

NG LAM v NG LAM

Supreme Court Apia
 14 May, 12 August, 2 September 1971
 Spring CJ

HUSBAND AND WIFE (Matrimonial proceedings) - Divorce - Petition by husband for dissolution of marriage on the grounds of separation for not less than five years and unlikelihood of reconciliation - Wife's answer denying such separation and alleging the birth of a child of the marriage between the relevant dates, but not praying for determination of the issue of paternity - Paternity denied by husband - Wife deposing petitioner the father, but adducing insufficient evidence to determine issue - Issue as to paternity of child directed to be tried and resolved before the Court would consider the merits of the divorce petition: Hodgkins v Hodgkins [1965] 3 AER 164, 166 followed.

PETITION in divorce on ground of separation for not less than five years.

Loe for petitioner.
 Clarke for respondent.

Cur adv vult

SPRING CJ. This is a petition in divorce brought by To'aono Ng Lam against his wife Ivona Ng Lam seeking a decree in divorce on the grounds that the parties are living apart and unlikely to be reconciled, and have been living apart for not less than five years, viz., from the month of August, 1963 down to the present time.

An answer was filed by the respondent denying that the parties have been living apart for five years from August, 1963 and alleging that the wrongful conduct of the petitioner brought about the separation of the parties. Further, it was alleged by the respondent that there was a child of the marriage, viz., Nolepeto born on the 6th June, 1967 and that the petitioner omitted reference to such child in his petition.

The answer prays that the prayer of the petitioner that the marriage be dissolved be rejected and that the petitioner be ordered to pay the costs of the proceedings.

Evidence was given during the hearing that proceedings were instituted by the respondent in the Magistrates' Court in July, 1963 seeking maintenance for herself and two children, Monika a female child born on 4th May, 1961 and Tolotea (referred to in the petition of divorce as Sita) born on the 27th April, 1963. Orders for maintenance as sought were made on the 21st August, 1963 by the Fa'amasino Fesoasoani.

Proceedings were issued out of the Magistrates' Court on the 5th July, 1967 by the respondent seeking maintenance for the child Nolepeto born on the 6th June, 1967. An Order was made in favour of the respondent against the petitioner on the 21st August, 1967 by Fa'amasino Fesoasoani To'alepai as follows:-

1. Order by consent adjudging the defendant the father of the complainant's one (1) child mentioned and referred to in the

complaint.

2. Order that defendant do pay for the maintenance of the said one child the sum of £2.00 per month; the first of such payments to be made on the 21st day of September, 1967.
3. Defendant to pay £2.50 solicitor's fee.

To'alepaialii
Fa'amasino Fesoasoani

Subsequently, the petitioner appeared before the Registrar and applied for a rehearing, which the Registrar granted, and for some reason, which was not apparent, the proceedings were withdrawn and the Order for maintenance vacated.

The petitioner in the course of his evidence denied that the child Nolepeto was his child, while the respondent deposed that the petitioner was the father.

Counsel for the respondent, at the close of his case, asked that this Court rule as to the paternity of the child. There was no such prayer in the answer filed by counsel for the respondent, nor was there sufficient evidence before the Court to come to a positive finding thereon. The petitioner called only one witness, his brother Fa'asino, who knew little of the children of the marriage. In fact, he said he had not heard of a child called Nolepeto.

The respondent called one witness only, a young girl Victoria, who was aged 16 to 17 years at the time of the birth of Nolepeto, and in my view her evidence was of little assistance as to the issue of paternity.

In evidence the respondent said it was in the last of the month of December, 1966 and in the beginning of 1967 that the petitioner came back to her and sexual intercourse took place. The child was born on 6th June, 1967. There was no evidence whether the child was a full-term baby. There was no medical evidence at all. As I say, counsel for the respondent did not pray for any such relief as to the issue of paternity, nor did he adduce sufficient evidence for any Court to come to a concluded opinion thereon.

In my view, the first issue to be decided between the parties is whether Nolepeto is a child of the marriage. I do not propose to say anything at this stage as to the merits of the petition in divorce.

The view I take, which I have expounded before in this Court, is that where there is an issue as to the paternity of a child that issue should be resolved first before the pronouncement of any decree in divorce.

It is unfortunate that counsel for the respondent did not direct his attention to this matter.

The question is what is the most convenient way of dealing with this matter, and I adopt the reasoning of the Court of Appeal in Hodgkins v. Hodgkins [1965] 3 A.E.R. 164 at page 166 where Willmer L.J. says:-

There is a clear issue between the parties, and that issue, thanks, as I have said, to the way in which the case was presented, has never been tried. The only question which remains, therefore, is one of machinery. It is for us to decide what should now be done. The question must then go to trial whether the child K. is or is not a child of the family. The convenient way to deal with that will be to direct an issue with regard to that question, and in that issue, as it seems to me, the wife, who seeks to claim maintenance and for that purpose seeks to establish that the child K. is a child of the family, should be the plaintiff, and the husband should be the defendant. I think that the only other thing to be said is that, pending the trial of this issue, no application for the decree to be made absolute should be entertained.

I direct that this issue be tried before me as a substantive matter, and all the available evidence adduced before the Court. I direct that counsel for the respondent initiate these proceedings within fourteen days from date and that an early fixture be given.