Topic: **Processing the Divorce in the Courtroom**
Opinion by: **Justice Doug Campbell**
Date: **December 19, 2014**

See also: Fm. Law Practice Tips: Issue No.9 - "Ground for Divorce - Alternate Proof"
Fm. Law Practice Tips: Issue No. 10 - "Detailed Proof of the Marriage"

This memorandum was prepared by Justice Doug Campbell in reply to the request of ACJ O'Neil as outlined in his Notice to the Bar dated November 6, 2014. It represents Justice Campbell's personal viewpoint and may or may not require some adjustment to conform to the preferences or practices of individual Judges. That will be left up to the Judge and the lawyer, if any, involved. Readers who make use of the within material do so therefore at their own discretion and subject to their own judgment.

Formulation: The Divorce and the Marriage must be proved in all cases including uncontested cases.

This Issue: Provides background to the subject formulation, and;

a) Suggests in Schedule "A" a procedure and questions for the witness
i) so as to prove the divorce relying on separation for a period in excess of 1 year, and
ii) so as to prove the marriage relying on the N.S ."Registration of Marriage";

b) Refers the reader to Family Law Practice Tips, Issue No. 9 (to be posted hereafter) regarding proof of the Ground based on adultery, mental cruelty or physical cruelty, and;

c) Refers the reader to Family Law Practice Tips, Issue No. 10 (to be postded hereafter) regarding proof of the marriage in the absence of a N.S. Registration of Marriage.

Unlike most other settled cases before the Court, an uncontested divorce may not be finalized, in my opinion, by the simple filing of a consent order. That is so because it is necessary by virtue of the Divorce Act that certain formalities be proved and findings made as prerequisites to the exercise of the Court's jurisdiction to grant the divorce. These can be achieved either through the Affidavit contemplated by the desktop divorce or through the testimony of the Petitioner who takes the witness stand in the "in Court" divorce. If such proof was not needed, there would be no purpose in following the "Desktop" divorce process required by the Civil Procedure Rules.

While the Civil Procedure Rules generally support the above conclusion, the new provision for application for divorce based on agreement contemplated by CPR 59.45 could be interpreted as casting doubt on that contention.

However, Rule 59. 45(2)(g) refers to the filing of the agreement by way of attaching it as an exhibit to the affidavit “filed in support of the application”. This seems to imply that the same type of affidavit that would be filed in support of an uncontested divorce is required.

Proof of the divorce and of the marriage will have been required and achieved through filing of that affidavit.

It should be clear that a civil procedure rule cannot override a statute. The doctrine of the Supremacy of Parliament dictates that the Court does not have authority to pass a Civil Procedure Rule that overrides a statutory directive. Therefore, to those who might interpret the above cited rule as authorizing the granting of a divorce without proof, I would reply that either this rule does not have that meaning or, if it does, it cannot operate to override the requirements of the Divorce Act.

Also, **corollary relief** cannot be ordered until the divorce is “proved”, because, by definition, corollary relief jurisdiction flows from the divorce jurisdiction according to principles of Constitutional Law. [For a discussion of this constitutional issue see “The 2014 Annotated Divorce Act”, McDonald and Wilton, Carswell, at page 133 and the case citations therein].

To summarize that work, divorce is a Federal power authorized by the Constitution. Spousal support, child support and child custody are provincial powers and thus there is provincial legislation such as Nova Scotia’s Maintenance and Custody Act. However, the Federal Parliament can pass legislation that is ancillary to its powers; thus the term “Corollary Relief”. In short, there can be no Divorce Act corollary relief without a divorce order which in turn will issue only with certain proof referred to below. If a divorce was denied, corollary relief must be denied and resort to the provincial legislation is the remedy.

This requirement of proof may be a technicality but it is a very important one because in its absence the veracity of both the divorce and the corollary relief orders are compromised.

In the majority of settled cases, this requirement for proof is met in the so-called "Desktop" uncontested divorce application by filing the **sworn** paperwork required by the Civil Procedure Rules (see Rule 59.43, 59.44 and 59.45).

Less often, the parties will wish to process the settled divorce (often accompanied by settled corollary relief) in the Courtroom. It is not enough that the file may contain such prerequisites

like the Registration of Marriage or that the Petition *alleges* critical facts that must be proved under oath in order to place the Judge in the position to make all of the findings required by the Divorce Act.

Another applicable setting is when the Trial will proceed for matters of relief such as custody or support. Again, the divorce must be proved before the Court can exercise its jurisdiction over such corollary or ancillary matters and that will generally happen in the Courtroom.

