IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

CAUSE NO. FAM 214 OF 2019

BETWEEN: **AA** **Petitioner**

AND **BB** **Respondent**

Appearances: Mr. David McGrath of McGrath Tonner for the Petitioner
Ms. Louise Desrosiers of Travers Thorp Alberga for the Respondent

Before: Hon. Justice Richard Williams

Heard: 4 February 2021

Circulation of draft judgment: 26 February 2021

Date of judgment: 4 March 2021

HEADNOTE

Matrimonial Causes Law (2003 Revision) - Divorce Petition and Cross-Petition - Unreasonable behaviour (s.10(1)(b)) - If a Respondent is disputing any particulars pleaded in a Petition must an Answer be filed? If admitting some of the particulars of behaviour in a Petition and not admitting other particulars in a Petition, does the failure to file an Answer result in all of the facts and matters stated in the Petition being proved? If admitting some of the particulars of behaviour in a Petition and not admitting other particulars in a Petition, can the Court prove the Petition based on only the admitted particulars if the Petitioner is insisting that the Court consider proving all of the particulars? Grenfell v Grenfell [1978] Fam 126. Does r.9(1)(a) Matrimonial Causes Rules (2003 Revision) apply when a Petition does not contain a ground of adultery but does rely on the allegation of adultery as a particular of behaviour?

JUDGMENT

Application and Background

1. This hearing concerns the Petitioner husband and the Respondent wife. For convenience I will refer to them as the husband and the wife in this Judgment.

2. The parties were married on 25 August 1995. The husband filed a Petition for Divorce on 30 August 2019 on the grounds of two years' separation with consent and unreasonable behaviour in the alternative.

3. The wife filed her Acknowledgement of Service on 6 September 2019 ("Acknowledgment") in which she acknowledged that the marriage had irretrievably broken down. The wife, who was legally represented at the time by ARKA, set out in the Acknowledgment her consent to the separation ground. It is evident that, at that time, the wife was indicating that she was content for the divorce to proceed on the grounds of two years separation by consent and was not insisting, as she is now, that the marriage only be proved on the ground of the husband's behaviour. In her Acknowledgment, the wife denied that the breakdown in the marriage was due to any unreasonable behaviour on her behalf.

4. Relying upon the content of the wife's Acknowledgment, the husband filed his Application for an Order to Prove the Petition on 6 September 2019. When considering the Application for an Order to Prove the Petition, I noted that no date

of separation was provided in the particulars. It appears that this fact was then communicated to the husband's attorney.[1]

5. On 30 September 2019 the husband's attorney informed the wife's then attorney that the date of separation was in September 2015, when he contends that the wife returned to live permanently in England.

6. The matter seemed to be dormant until it came before me for a First Appointment Hearing on 5 May 2020. The wife's legal representation had changed and she was represented at the hearing by her current attorney. At the hearing, the Court was informed that the wife no longer consented to the Petition being proved on the ground of the parties living apart for two years. That may partly be because she, then and now, contends that the parties had not lived apart for two years prior to the filing of the Petition[2]. The wife had prepared a draft Summons in which leave was sought to amend the Acknowledgment.

7. It is trite law that, for the ground of two years separation to be proved, there must be a positive act of consent to the decree and that must continue until the proving of the Petition. Even if the Petition had properly particularised the date of separation, it could not have then been proved on that ground in the absence of ongoing voluntary consent from the wife.

[1]There is an email to only the wife's attorney from the Court on the Court file highlighting the lack of a date of separation in the Petition.
[2]The wife contends that the two years separation will be in April 2021, a date which the husband does not accept.

8. At the May 2020 First Appointment Hearing, as both parties agreed that the marriage had broken down, the Court sought to encourage them to negotiate to try to settle the Petition issue, possibly by means of the husband filing an Amended Petition or by the wife filing a Cross-Petition containing particulars palatable for each party. The Court shared its concerns, despite the high value of their matrimonial assets, about the drain on this family's finances to the detriment of their dependent children's welfare that would occur if the parties failed to sensibly resolve the Petition issue. It was hoped that the parties would have paid careful regard to the Court's concerns in the short and long term best interests of their family.

