IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
(Cite as: QUIGLEY v. WILLMORE, 2007 NSSC 305)

Date: 20071022
Docket: 1201-061186
SFH49599
Registry: Halifax, Nova Scotia

Between:

KAREN QUIGLEY

Applicant

v.

GARY WILLMORE

Respondent

DECISION

Judge: The Honourable Justice Darryl W. Wilson

Heard: October 5, 2007 & October 9, 2007 in Halifax, N.S.

Written Decision: October 22, 2007

Counsel: Karen Quigley - Self-Represented
Gordon Kelly & Angela Swantee - Counsel for the Respondent

By the Court:

[1] The Petitioner, Karen Quigley, commenced divorce proceedings by filing an Application and Petition for Divorce dated November 6th with the Family Division of the Supreme Court of Nova Scotia, in Halifax, on November 7th, 2006. The Respondent, Gary Willmore, commenced a divorce proceeding by filing an original

Petition for Divorce in the District Court, Liberty County, Texas, USA on November 9th, 2006.

[2] The Respondent has made application pursuant to the *Civil Procedure Rule 11.05* to set aside the Petition for Divorce filed by the Petitioner on the grounds that this Court has no jurisdiction to entertain the action. The Respondent's argument is that at the date of commencement of the divorce proceedings in Nova Scotia, the Petitioner, had not been ordinarily resident in Nova Scotia for one year.

[3] Section (3) of the **Divorce Act** states:

> 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.
>
> (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] Although the Petitioner's divorce proceeding in Nova Scotia was commenced two (2) days earlier than the divorce proceeding in Texas, Section 3(2) does not apply if the Nova Scotia Court does not "otherwise have jurisdiction under subsection (1)".

[5] This proceeding does not concern a determination of *forum conveniens.* The residency requirement of the **Divorce Act** is substantive and not procedural and

cannot be waived, even by agreement of the parties. The court's jurisdiction to hear and determine a divorce proceeding is dependent on one spouse being ordinarily resident in Nova Scotia for at least one year immediately preceding November 6, 2006.

BACKGROUND

[6] The Petitioner is a lawyer and a member of the Barristers' Society of Nova Scotia. The Petitioner has operated a law practice in Elmsdale and Milford, Nova Scotia for several years. She also has been employed as a solicitor with the Nova Scotia Department of Justice and as a Crown Attorney with the Public Prosecution Service.

[7] The Respondent is a marine consultant. He has worked at this occupation for thirty-two (32) years. Although based in Houston, Texas, the Respondent's job involves travelling to and working out of various locations around the world.

[8] The parties met and began dating in 1997. The Petitioner was living in Milford, Nova Scotia and the Respondent was living in Kingwood, Texas. Both parties had been married and divorced. In early 1999, the Petitioner discovered she was pregnant. The parties decided to marry. They spent some time together in Portland, Oregon in August, 1999, while the Petitioner was pregnant, and the Respondent was relocating from Texas to Oregon to take a new job. The

Respondent said the parties began living together at this time while the Petitioner described her time in Oregon as a trip which lasted approximately ten (10) days, during which time she helped the Respondent find and furnish an apartment. The Petitioner returned to Nova Scotia after her visit to await the birth of her child.

[9] The parties were married on September 25, 1999 in Halifax. The Respondent travelled to Halifax from Oregon for the weekend of the wedding and then returned to Oregon. The Petitioner remained in Nova Scotia. The parties' child, Ryan, was born on November 15, 1999. The Respondent was in Nova Scotia for the birth of his son and remained with the Petitioner for approximately a week after the birth before returning to Portland, Oregon. The Petitioner spent the next few months living with her parents at their home in Halifax while recovering from complications associated with child birth.

[10] The Respondent's employment in Portland, Oregon did not work out and he either resigned or was let go from his position. The Respondent moved to Nova Scotia in January, 2000 and lived with the Petitioner at her parents' home for several months until the Petitioner was able to return to her home in Milford with the Respondent and Ryan. The Respondent opened an equipment rental business called, "Corridor Equipment", which was located near the farm property in Milford, Nova Scotia. The business was not successful and ceased operations in late 2000.