The following remarks refer to the presentation of a Divorce in the Courtroom in either context; i.e. the settled case and the one unsettled as to support and child custody. In either case, all of the sworn formalities that are envisioned by the "Desktop" uncontested divorce paperwork must be met. These include:

a) **Proof that the parties are legally married** - this is normally done by authenticating a long form certificate of their "Registration of Marriage" issued by the Province of Nova Scotia by identifying it under oath along with sworn testimony as to its accuracy. Some Judges will permit this to be achieved by tendering the short form of their marriage certificate issued by the officiant at the wedding; but, often only when there is an acceptable explanation given. If both of those methods fail, Counsel must bring questions directed to the Petitioner whose answers allow the Trial Judge to conclude that a legitimate marriage solemnization had occurred;

b) **proof of the Court's jurisdiction as outlined by Sections 3 & 4 of the Divorce Act;**

c) **proof that there was no collusion, connivance or condonation** with respect to the divorce as required by Section 11 of the Divorce Act [unless the Judge concludes that the granting of the divorce would greater serve the public interest – Section 11] ; a consent divorce and corollary relief Order, if allowed without proof,would be a ripe opportunity for collusion and connivance, contrary to the Act.

d) **proof of the ground for divorce...** [and there is only **one** ground under the Divorce Act which is that there had been a breakdown of the marriage which may be proved **only** by satisfactory evidence of adultery, mental or physical cruelty or that a period of separation of at least one year occurred preceding the granting of the divorce (but not necessarily preceding the issuance of the Petition for Divorce) and that the parties were living separately at the commencement of the proceedings];

e) **proof that there is no possibility of reconciliation** which is an inquiry that certain Judges may wish to make of the witness. *[Section 10 of the Divorce Act allows for those questions to be avoided when the Judge finds on the evidence that reconciliation is clearly not appropriate based on the facts of the case];*

The requirement of these various necessary findings supports the view that the Divorce Order **cannot** be granted simply because there is consent to it in the absence of proof of all of the above.

When a Corollary Relief Order is sought, there should be at least a consent submission as to the details of the settled relief. That is usually achieved by reading the settlement on the record with consent/confirmation from the Respondent and later filing the Corollary Relief Order.

When no Corollary Relief Order is sought because all matters have been settled, an order confirming that fact (i.e. a mutual release Corollary Relief Order) is desirable because otherwise, either party could be ambushed by a future application for Corollary Relief. (For this reason, when drafting a Petition for Divorce, Counsel should always plead for a Corollary Relief Order even if it is the type that operates as a mutual release).

When there are corollary issues to be tried, the hearing of the Divorce is preferably conducted **first** so as to foster a finding by the judge that the divorce will be granted – even if it is formally deferred to the conclusion of the Trial - thereby assuring the parties, before hearing the evidence regarding matters of corollary relief, that the Court has Jurisdiction to award corollary relief.

The reference herein to "proof" might be misinterpreted: In this uncontested setting "proof" has historically been considered to have been made out when **evidence** from the Petitioner (accompanied by corroboration, when needed – such as the Registration of Marriage) is un-contradicted by an otherwise participating Respondent. Typically, the Respondent will not testify (and will be encouraged by her Counsel not to testify for obvious reasons).

Schedule "A" below details the procedure suggested by this writer.

Schedule "A" - The Procedure

(Processing the Divorce in the Courtroom)

Counsel should arrange for the Petition for Divorce to be marked as Exhibit "1" and for the Registration of Marriage to be marked as Exhibit "2" or vice versa, depending on the order in which Counsel will be entering them. My suggestion is that the above order is to be preferred. The marking of these exhibits should be done before the Petitioner is called to the witness stand, if possible.

An acknowledgement by the Petitioner that all of the particulars in the Petition are true will represent proof of jurisdiction, lack of collusion etc., the ground (to some extent) and, subject to the discretion of the Judge, that there is no possibility of reconciliation.
A similar acknowledgement regarding the accuracy of the particulars of the Registration of Marriage certificate will represent proof of the marriage.

1. Counsel for the Petitioner will call her/him to the witness stand to be sworn or affirmed.

2. The following questions are **examples** of how the above noted task is satisfactorily completed: *(Counsel will insure that each of the Exhibits are marked and that the **marked original** is handed to the witness... the formality of allowing time for the opposing counsel to object can be relaxed since, in an uncontested setting, there should be no objection to their admissibility – see Family Law Practice Tips- Issue No.1: Entering a documentary Exhibit at Trial)*

Q 1 : "Are you the Petitioner with respect to the Petition for Divorce brought by yourself against the Respondent, XYZ?"