9. At the May 2020 hearing the parties were directed to attend mediation. Although the Mediation Report dated 17 September 2020 indicated that the case was partly settled, regrettably the parties were not able to resolve the Petition issue in mediation. In light of the wife's intention to apply to withdraw her Acknowledgement and defend the Petition, the husband indicated that he wished to amend the Petition.

10. The matter came on before me on 15 October 2020. The husband's position was clearly set out at paragraphs 11 and 12 in the Position Statement prepared by his attorney for the hearing, namely:

> *"11. H wishes to make clear to the Court that he has absolutely no desire to contest this aspect of the proceedings. He wishes to resolve this issue as quickly and civilly as possible and if W will not agree to progressing on the basis of two years separation, H will agree to any sensible and*

reasonable form of petition or cross petition. He has gone so far as instructing his attorney to draft and provide W with a draft Answer and Cross Petition which he will accept…. It had been hoped that after 14 months, the terms of the Petition would and could have been disposed of. If the issue cannot be resolved, H will regrettably have to request the Court's leave to amend his Petition.

12. It should, we trust, be clear that H has no objection to W withdrawing her original acknowledgment of service and filing an answer and cross petition if that is what she desires. H would like to see this issue disposed of as expeditiously as possible without additional acrimony."

11. At the hearing on 15 October 2020, despite the Court again highlighting its concerns about (i) this family's finances; (ii) the delay in these drawn out proceedings; and (iii) the emotional well-being of this family if there was a failure to resolve the Petition issue, no agreement could be reached by the parties. As a consequence, directions were given to a two-day Contested Petition Hearing. Leave was given to the wife to withdraw her Acknowledgment and to the husband to file and serve an Amended Petition to remove the two year separation ground and to add further particulars of the wife's alleged behaviour. That Amended Petition was filed on 29 October 2020.

12. On 12 November 2020, the wife filed an Acknowledgment of Service of the Amended Petition in which she set out her intention to defend the Amended Petition. She also filed her Answer to the Amended Petition. The wife again accepted that the marriage had irretrievably broken down and again denied that was caused by her behaviour. The wife admitted and asserted that:

(i) She had ceased communicating with the husband on any meaningful, emotional level and that she had become emotionally and physically withdrawn such that the sense of intimacy and of being husband and wife had gone from the marriage from April 2019 onward;

(ii) The parties' separation occurred in April 2019 when she says the husband, without her permission or knowledge, packed up her belongings and put them in storage and sold her cars;

(iii) The relationship had been strained since April 2019;

(iv) The parties would have disagreements about the amount of time that the husband worked and his lack of participation in family life. She also accepted that he was the sole financial earner of the family;

(v) The primary reason for the move to England was in relation to an illness in the husband's family as well as for the children's schooling.

(vi) She had no love or affection for the husband which she had stated to him and that she believed that the marriage was over.

13. On 12 November 2020, the wife filed a Cross-Petition and a more detailed Verifying Affidavit than is ordinarily filed along with exhibits[3]. The wife stated in the Cross-Petition that the marriage had irretrievably broken down due to the husband's unreasonable behaviour and adultery. No Co-Respondents were named in the Cross-Petition, which is required, unless otherwise directed by the Court, pursuant to r.9(1)(a) of the Matrimonial Causes Rules (2003 Revision) ("the

[3]This may be because there are minimal details pleaded in the Cross-Petition concerning the conduct relied upon.