Once Corridor Equipment ceased operations, the Respondent went to work in Halifax with Accent Engineering Consultants Incorporated. He was employed with this company until 2001 when he quit and returned to his usual employment as a Marine Consultant working out of Houston, Texas. As stated, this job involved travelling to and working out of various locations around the world for six (6) to seven (7) weeks at a time and then home for two (2) weeks.

[11] The Respondent's Affidavit stated the parties and Ryan began living in Kingwood, Harris County, Texas in August, 2001. When he was working, the Petitioner and Ryan would stay at their farm in Milford, Nova Scotia, and when he was not working, the Petitioner and Ryan would go to Texas where they would live together in Kingwood. According to the Respondent, this situation continued until 2004. The Respondent said substantial improvements were made to their property in Milford, Nova Scotia, including purchasing land adjacent to the farm, renovating the old farm house, and adding two (2) new buildings during this period.

[12] The Petitioner said that she and Ryan never resided in Texas with the Respondent. She always resided in Nova Scotia. On occasion, when the Respondent was not working, she and Ryan visited him in Texas. They stayed with the Petitioner's son from a previous marriage, who owned a home in Kingwood, Texas. The Petitioner said the Respondent did not own property in Texas during

their marriage until 2004. When he was not working, he either boarded with his son Lee, a friend Mark, other friends Lita and Doug Wolmack or rented an apartment. The Petitioner said that the Respondent, when not working overseas, often came to Nova Scotia to see her and Ryan for six (6) or seven (7) days at a time. He also spent time in Texas visiting with his children from his previous marriage. The Petitioner said that the parties never enjoyed a successful marriage and spent little time together as a family because of the Respondent's travelling and work commitments. The Petitioner said that during the period 2001-2004 when the Respondent said she resided in Texas, she continued to practice law in Nova Scotia and worked as a solicitor with the Department of Justice in Halifax on a full-time basis during 2003 and 2004.

[13] The extended time apart and the Petitioner's attachment to her home and family in Nova Scotia and the Respondent's attachment to Texas caused significant strain in the marriage. The Petitioner's mother, Sharon Quigley, reported that the Petitioner told her in the Fall of 2000 that life with the Respondent was becoming intolerable and they agreed he should leave; in the Spring of 2004, the Petitioner told her mother that the marriage with the Respondent had all but completely failed and the Respondent said he would never work in Canada again. Although frustrated by the nature of their relationship, the parties continued to

communicate with one another and see each other whenever they could, either in Nova Scotia, or Texas. They also acquired assets and debts together.

[14] It was necessary for the parties to resolve the family's place of residence if their marriage was going to succeed. Ryan would be starting school in September, 2005 when he was five (5) years old. It was necessary for the parties to decide where he would attend school. According to the Respondent, the parties discussed their goals and plans and agreed that Ryan would attend school in Texas because of better schooling, the Canadian tax structure, more horse shows in Texas and the presence of the Respondent's other children. In August, 2004, the Respondent purchased land in Tarkington, Liberty County, Texas. There was an old farm house on the property which was not suitable for the Petitioner and Ryan. A modular home was purchased and moved onto the property.

[15] The Petitioner stated that she agreed to put Ryan in school for his kindergarten year if the Respondent would take a land-based job which did not require him to travel. She would continue to practice law in Nova Scotia while maintaining the home in Milford and living in Texas with Ryan. The Petitioner agreed to this arrangement because she wanted to try one last time to see if her marriage with the Respondent would work.

[16] In February, 2005, the Petitioner transported furniture and belongings of the Respondent from Milford, Nova Scotia, to the new home located in Cleveland, Texas. The Respondent provided a letter addressed to US Customs indicating that the Petitioner, a Canadian citizen, would be transporting his furniture and belongings from Canada to the United States and then would be returning to her residence in Milford. The Petitioner said that the items transported were items that were in storage and not being used in their home in Milford. In April, 2005, the Petitioner arranged for her horses to be transported to Texas. Cassie, an employee at the parties' farm in Milford, travelled to Texas with the horses. Cassie remained in Texas for over a year looking after the horses. She was paid at least $900.00 per month, plus other benefits. At some point, Cassie's sister visited and was paid a wage when she decided to stay.

[17] While in Texas in April, 2005, the Petitioner registered her son and herself for Tae Kwon Do lessons. However, the Petitioner stated that they weren't in Texas long enough in April to actually participate in the sessions. Also in April, the Petitioner's father drove the Respondent's motor vehicle to Texas. He returned by plane.