A: "Yes" *[note the importance of naming the Respondent for identification purposes and of connecting this petition to the parties.]*

Q 2: "I show you exhibit number"1" which is entitled "Petition for Divorce". Is this your divorce petition in relation to your marriage to the respondent, XYZ?

A: Yes". *[Above commented is repeated]*

***Q* 3**: **"Did you review this document in my office before signing it?"**

A: "Yes

Q 4: "I refer you to the last page thereof: Does this page bear your signature?

A: "Yes"

Q 5: "Are all of its particulars true and accurate to the best of your knowledge and belief?

A: "Yes"

I prefer that Counsel avoid asking the all too common question of whether these particulars ***"remain"*** *true and accurate because I have difficulty understanding how a fact that was once said to be true could become untrue. If there is an error in the Petition, or if circumstances have changed, simply fix that by asking, for example: "I understand that the date of the marriage in paragraph X is stated in error... what is the correct date?"*

Note: *With an affirmative answer to Q5, Counsel will have succeeded in proving all of the formalities above-noted, but not necessarily the ground for Divorce.*

Q 6: "The Petition states that you separated from the Respondent more than one year preceding today's date on the Xth day of Y (Month), 20XX: Is that true?

A: "Yes"

Q 7: "During the immediate past 12 months, have you at any time reconciled your marriage by participating in a spousal relationship with the Respondent?"

A: "No".

[If the answer is "yes", add questions which establish that the reconciliation periods did not exceed 90 days as contemplated by Section 8(3)(b)(ii) of the Divorce Act. Presumably, Counsel would have prepared the client for this development in the questions].

Note 1: *if the Petitioner is relying on proof of the ground by an alternative to 1-year separation,* ***see sample questions in Family Law Practice Tips – Issue No 9: Alternate Proof (of the Ground) -*** *(to be posted hereafter)*

Note 2: *At this point, Counsel will have proved the formalities and also the ground for Divorce but not that the parties were married to each other.*

Q 8: "I show you Exhibit '2', which is entitled 'Registration of Marriage' as issued by the Province of Nova Scotia. Does this document represent the particulars of your marriage to the Respondent?

A: "Yes".

Note *how the question connects the document to a marriage between* ***this*** *Petitioner and* ***this*** *Respondent as opposed to someone else].*

Q 9: "I point to your signature approximately mid-way down the page on that document and I ask you, are all of its particulars true and accurate to the best of your knowledge and belief?"

A: "Yes"

[Counsel should become familiar with that form and the location of that signature for this case and future cases].

Note 3: *If there is no Registration of Marriage certificate or if the Judge will not accept the short form or if the Judge is uncomfortable with the fact of an out of province or out of country ceremony, digress by asking the questions such as those listed in Family Law Practice Tips – Issue No.10: "Detailed Proof of the Marriage". (to be posted hereafter)*

Note 4: *At this point, in addition to having proved the ground for divorce, Counsel will have proved that the parties were in fact married to each other.*

Note 5: *Most of the above questions are leading in such a way as to allow the witness to give the simple answer: "yes". In this uncontested setting, such leading questions that promote "yes" answers are both acceptable and efficient. Counsel should prepare the witness for the ease of that fact. Notice to the Court and to Counsel of an intention to lead could sometimes be good practice but, for some Judges, would "go without saying".*

Addressing the Court in Summation:

1) Next, Counsel may inquire of the Judge whether she/he requires any further questions regarding **reconciliation** or whether she wishes to make the inquiry herself. The Judge may then volunteer that she/he is satisfied in accordance with the provisions of section 10 of the Divorce Act that **reconciliation is not appropriate** in which case the inquiry is unnecessary. I would do so routinely because I subscribe to the view that real proof of marriage breakdown is inconsistent with reconciliation. Some Judges may not agree.

2) Counsel might also inquire whether the Judge requires anything further by way of evidence on any other matters.

3) Counsel might comment that the Respondent's Counsel might have questions for the witness even though that is highly unlikely whereupon Counsel for the Respondent will be expected to politely decline.

4) The Judge would presumably then dismiss the witness from the witness box or invite him to remain in the box if there are matters to be tried.

5) Counsel would then deal with the terms of Corollary Relief including Matrimonial Property Act issues by way of a Trial or settlement, in which case Counsel would read the settlement terms into the record and obtain the consent/confirmation of the Respondent.

6) If deferral of the issuance of the Corollary Relief Order is requested or required by the fact of a reserved decision, Counsel should also consider requesting delay of the Divorce Order if the loss of marital status brought about by the Divorce Order would cause any practical problem such as a loss of spousal exemption under the Income Tax Act for a Capital asset transfer between the Spouses or if deed transfer tax exemption might be lost (which is apparently not the case in all municipalities).