Rules") if the ground of adultery is being relied upon.[4] The ground of adultery is not separately pleaded in the Cross-Petition, but only appears as one of the particulars of behaviour relied upon. Although the wife stated at paragraph 7 of her Verifying Affidavit sworn on 13 November 2020 that she proceeds on the *"ground"*[5] of the husband's *"adultery and*[6]*unreasonable behaviour"*, at the hearing, Ms. Desrosiers conceded that the ground of adultery was not pleaded in the Cross-Petition. Counsel clarified that the adultery was relied upon as an allegation that the husband had behaved in such a way that she could not be expected to live with him which the Court should consider when having regard to the whole history of the marriage. It is clear that such an approach may be undertaken in England and Wales, as highlighted at page 60, paragraph 35 in Rayden and Jackson on Divorce Fifteenth Edition. I am satisfied that this approach may also be taken in the Cayman Islands, as I interpret the requirement set out at r.9(1)(a) of the Rules as only applying to the situation where the ground of adultery is being relied upon. A third person should be entitled to challenge the ground of adultery alleging their involvement before it is determined, which is different to the situation where the allegation of adultery is being relied upon only when considering the ground of behaviour.

14. The particulars of the unreasonable behaviour alleged by the wife at paragraph 7 in the Cross-Petition are:

[4]This is a similar requirement to the position in the England and Wales found in the more detailed s.2.7(1) Family Proceedings Rules 1991 which listed the exception to the requirement. In the Cayman Islands there is arguably a wider exception namely the wider discretion of the Court from the words "*unless otherwise directed"*.
[5]The wife pleaded *"ground*" not "*grounds*".
[6]My emphasis.

(i) The husband has had a number of extra marital affairs;

(ii) The husband has been abusing cannabis and prescription drugs;

(iii) The husband has failed to prioritise the Children's welfare above his own;

(iv) The husband has abandoned all love and affection for the wife;

(v) The husband has been domestically abusive towards the wife; and

(vi) The husband has acted in such a way as to cause feelings of isolation for the wife.

15. On 19 November 2020 the husband filed an Acknowledgement of Service of the Cross-Petition indicating that he did not intend to defend the Cross-Petition. The husband indicated at paragraph 4 therein that he accepted that the marriage has irretrievably broken down, but only admitted the particulars in the Cross-Petition set out at paragraphs 7(iv) (*"the Husband has abandoned all love and affection for the wife"*) and 7(vi) (*"the Husband has acted in such a way as to cause feeling of isolation"*). The husband therein indicated that he made no other admissions concerning the particulars contained in the Cross-Petition.

16. At the hearing, due to the lack of particularisation in the Cross-Petition concerning the particulars relied upon at paragraphs 7(iv) and 7(vi), when invited to do so, Ms. Desrosiers assisted the Court by highlighting the alleged behaviour of the husband set out at paragraphs 17[7] and 19[8] in the wife's Verifying Affidavit.

17. At paragraph 17 in her Verifying Affidavit the wife states:

[7]Which appears under the heading "Domestic Abuse".
[8]Which appears under the heading "General".

"(The husband) has isolated me from my own family and friends by refusing to spend time with them over the course of their marriage, instead preferring his own family or friends and making his feelings known to others. This has put a strain on family friendship and left me further isolated and alone."

18. At paragraph 19 in her Verifying Affidavit the wife states:

"During the course of the marriage (the husband) prioritised work and his own personal and social needs over commitment to spend time with me and the children. This has caused me to have to function unaided with the children almost all the time, leading to feelings of stress, loneliness and isolation."

19. Although not referred to by Ms. Desrosiers, the details in paragraph 18 in the wife's Verifying Affidavit may arguably also be relevant to the above two particulars.[9] At paragraph 18 in her affidavit the wife states:

"(the husband) has shown little kindness or regard for me, acting dismissively with regard to my views and with little respect for me as an individual. As a result, both parties have withdrawn from each other and have ceased communicating in any meaningful way."

20. On 26 November 2020 and on 4 December 2020 the husband's attorney wrote to the Court indicating that a Contested Petition Hearing was no longer required as the Petition issue had *"been compromised"*. In light of this, the attorney sought a date for a Case Management Hearing to re-timetable the proceedings.

[9]Which also appears under the heading "Domestic Abuse".

21. On 7 December 2020 the wife's attorney filed her Application for an Order that the Cross-Petition be Proved on the basis that the husband had not served any notice of intention to defend.