[18] The Petitioner said that she and Ryan remained in Nova Scotia during the summer of 2005 and did not actually travel to Texas until late August, 2005. On

August 29, 2005, the Petitioner registered Ryan with the Tarkington Primary School located in Cleveland, Texas for the 2005/2006 school year. The Petitioner certified that Ryan was a resident of her household and they both resided within the Tarkington Independent School District. She indicated her address was 814 County Road 2268, Cleveland, Texas. Ryan remained in the school throughout the school year and was promoted to the first grade at the conclusion of his primary year, which ended on June, 2, 2006. According to school records, Ryan missed fourteen (14) days of school throughout the year; nine (9) days in the first semester and five (5) days in the second semester.

[19] The Respondent stated that, prior to moving to Texas, two (2) of the parties' three (3) properties in Nova Scotia were rented and it was his understanding the Milford farm would be closed completely before the end of the summer, 2005. Affidavits filed on behalf of the Petitioner indicated there was never any intention to completely shut down the Milford farm property. The Milford farm was to remain fully furnished and a new security system was installed. Arrangements were made to have the house heated and Marion Singer, a friend and former part-time employee, attend at the farm to pick up mail, check on the house, feed the barn cats, water plants and arrange for any repairs or snow removal. She also opened and sorted all of the Petitioner's business and person mail, and acted as a liaison for

arranging meetings with clients. She was paid $150.00 per month for her assistance.

[20] While Ryan was attending school in Texas, the Petitioner cared for him and participated in his schooling. In November, 2005 and February, 2006, she attended mediation training in Austin, Texas. Attached as Exhibit "B" to the Respondent's Affidavit sworn July 12, 2007, is an email the Petitioner forwarded dated February 23, 2006 in which she said:

> "Things here are good. The course is interesting. I am learning it maybe I just have to get out and "do it" - there is no real pattern on what or how I am to conduct the mediations - - anyways, I am sure that I will "get it" as I go. I need to get the US immigration stuff done so that I don't get into trouble."

[21] Tab "A" of the Petitioner's Affidavit, sworn September 25, 2007, is an email from the Petitioner to Ms. Lita Wolmack, dated December 13, 2006, which contained the following comment: "We discussed me possibly joining you and Doug Wolmack as a lawyer." The Petitioner said that there was no discussion of her joining the law firm, only Ms. Wolmack's invitation to join the firm. The Petitioner also said that she never conducted any mediation for pay in Texas and took the training in order to widen employment opportunities in Canada. The Petitioner never made any effort to gain admission to the Texas Bar and continued as a member of the Nova Scotia Barristers' Society practising law in Nova Scotia while Ryan was attending school in Texas.

[22] The Petitioner acknowledged her legal practice was substantially reduced while Ryan was in Texas, but she continued to travel to Nova Scotia from Texas to meet with clients, conduct discoveries and pursue matters on their behalf.

[23] While in Texas, the Petitioner took steps to begin a riding school known as "Linden Lane Farms". Exhibit "A" of the Respondent's Affidavit sworn July 12, 2007, is an email dated February 25, 2006 from the Petitioner to the Respondent in which she said:

> "On a good note, received more calls for lessons. I will soon have 10 real students - - that will be $1000.00 per month. Not much - but a help. Will pay for the hay I suppose."

[24] A web site also was developed by an employee and put on-line. The Petitioner said that the riding school was set up under pressure from the Respondent who wanted her to earn some money in order to pay for the expenses of operating the horse farm. The riding school never was operational and did not have any students.

[25] The Petitioner's tax summaries indicates that she had a net business income of $19,355.00 in 2005 and $6,000.00 in 2006 and filed her income tax returns as a Nova Scotia resident.

[26] The Petitioner said that she made numerous trips from Texas to Nova Scotia to look after her law practice while Ryan was attending school. Sometimes Ryan accompanied her and other times her parents travelled to Texas to care for Ryan while she was in Nova Scotia. The Petitioner said that she and Ryan returned to

Nova Scotia for two (2) weeks in September, 2005, when the area they were living in was evacuated because of a hurricane. She also returned to Nova Scotia on several occasions in October, once in November and during the Christmas holidays. The Petitioner also said she was in Nova Scotia in January, February and March of 2006. The only months in which she did not travel from Texas to Nova Scotia during Ryan's school year was in April and May of 2006.

