage, and a lengthy separation. In granting the divorce, Gruchy, J., held there was no prejudice to the wife in the factual circumstances presented.

[13] In **Spiring v. Spiring** (2004) M.B.Q.B. 258, Allen, J. held that the court must balance competing factors to determine if severance is an appropriate remedy. Allen, J. summarized the case law relevant to this determination. Cases in which the severance request was denied include the following, as found at para 21:

21 Counsel cited a variety of cases where severance was or was not granted. From these cases a number of principles relevant to this motion can be distilled. Beginning with cases where the request was denied:

- the issues were simple and the party wanting severance could easily get to trial within a reasonable time: Desjardins, supra;
- severing the divorce meant corollary relief issues might not be dealt with reasonably: Desjardins, supra; Zimmerman v. Zimmerman (1992), 41 R.F.L. (3d) 291 (Alta. Q.B.);
- there was possible prejudice to both parties regarding their marital property: Potter v. Potter (1999), 48 R.F.L. (4th) 450 (Alta. C.A.);
- the interaction between severance and summary judgment is problematic: Friesen v. Friesen (1996), 113 Man. R. (2d) 192 (Man. C.A.);

[14] Cases in which the severance request was granted are as follows, and as found in para 22:

22 Secondly, where the request was granted:

- as the outstanding property issues were complicated and would take some time to resolve, there was no reason to block the petitioner's future plans: *Pow v. Pow*, supra;
- spousal support and property issues were outstanding and may well take years to finalize, so to continue the actions as joined would unduly complicate matters: *Kornberg*, supra;
- the access issues were going to be protracted and there would be no prejudice to the father to sever and proceed with all other issues: *Janz v. Harris* (1993), 88 Man. R. (2d) 6 (Man. C.A.);
- the objection to severance was that the divorce might prejudice marital property because the husband might marry and move out of the jurisdiction; not sufficient to deny severance/summary judgment: *Heon v. Heon* (1988), 67 O.R. (2d) 312 (Ont. C.A.);
- the objection to severance was that the husband might remarry and live in another jurisdiction, but as he was paying support voluntarily, this was simply a tactical position to force settlement and not a bona fide defence: *Cochran v. Cochran* (1996), 22 R.F.L. (4th) 170 (Ont. Gen. Div.);
- the argument that severance should not have been granted because of a lack of financial information went to corollary relief issues and was not a ground for refusing the divorce: *Johnson v. Johnson* (1991), 32 R.F.L. (3d) 349 (B.C. C.A.);
- the argument that severance would make it more difficult to settle spousal support and property issues where the party seeking severance was out of the jurisdiction did not raise the issue of injustice to the person opposed; a divorce order will not alter entitlement: *Wong v. Wong* (1997), 30 R.F.L. (4th) 382 (B.C. S.C.);
- the argument that the wife would lose her rights to marital property as she would no longer be a spouse if the divorce was granted was not accepted as the spousal rights had crystallized and the fact that they would no longer be spouses will not adversely affect those rights: *Newman v. Seaman* (1994), 140 N.S.R. (2d) 251 (N.S. S.C. [In Chambers]);

[15] In summary, the court must balance issues of real prejudice stemming from the granting of the severance, against issues of delay in respect of an uncontested matter.

[16] *Decision*

[17] I refuse the motion of Mr. Al-Khourī. He has not proved, on a balance of probabilities, that a severance of the divorce and corollary relief proceedings is an appropriate exercise of my discretion.

[18] A financial prejudice will attach to Ms. Al-Khourī if the severance is granted. Ms. Al-Khourī, after approximately 35 years of marriage, likely has a maintenance claim against Mr. Al-Khourī. Mr. Al-Khourī has no life insurance. Without life insurance, Ms. Al-Khourī has little security because maintenance does not attach to an estate. In **Carmichael v. Carmichael** (1992) 115 N.S.R. (2d) 45 (C.A.), Freeman, J.A. stated that the court had no jurisdiction to make a support order binding on the payor's estate, as reviewed in paras. 17 to 27.

[19] Further, in the event of Mr. Al-Khourī's death, Ms. Al-Khourī will have no access to the *Testator's Family Maintenance Act* if the divorce was granted. A former spouse is not included within the definition of a dependent in s. 2 of the *Act*. However, the new Ms. Al-Khourī would have standing.

[20] There are outstanding jurisdictional issues because the Syrian divorce proceedings were initiated before the Canadian proceedings. The jurisdictional issue has not been resolved to date, nor has counsel for Mr. Al-Khourī sufficiently addressed this point. In the event, it is determined that Nova Scotia does not have jurisdiction to issue the divorce, property and maintenance issues can be determined pursuant to Ms. Al-Khourī's application which relies upon the *Matrimonial Property Act* and the *Maintenance and Custody Act* at the upcoming trial.

[21] There has been no significant delay. The trial is scheduled for May and June of this year. The previous adjournment was necessary because an expert report had not been completed. The adjournment request was valid; it was unrelated to tactical considerations. The expert evidence has since been secured, and further delays are not anticipated.

[22] There is little prejudice flowing by my decision not to grant the severance. Mr. Al-Khouri is residing with his partner. She completes the tasks which Mr. Al-Khouri seeks. On cross examination, it quickly became apparent that religious and cultural concerns were not significant factors in Mr. Al-Khouri's life.

[23] In summary, the court will not sever the divorce from the corollary relief trial. There is no significant delay because the trial will be heard in May and June, 2011. Mr. Al-Khouri's stated needs have been met by virtue of his current living arrangement. In contrast, if the severance was granted, the evidence confirms financial prejudice flowing to Ms. Al-Khouri. On balance, this prejudice is of greater concern than postponing Mr. Al-Khouri's second marriage. Further, the jurisdictional issue will have to be fully explored by counsel for Mr. Al-Khouri by the time of the trial in May.

[24] If either party seeks costs, brief submissions should be forwarded to the court by April 5th.

Forgeron, J.
(N.S.S.C.F.D.)