22. On 10 December 2020 the wife's attorney emailed the Court stating:

> *"For the avoidance of doubt (the wife) has always sought to prove the entirety of her Petition…"*

An open letter from the wife's attorney to the husband's attorney dated 8 December 2020 was exhibited to the email. The letter states that:

> *"Section 4 of your client's Acknowledgement of Service states that your client does not intend to defend the Cross Petition. Your client admits paragraphs 7(iv) and (vi) and makes no admissions to paragraphs 7(i)-(iii)) and (v). As a result the paragraphs are not denied and, as no Answer is offered in relation to them, Cross Petition has proceeded unchallenged.*
>
> *If the intention was instead to defend the Cross Petition, save that paragraphs 7(iv) and (vi) were accepted, this should have been set out in the Acknowledgement and an Answer provided to the defended parts, in accordance with the relevant procedure.*
>
> *In such a scenario an Answer should have been filed and served within the time limit for acknowledging service of the Cross Petition, that being 14 days.*
>
> *As partial admissions were made and no Answer was offered in relation to the other paragraphs, the Application to Prove was filed with the Court.*
>
> *If you wish to instead defend the paragraphs referred to, rather than simply offering no admissions or Answer, we invite you within 7 days of the date of this letter to make an application to the Court for leave to amend your Acknowledgement and file your client's Answer out of time."*

23. It became apparent to the Court that it was improperly being expected to adjudicate on the Petition issue by correspondence. Therefore, on 10 December 2020, the parties were informed (i) that the Court was not going to deal with these issues by correspondence or by means of written submissions and (ii) about its concern that:

> *"This case and the amount of email correspondence to the Court on issues is taking up a disproportionate amount of the Court's time."*

The parties were also informed that, if they could not agree the issues, they would need to make whatever formal application they deemed appropriate in the normal way and that directions could be given at the January 2021 Mention Hearing.

24. The matter came before me on 21 January 2021. Directions were given and the determination of the issues in relation to the Petition was adjourned to the present hearing, namely on 4 February 2021. At the hearing in Chambers I had the benefit of receiving detailed oral submissions from Ms. Desrosiers and Mr. McGrath, with the husband and wife attending the hearing by Zoom. I have carefully considered those submissions and the helpful written submissions submitted by Counsel. I have regard to the contents of the bundles provided by both parties. I have cautioned myself concerning certain submissions of alleged facts made by Counsel which amount to Counsel giving evidence in the absence of that detail appearing in the formal pleadings or evidence in the evidential material in the bundles. This includes, but is not limited to, evidential remarks in the written and/or oral submissions concerning the nature of the particulars and the strength

of her Catholic beliefs including the requirements of the Catholic Church in relation to an annulment[10], as well as to comments from Counsel that the wife would have chosen to remain married if the only particulars of behaviour were the two admitted by the husband.

25. This is the reserved written Judgment from the 4 February 2021 hearing.

Petition Issues

26. The wife has submitted a draft Order to prove the Cross-Petition in the format of Form 9 in the Schedule to the Rules. It contains the following provision at the last paragraph:

"The facts and the matters stated in the Cross-Petition are proved…"

This would mean that all six of the particulars of unreasonable behaviour[11] alleged by the wife at paragraph 7 of her Cross-Petition would be proved.

27. The husband has submitted a draft Order to Prove the Cross-Petition replacing the last paragraph in the wife's draft with wording mirroring that found s.10(1)(i)-(iii) in the Matrimonial Causes Law (2003 Revision) ("the Law"). The husband's suggested wording is:

"…. that the court is satisfied that:

[10]I note that in ***Grenfell v Grenfell*** [1978] Fam 128, CA where the husband had cross-petitioned on the basis of five years separation, the wife had formally pleaded that, as she was a practising member of the Greek Orthodox Church, her conscience would be affronted if her marriage were to be dissolved *"otherwise on grounds of substance"*. For completeness sake, I also note that, despite her raising that concern, it was held that, as she was seeking divorce herself based on her husband's behaviour, she could not argue that she would suffer hardship (s.5 Matrimonial Causes Act 1973) if the marriage were dissolved on the grounds of five year separation and so her answer was struck out.
[11]See paragraph 14 above.