[27] The Petitioner's mother kept a calendar of times in which various members of her family were coming and going. A copy of this calendar was marked as an exhibit to her Affidavit. The calendar indicates the Petitioner was in Nova Scotia on October 8, 2005 and that the Petitioner's parents were in Texas looking after Ryan in his home from October 22nd to 29th, and November 7th and 8th, while the Petitioner was in Nova Scotia. The calendar also indicates that the Petitioner and Ryan arrived in Halifax on December 7, 2005. The calendar entries for the period January, 2006 to June 3, 2006, indicates that the Petitioner was in Nova Scotia working from March 1st to March 8th while the Petitioner's mother looked after Ryan in Texas. The calendar indicates that the Petitioner and Ryan returned to Nova Scotia on June 3rd.

[28] Ryan graduated from Kindergarten on June 2, 2006 and on June 3rd the parties and Ryan began their trip from Texas to Nova Scotia by car. The Petitioner

arranged for all her horses to travel at the same time with Equine Transport Company at a cost of over $9,000.00. The Petitioner stated that during the course of Ryan's kindergarten schooling, she came to the realization that she and the Respondent would never be able to live together as a family. The Respondent became unhappy with his land-based job in Houston a few weeks after she arrived in Texas and took a job that required him to travel to the Carribean. This allowed for shorter but more frequent visits to Texas. The Respondent took another land-based job in Houston in the Fall of 2005, but became increasingly unhappy and difficult to live with because of the job.

[29] On one occasion, the Petitioner said that the Respondent became very angry with her for not taking the Christmas tree down and putting the Christmas ornaments away. According to the Petition, the Respondent was verbally abusive and destroyed a number of ornaments. She left the home concerned for her and Ryan's safety. The Respondent said that they had an argument about the Christmas tree but claims it was not confrontational and denies being abusive and destroying Christmas ornaments.

[30] According to the Petitioner, she and Ryan returned to the home after the Respondent calmed down. Soon after, they agreed the Respondent should return to his former work as a marine consultant and he took a job in Russia. According to

the Petitioner, she told the Respondent and others, including her family and friends, that she could not live with the Respondent and that she intended to return to Nova Scotia at the end of Ryan's school year. She did not leave immediately because she did not want to disrupt Ryan's schooling. She did not tell the Respondent of her intentions to separate from him because she was afraid of his behaviour.

[31] The Respondent said that he was not aware the Petitioner intended to separate when they travelled to Nova Scotia in June, 2006. He thought that the Petitioner and Ryan would visit with her family in Nova Scotia during the summer while he was working in Russia and they all would return to Texas for Ryan's next year of schooling.

[32] Shortly after returning to Nova Scotia in June, 2006, the Petitioner looked for employment with the Public Prosecution Service and the Department of Justice and continued with her private law practice.

[33] The Petitioner enrolled Ryan in school in Nova Scotia in September. The Respondent, who returned to Nova Scotia in late August from his work, said he didn't agree with this but since he was working in Russia, he was unable to do anything about it.

[34] Although the Petitioner was convinced the parties could no longer live together as a family, she was still hopeful of a reconciliation if the Respondent

would attend marriage counselling. During September, 2006, the Petitioner visited the Respondent while he was working in Scotland. Her parents cared for Ryan. By this time, the Petitioner had obtained employment on a term basis. According to the Petitioner, the Respondent said he would never attend marriage counselling.

[35] A visit by the Petitioner and Ryan with the Respondent in Texas was planned for early November. The Petitioner was going to cancel the visit because of the Respondent's refusal to attend counselling but was convinced to travel to Texas anyway. It was during this time that the parties finally decided they would separate. Initially, they were hopeful of resolving the issues surrounding their divorce by agreement with the assistance of Lita Wolmack, a lawyer in Texas. However, there was another disagreement and the Petitioner and Ryan left Texas before their scheduled departure time. The Respondent, who was going to travel to Nova Scotia with the Petitioner and Ryan before returning to his work in Russia, remained in Texas.