(i) the Cross Respondent has behaved in such a way that the Cross-Petitioner cannot reasonably be expected to live with the Cross-Respondent;
(ii) the marriage has broken down irretrievably; and
(iii) there is no material impediment under this law exists to the pronouncement of the decree."

This form of the order would mean that, in the circumstances where both of these parties clearly agree that the marriage has irretrievably broken down, the particulars in paragraphs 7(iv) and 7(vi) in the Cross-Petition have been proved and that there has been no determination of the merits of the particulars set out at paragraphs 7(i)-(iii) and (v).

28. The wife contends that her form of order is the correct one, as the husband has failed to file an Answer. The wife contends that if a Respondent has an:

"intention to defend a ground[12]*, by way of bare denial, an Answer should be filed and the particularity of facts relied upon".*[13]

It is argued that, as no Answer has been filed by the husband within the relevant time limits, the Cross-Petition is undefended and it should be proved. The wife states that she:

"does not seek to prove the Cross Petition despite the fact that the husband has not admitted the particulars, but because he does not admit them."

29. The husband does not agree, contending that an Answer is only required if the Cross-Petition is defended and is not required in a situation where the petition is

[12]My emphasis.
[13] See paragraph 8 of wife's Skeleton Argument dated 3 February 2021 -

undefended with some of the particulars not being admitted, or to put it another way where some of the facts alleged in the Cross-Petition remain disputed.

30. The husband contends that the wording suggested in his draft order is appropriate, as the Court is empowered to prove the Cross-Petition because, on the admitted particulars, the Court is able to be satisfied that (i) the ground of behaviour has been established based on the two admitted particulars (which the parties do not agree); (ii) the marriage has broken down (which both parties accept) and; (iii) there is no impediment to the pronouncement of the decree (which both parties accept). The wife does not agree, as she contends that, even if the Court has the jurisdiction to prove the Cross-Petition without carrying out an investigation in relation to all of the particulars raised by the wife, the two particulars admitted by the husband are *"anodyne"* and *"rather flimsy grounds for divorce on a contested petition*" and having regard to all of the circumstances of this marriage would not be *"sufficiently serious"* to cross the threshold required to establish the ground. It is stated on behalf of the wife that if the Court:

> *"were to grant a Petition of the basis of these anodyne grounds it would be one of the first cases to establish a wholesale departure from established case law to lower the bar to a level not accepted in any comparable jurisdiction and not this far considered here."*

In the same vein as that remark, the Court informed the parties during the hearing that, in light of the absence of any case authority that they could produce or that the Court could locate, this was the first case that it was aware of in this jurisdiction where a petitioner was insisting that a petition must be defended by a

respondent when the respondent was admitting some of the particulars of the ground that a petitioner had pleaded and relied upon to establish the ground for a divorce, because the petitioner was contending that those pleaded particulars alone were insufficient to establish that ground.

31. The wife states that, if the Court is not willing to prove the entirety of the Cross-Petition at this stage or to make an order proving the Cross-Petition on the basis of the facts and matters admitted by the husband in his Acknowledgement of Service, the husband should apply for leave to file an Answer indicating an intention to defend the behaviour particulars which he has not admitted with directions then being given to a Contested Petition Hearing.

32. Similar to the husband's position outlined at the 15 October 2020 hearing[14] the husband's desire to progress this matter in an uncontentious manner was repeated at paragraph 4 of his Position Statement dated 3 February 2021 which stated:

> *"Merely by way of introduction to this discrete and limited topic, we wish to remind the court that H is, and has been, anxious for a fairly lengthy period of time to try to put this issue behind the parties. As the court may recall from 16th October 2020 mention date, H was at pains to advise the court that he was prepared to accept any reasonable and sensible cross-petition which W may file so that the parties could get on with the far more important business of putting in place children orders, if necessary, dividing the estate, putting these proceedings behind them and getting on the road to independent living."*

[14]See paragraph 10 above.

33. At the hearing Mr. McGrath informed the Court that, if the Court decided that the Cross-Petition should be treated as being defended as a consequence of the husband not admitting four of the six particulars pleaded by the wife, there would be no application made by him to extend time for him to file an Answer. He indicated that the husband would not file an Answer and, in such circumstances, the Court could go on and prove the Cross-Petition in the form of the draft proving order submitted by the wife.

The Law and Procedure

34. Section 10(1) of the Law sets out the five permitted grounds for the divorce. The relevant ground for the purpose of this hearing is s.10(1)(b) of the Law. This section of the Law provides that irretrievable breakdown of the marriage may be proved by satisfying the Court that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

35. Lord Justice Ormrod, in the case of ***Grenfell v Grenfell*** [1978] 1 All E.R. 561 at 566C, stated in relation to the grounds for divorce in England and Wales:

> *"On proof of any one of those five (and Parliament plainly chose each of these five facts[15] as being facts which would raise in any reasonable mind a presumption that the marriage had broken down) Parliament provided that the court shall grant a decree of divorce unless it is satisfied on all the evidence that the marriage has not broken down irretrievably. In other words, on proof of any one of the five facts, there is a presumption, rebuttable, it is true, of irretrievable breakdown, and the onus is quite*

[15]The Matrimonial Causes Act 1973 in England and Wales uses the term at s.1 *"the facts"* for what the Law refers at s.10 as being *"the grounds"* for pronouncing decrees for dissolution of marriage.

plainly on the party who is asserting that the marriage has not irretrievably broken down to satisfy the court by evidence that the presumption should be treated as rebutted. It is not, therefore, an adversary proceeding in any way comparable to the proceedings in other divisions of this court. Whichever side proves a fact under s.1(2) proves prima facie that the marriage has irretrievably broken down, and the court is not, in my judgment, concerned with anything else."

36. As already mentioned at paragraph 27 above s.10(1) of the Law goes on to provide that a Court may prove the Petition if it is satisfied *"… after inquiring so far as it can into the facts of the case"* that –

(i) the ground has been established;

(ii) that the marriage has broken down irretrievably[16]*; and*

(iii) there exists no impediment under the law to the pronouncement of the decree[17]*."*

37. Pursuant to r.10(1) of the Rules, when a Petition is served on a respondent a Form 2 must also be served. Form 2 includes the Acknowledgment of Service Form as well as accompanying written *"Directions"* sheet.

38. Rule 11(3) of the Rules provides that the respondent must state or answer each of the questions contained in it. Question 4 requires the respondent to indicate whether he intends to defend the case. Rule 11(4) of the Rules requires, in the

[16]In this matter, both parties agree that the marriage has broken down irretrievably.
[17]In this matter, both parties agree that there is no impediment.

circumstances of the present case, that the Acknowledgement of Service should be filed within fourteen days after the service of the Petition[18].

39. Rules 12 (1) and (2) of the Rules provide:

> *(1) A respondent … who has filed and served an acknowledgment of service containing a statement of his intention to defend[19] shall serve an answer (and any cross petition) within the time limited for acknowledging service of the petition.*
> *(2) No further pleadings may be served by any party without the leave of the Court."*

Rule 12 of the Rules does not require a respondent in the same position as the husband in this case to file an Answer. The husband admits two of the particulars relied on in the Cross-Petition and states that, on that basis, he does not defend the Cross-Petition.

40. The purpose of the Form 2 Directions Form is to inform a respondent about the practical steps he must take when completing the Acknowledgment and what consequences may flow from not filing and serving a completed Acknowledgment or from the manner in which the Acknowledgment is completed. The Directions Form also gives guidance to a respondent about the Answer requirements. I have for quite some time been airing my concern about the lack of clarity resulting from some of the wording in the Form 2 Directions Form.

[18]This applies to a Petition and a Cross-Petition.
[19]My emphasis.