[36] On her return to Nova Scotia in early November, the Petitioner initiated divorce proceedings, which were served on the Respondent on November 9th, which is the day he initiated divorce proceedings in Texas. According to the Petitioner, since November, 2006, the Respondent has engaged in behaviour which is meant to frighten and intimidate her. He has withheld funds for the payment of debts with

the result that she had to file for bankruptcy at considerable financial and emotional costs to herself. The Petitioner states that the Respondent's motive in opposing the court's jurisdiction is to reduce his obligations to pay spousal and child support and to avoid payment of Canadian creditors.

[37] According to the Respondent, the District Court in Texas has determined that it has jurisdiction in the proceeding. The Petitioner said that she never submitted to the jurisdiction of the District Court in Texas, and attempted unsuccessfully to have her counsel participate in the jurisdictional hearing in Texas. She was unclear as to the reason why her counsel was not able to participate in the hearing.

[38] The court heard evidence relating to various events at the time of separation and in the post-separation period. While these events have a significant impact on the parties, they do not affect the history of the parties' relationship in the year preceding the filing of the Petition for Divorce or the court's determination of its jurisdiction in this proceeding.

[39] Likewise, the decision of the District Court in Texas to assume jurisdiction, does not impact this court's determination of its jurisdiction.

MEANING OF "ORDINARILY RESIDENT"

[40] The phrase "ordinarily resident" is not defined in the **Divorce Act, 1985.** The meaning of those words have been considered in judicial decisions interpreting

Section 3(1) of the **Divorce Act, 1985** and Section 5(1)(b) of the **Divorce Act, 1970,** in which the same words appear.

[41] The interpretation of the phrase, "ordinarily resident" was also considered in **Thomson v. Minister of National Revenue (1946) CANLII (S.C.C.), 1946 S.C.R. 209**, which dealt with its meaning as used in the **Income Tax Act**, R.S.C. 1927, c. 97. Rand J. stated at page 224:

> The expression "ordinary resident" carries a restricted significance, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life, therefore, relevant to the question of its application.

[42] Estey, J. stated at page 231:

> A reference to the dictionary and judicial comments upon the meaning of these terms indicate that one is "ordinarily resident" in the place wherein the settled routine of his life he regularly, normally, or customarily lives. One sojourns at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; and the latter of that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question."

[43] Rand J.'s comments were noted by Evans, J.A. of the Ontario Court of Appeal in **MacPherson v. MacPherson** (1977), 28 R.F.L. 106. The Court also referred to **MacRae v. MacRae, [1949] 2 All E.R. 34,** in which Somervelle, L.J., in

interpreting the phrase "ordinarily resident" in Section 4 of the **Summary Jurisdiction (Married Woman) Act**, 1895 stated at pages 36-37:

> "Ordinary resident" is a thing which can be changed in a day. A man is ordinarily a resident in one place up until a particular day. It then cuts the connection he has with that place...in this case he left his wife; in another case, he might have disposed of his house...and make arrangements to have his home somewhere else. Where there are indications that the place to which he moves is a place which he intends to make his home for, at any rate, an indefinite period, as from that date he is ordinarily a resident at that place.

[44] Evans, J.A. also referred to passages from the following cases:

> (1) In Hardy v. Hardy, [1969] 2 O.R. 875, 7 D.L.R. (3d) 307, 2 R.F.L. 50, Houlden J., was of the view that a captain in the Canadian Army who was born and lived in Ontario continuously until he joined the Army, and who returned on leave to his parents' home in Ontario was ordinarily resident in Ontario. Some of the above authorities were reviewed by Houlden, J., who applied the test at p. 877 O.R., p. 309 D.L.R.:
>
> > Where did this person regularly, normally or customarily live in the year preceding the filing of the petition? ... "Where was his real home in that period?".
>
> (2) In Girardin v. Girardin (1973), 42 D.L.R. (3d) 294, 15 R.F.L. 16, [1974] 2 W.W.R. 180 (Sask. Q.B.), the wife presented a petition for divorce in Saskatchewan on August 13, 1973. In October of 1969, the respondent husband had been transferred by his employer to Nova Scotia. The spouses moved to Nova Scotia where they lived together in rented accommodation. The wife returned to Saskatchewan alone on September 24, 1972. At trial the wife testified that she had always considered Saskatchewan her home.
>
> Disbery, J., stated at pp. 299-300:
>
> > When engaged in determining for jurisdictional purposes in matrimonial cases where a person is ordinarily resident, the person's state of mind may properly be taken into consideration for the limited purpose as to whether he was at the material time within the jurisdiction as a mere visitor, tourist or for some other temporary purpose; for example, on a business trip from another jurisdiction where he normally or customarily would be found living as one of the inhabitants thereof. If his home base was in another

> jurisdiction from which he ventured from time to time into other jurisdictions, he would, in my opinion, be ordinarily resident in the jurisdiction wherein his home base was situate, and he could not be said to be ordinarily resident in any other jurisdiction into which he intermittently travelled.