41. Relevant to the present matter are paragraphs 4 and 5 which provide that:

> *"4. A Respondent who states in his Acknowledgment of Service that he intends to contest the proceedings must also serve an Answer on the attorney for the Petitioner (or on the Petitioner, if acting in person) within fourteen days after service of the Petition.*
>
> *5. A Petition will be treated as an "undefended petition" in respect of which a decree of divorce may be pronounced without the need for any hearing in open court unless an acknowledgement of service form in which you have stated an intention to defend has been filed at the Court office within fourteen days of service of the Petition."*

This makes no mention of what happens if an Answer is not served within the fourteen days. Despite the fact that Answers are ordinarily filed and a CI$200 Court filing fee paid before they are served, there is no mention in the Form 2 Direction Form of any requirement to file an Answer. To a lay person this is confusing. From the face of the Form 2 Directions Form if a respondent files an Acknowledgment stating an intention to defend a petition but fails to file an Answer, the Petition will not be treated as being an undefended petition. Also, even if a respondent fails to serve an Answer within the 14 days, the Form 2 Directions Form does not indicate that the Petition will not be treated as being an undefended petition.

42. This has caused confusion amongst litigants and an inconsistent approach by the Court at the proving of petition stage. In some instances petitions are being proved administratively when the Acknowledgement states that the petition is defended, but no Answer has been filed. The better approach when a party files an

application to prove a petition in such circumstances is to direct that the matter be listed for a First Appointment Hearing on a Family Mention Day. At that hearing the Court should then explore whether the petition remains defended, and if it is, then consider an application for leave to extend time for the filing of the Answer. Of course, if no Acknowledgment is filed within the fourteen day time limit, then the petition can be proved administratively. It is arguable whether it should be proved administratively[20] if it has not been served, as paragraph 4 of the Form 2 Directions Form only states that a petition should be treated as being undefended if it has not been filed within the fourteen days.

43. For completeness sake, apart from the need to better draft the above-mentioned parts of the Form 2, paragraph 2 should be re-drafted to be consistent with the current acceptable methods of court filings. The Form 2 Acknowledgement of Service Form also requires amendment. The italic words found at paragraph 6 therein should be deleted, as this paragraph should be applicable, no matter what the ground of divorce may be. Paragraph 7 of the Acknowledgment should be amended to use the terminology from Children Law (2012 Revision).

44. The husband's approach to the Cross-Petition is one that is sensibly frequently adopted in both England and Wales and in the Cayman Islands where there is a behaviour petition when a respondent does not accept some of the allegations of behaviour cited. In such cases, respondents often complete the Acknowledgement of Service Form confirming that they do not intend to defend the divorce, but that

[20]Despite paragraph 2 stating that it must be filed and served within fourteen days.

they do not admit some of the allegations contained within the same. This makes it clear that the respondent is allowing the divorce to proceed but is not accepting that he has acted in some of the ways alleged. This highlights to the Judge that the respondent is not admitting to this behaviour and it may be important later if there are children proceedings and the other party tries to rely on allegations made in the Petition. In such instances, this allows the divorce to go through undefended but without the disputed findings of fact having been made by the Court.

45. Accordingly, I am satisfied that, as the husband accepts that the marriage has irretrievably broken down and is not defending the Cross-Petition, he is not required to file an Answer. He clearly states in the Acknowledgment that he does not defend the petition and he accepts his behaviour as being the ground for the divorce based on some but not all of the particulars relied upon.

46. I do not accept the wife's contention[21] that it can be implied from r.12 and 13 of the Rules, that if there is an intention to defend some *"ground"*[22] by way of a bare denial, an Answer dealing with every particular in the Cross-Petition should be filed and because he has failed to file an Answer then an order should now be made proving all facts and matters and Cross-Petition.

47. Rule 15(1) of the Rules enables a petitioner to apply for the adjudication of an undefended petition. The judge may prove the petition if he is satisfied about four things, two of which are (i) that the petition is undefended and (ii) that the content

[21]Paragraph 8 of Skeleton Argument dated 3 February 2021.
[22]The wife uses the words "grounds" for what might be better termed as being "Particulars".

of the petition and the verifying affidavit sufficient to prove the petition. The husband's case is that the Court should be satisfied that, in light of his indication in the Acknowledgment of Service that the Cross-Petition is undefended on the basis of what he has admitted in paragraph 4 of the Acknowledgment, the factors set out at s.10(1)(i)-(iii) are met. Therefore, he argues that the wife may apply for the adjudication of an undefended petition, highlighting that the only issue between them is the extent to which the facts and matters stated in the Cross-Petition are proved. He contends that in such circumstances the Court need not, indeed should not, on the wife's insistence, then embark upon a trial of the unadmitted allegations which are not necessary in order to grant the decree.