The wife was found not to be ordinarily resident in Saskatchewan.

(3) In Zoldester v. Zoldester (1973), 42 D.L.R. (3d) 316, 13 R.F.L. 398, [1974] 2 W.W.R. 572 (B.C.S.C.), the petitioner-wife was found to be ordinarily resident in British Columbia despite a stay in Bombay, India from February 10, 1973 to March 8, 1973. The spouse had lived in hotels in Bombay while waiting for their apartment in that city to become ready. Hutcheon, L.J.S.C., stated at p. 318:

> It is impossible to fix the precise point in time when a person who, by the nature of his work, is required to move from one country to another, or from one Province to another, ceases to be ordinarily resident in the first country or Province. I am satisfied, however, that in this particular case, anyone in the circumstances of this petitioner if asked during February, 1973, where she was ordinarily resident would have given British Columbia as the answer. In my opinion that would be the correct answer for the purposes of 5(1)(b) of the Divorce Act.

(4) In Graves v. Graves (1973), 36 D.L.R. (3d) 637, 13 N.S.R. (2d) 262, 11 R.F.L. 112, the wife-petitioner was held to be ordinarily resident in Nova Scotia for the year preceding the presentation of her petition despite the fact that she had gone to Ontario to join her husband who had just been released on parole. Not being very hopeful of reconciliation the petitioner had requested that her accommodations in Nova Scotia be held vacant for a month "in case things didn't work out". She had returned to Nova Scotia within a week of arriving in Ontario.

McLellan, L.J.S.C., stated at p. 638:

> Whatever degree of permanence may be read into this petitioner's actions by disposing of a few articles of personal effects prior to leaving for Ontario must be qualified by her action in ensuring that she had a place to return to "if things didn't work out".
>
> From another point of view, it may, I think, be said that this petitioner was not "ordinarily resident" in Ontario when she joined the respondent there,

> in May, 1972...I would regard her residence in Ontario, in the circumstances I have outlined, as "extraordinary" residence (i.e., the antithesis of "ordinary" residence) and therefore not such residence as would break the continuity of her Nova Scotia residence for the requisite period.

[45] Evans, J.A. then concluded:

> "In my opinion, the arrival of a person in a new locality with the intention of making a home in that locality for an indefinite period makes that person "ordinarily resident" in that community. In the present matter, while the husband and wife expressed opposing views as to their intention with respect to the establishment of a permanent residence in Nova Scotia, I do not believe that that intention alone can determine the issue of "ordinary resident". Mrs. MacPherson left Ontario to reside with her husband and family with the intention of residing in Nova Scotia for an indefinite period of time. Her stated intention of returning to live in Ontario does not detract from the fact that she was "ordinarily resident" in Nova Scotia for that period which continued until she moved and established her residence in Ontario."

[46] In **Adderson v. Adderson (1987), 7 R.F.L., (3d) 185 (Alta. C.A.)** the court noted a difference between the terms "domicile" and "habitually resident" and "residence". At page 189, the court found the concept of "habitual resident" to imply a more permanent or enduring quality than the term "residence".

[47] In **Arnold v. Arnold, (1998) CANLII 13372 (SKQ. B.)** online CanLII at page 5, cited as [1998] 6 W.W.R. 344, the wife commenced a petition for a divorce in Saskatchewan on July 15, 1997. The husband commenced a petition for divorce in Dallas, Texas on June 12, 1997. The parties lived in Texas and Saskatchewan at various times. The husband, who was working in Regina during the week would

return to Dallas on weekends. In June, 1996, the wife and children began living with the husband in Regina, although they separated in May, 1997.

[48] In support of his application to strike the Saskatchewan petition, the husband argued there was never an intention to make Regina the family's home, as they lived there only due to the husband's work contract, which had a duration of approximately one (1) or two (2) years. The husband stated in support of his position that the parties had maintained their house in Dallas and had someone house sit for them while they were away, and that their furnishings and belongings remained in the house in Dallas. The wife and child travelled to Dallas in July, 1996 and November, 1996 for doctor's appointments and they travelled to Dallas in December to visit relatives. The wife and the children remained in Dallas until the end of February, 1997, after the Christmas holidays while the husband was in Regina. The wife was in Canada on a visitor's Visa, but after separation she sought refugee status. The court posed the questions to be asked:

> Where in the settled routine of her life the Petitioner may be said to have regularly, normally, or customarily lived in the year preceding the commencement of these proceedings. As noted in Thompson v. Minister of Natural Revenue, supra, it is not the length of the visit or stay that determines the question, but rather the nature of the time spent. The sojourns's presence is unusual, casual or intermittent. This is to be distinguished from a situation where a person may be said to be customarily or ordinarily living during a specific time frame even though residence is intended or known to be for a definite duration or purpose (at p. 5).

The court found at p. (5):

> The fact that the petitioner was away for periods of time does not detract from the fact that from June, 1996, until their separation, Regina was home base for the family unit...While the children may not have become habitually resident in Saskatchewan for the purposes of the Children's Law Act, the test is different under the Divorce Act. The fact the person may be resident in a particular locale for a definite duration or purpose does not mean that the person cannot be said to be ordinarily resident in that locale during the period.

[49] In **Jadavji v. Jadavji, [2001] B.C.S.C. 1027, online at CanLII** the court dealt with a situation in which both parties agreed that their relocation from British Columbia to Quebec was for a definite time and that they intended to return to British Columbia. The parties, who were married in British Columbia in 1993, moved with their children to Quebec in August, 2000. They separated in January, 2001 and the husband returned to B.C. The wife commenced legal proceedings in Quebec in January, 2001 and the husband commenced legal proceedings in British Columbia in March, 2001.

[50] The court determined that it could not find that the parties were ordinarily resident in British Columbia after they moved to Quebec. The Court determined that it would have been confusing "permanent residence with ordinary residence" if it found that the parties were ordinarily resident in British Columbia. At paragraph 17, the Court determined that:

> "The test is regular, normal, or customary routine, not permanent residence."

[51] The Court continued:

> Intention is not the only test. The Court must look to determine where the real home of the parties is at the relevant time...I am satisfied that Mr. Jadavji was not a mere visitor, or there for a temporary purpose when he resided in Quebec. Even though the period was short, he was during his period of residence, normally or customarily living in that Province..."

CONCLUSION

[52] In order to establish this Court's jurisdiction to entertain the Petitioner's action, it must be established that either the Petitioner or the Respondent were ordinarily resident in Nova Scotia for at least one (1) year immediately proceeding the commencement of the proceedings which is the period November 6, 2005 to November 6, 2006. It is acknowledged that the Respondent was not ordinarily resident in Nova Scotia during this period. Therefore, it must be established the Petitioner was ordinarily resident in Nova Scotia during this period, notwithstanding the fact that from November 6, 2005 to June 2, 2006 she was living in Texas.

[53] The evidence establishes that the Petitioner was ordinarily resident in the Province of Nova Scotia from the time of her marriage in 1999 until late August, 2005. She was living in Milford, employed in her own law practice or by the Province of Nova Scotia as a solicitor and/or prosecutor, caring for her son and looking after her horses on the farm. The Respondent visited her and Ryan in Nova Scotia on his work leave and on occasion, the Petitioner and Ryan visited the Respondent in Texas. During the marriage, the Respondent resided with the Petitioner and Ryan in Nova Scotia on two (2) occasions for significant periods of

time. Until August, 2005, I would characterize the Petitioner's time with the Respondent in Texas as visits or sojourns. The Petitioner would then return to Nova Scotia, her usual place of residence.

[54] Although discussions took place in 2004 or early 2005 about the Petitioner and Ryan residing in Texas for Ryan's schooling and steps were taken to prepare for this potential move such as acquiring land, purchasing a modular home, moving some furnishings and horses, the Petitioner did not actually arrive in Texas with an intention to live there until late August of 2005.

[55] It is the Petitioner's submission that she continued to be ordinarily resident in Nova Scotia after August 2005 because she maintained significant ties with Nova Scotia, including her law practice, membership in the Nova Scotia Barristers' Society, maintaining the family residence in Milford for her and Ryan's use when she was in Nova Scotia, continuing use of existing bank, insurance and other financial arrangements for the family through Nova Scotia organizations and she intended to return to Nova Scotia if the parties were unable to reside together as a family.

[56] I find that when the Petition travelled with Ryan to Cleveland, Texas in August 2005 she intended to live with Ryan in Texas for his kindergarten school year. The Petitioner agreed to register Ryan in school in Texas to see if the parties

could live together as a family. The Petitioner gave her Texas residence as Cleveland, Texas which was communicated to the Tarkington School District as Ryan's residence. The Petitioner was Ryan's primary caregiver. The Petitioner moved her horses to Texas and paid the same employee who cared for them in Nova Scotia to look after them in Texas. The Petitioner travelled to Nova Scotia for brief periods of time to deal with outstanding issues from her reduced law practice and then returned to Texas to care for Ryan. While in Texas she took mediation courses on two occasions. She initiated steps to set up a riding school in order to pay some of the expenses of maintaining the horses.

[57] Ordinary residence refers to a person's residence in the course of a customary mode of life during the relevant time. Texas was the real home of the parties from August, 2005 until June 2, 2006. There was a fixed address, Ryan was attending school, the Petitioner was Ryan's primary caregiver, her horses were moved to Texas and being looked after by the same person who cared for them in Nova Scotia, she travelled to Nova Scotia for short trips to look after her law practice and returned to Texas to care for Ryan. She intended to live with the Respondent in Texas for an indefinite period to see if the parties could live together as a family. In this period of time, she was not a sojourner as she was on other occasions when she was residing in Nova Scotia and visiting the Respondent in Texas. I find that during this period

of residence in Texas, she was regularly, normally, or customarily living in that State.

[58] Although the Petitioner expressed an intention to return to Nova Scotia in January, 2006 after the Christmas tree incident, intention alone does not determine ordinary residence. The Respondent continued to reside in Texas from January 2006 to June 2006.

[59] The Petitioner's circumstances are not similar to those persons who maybe ordinarily resident in one jurisdiction but are posted in different jurisdictions for employment purposes and then return to their usual home. Some of these situations were referred to in the Ontario Court of Appeal decision in **MacPherson, supra,** which concluded that a person arriving in a new location with intent of making that location a home for a indefinite period means the person is ordinarily a resident in that community. In this circumstance the Petitioner voluntarily moved to Texas with Ryan and was not ordered there as a condition of employment. The decision to move to Texas was a joint decision of the parties with the specific purpose to see if they could live together as a family.

[60] Many of the factors that the Petitioner requests the court to consider as evidence that her ordinary residence during this time was Nova Scotia relate more to

the concept of habitual resident or domicile which are distinct from the concept of ordinary residence as it has been interpreted in the **Divorce Act**.

[61] Since June 2, 2006, the evidence establishes that the Petitioner was ordinarily resident in Nova Scotia. The Petitioner's horses were returned to Nova Scotia. The Petitioner and Ryan resided at the farm in Milford and the Petitioner was employed either in her law practice or with the Department of Justice for the Province of Nova Scotia. Ryan was enrolled in school in September. The Petitioner's home base was Nova Scotia when she visited the Respondent in Scotland during September and Texas during November, 2006.

[62] Since the Court finds that the Petitioner was ordinarily resident in Texas from August, 2005 to June 2, 2006, which includes the period of time from November 6, 2005 to June 2, 2006, which is within the year preceding the issuance of the Divorce Petition, the Petitioner did not establish that she was ordinarily resident in Nova Scotia for at least one (1) year immediately preceding the commencement of these proceedings. The application to set aside the Petition for Divorce filed by the Petitioner on the grounds that this court has no jurisdiction is granted. Interim Orders issued in this proceeding are void.

[63] The parties made pre-hearing submissions on the issue of costs. I have reviewed the *Rule* and case law on costs and I decline to award costs to either party.

Although the Respondent was successful in his application, extra costs were incurred in the overall proceeding due to delay in bringing this matter to court for determination and some assertions of fact relating to the ordinary residence of the Petitioner not accepted by the court, put the Petitioner to extra expense to refute.

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Justice Darryl W. Wilson