48. As already highlighted, despite the fact that it is her petition, the wife argues that the two of the six particulars relied upon by her in her Cross-Petition should not be regarded as being sufficient to grant a decree on the ground of the husband's behaviour, even where both parties accept that the marriage has irretrievably broken down. Her case is that, whether or not the husband defends the Cross-Petition and/or files an Answer, the Court should *"inquire as far as it can into the facts of the case"* in relation to all six particulars and prove the Cross-Petition on the basis that all of the *"facts and matters stated"* therein *"are proved"*. This is what makes the present case arguably unique, because the submissions made and reasons for not proving a petition raised by the cross-petitioner wife in this case are of the nature one expects to see from a respondent.

49. The husband, in opposing this contention, places reliance upon the decision in ***Grenfell v Grenfell***. In that case the wife petitioned on the ground of the husband's behaviour. The husband replied and agreed that the marriage had broken down, but he denied that it was due to his behaviour. He then cross-petitioned on the ground of five years' separation. The wife then filed an Answer to the Cross-Petition opposing the grant of a decree on the ground that the dissolution of the marriage would result in grave hardship to her and that it would be wrong in all of the circumstances to dissolve the marriage**.** The wife, although agreeing that they had lived part for the requisite time, argued that because she was a Christian, her conscience would be harmed if the marriage broke down based on separation. It was held that, as she was seeking a divorce herself, she could not argue that she would suffer hardship if the marriage were to be dissolved and so her Answer was struck out.

50. Lord Ormrod LJ stated at page 566i:

> *"There is no point, as I see it, in a case like this of conducting an inquiry into behaviour merely to satisfy feelings, however genuinely and sincerely held by one or other of the parties. To do so would be a waste of time of the court and, in any event, would be running, as I think, counter to the general policy or philosophy of the divorce legislation as it stands today. The purpose of Parliament was to ensure that where a marriage has irretrievably broken down, it should be dissolved as quickly and as painlessly as possible under the Act, and attempts to recriminate in the manner in which the wife in this case appears to wish to do should be, in my judgment, firmly discouraged."* [My emphasis]

51. Ormrod LJ went on to comment about the timing of a Court's review of allegations of conduct at page 567g:

> *"That, of course, is plainly a matter of discretion which lies in the judge and there may be cases where it is more convenient to dispose of allegations of conduct at the time the suit is before the court rather than when the ancillary relief is before the court, but I should not think that there will be very many such cases, because conduct is not, except in rare cases, a relevant issue nowadays in relation to ancillary relief, and it is not very often a live issue in relation to custody, although it may be. Usually it will be found convenient to deal with conduct in relation either to ancillary relief or to custody when dealing with that specific matter. Certainly little useful purpose is served in conducting an inquiry in the course of the suit in most cases."*

There is nothing in the matter before me that makes this one of those cases in which a useful purpose would be served in dealing with disputes about the husband's conduct, even though the wife may seek to raise them if the Court is asked to consider any s.10 Children Law (2003 Revision) arrangements.

52. The author of Rayden commented on page 219 paragraph 3 about ***Grenfell v Grenfell*** in the following terms:

> *"Where on the face of the pleadings there are facts sufficient to enable the court to grant a decree of dissolution, the Court of Appeal has firmly declared that it is in general wrong to permit a party to have other allegations investigated: in particular, where on the face of the pleadings five years' separation is alleged by a respondent and admitted by the petitioner who has alleged behaviour in the petition."*

53. In ***M v M*** FAM 53 of 2014 (unreported Ex-Tempore Ruling)[23], I had to consider the husband's petition and the wife's cross-petition. The husband stated in his acknowledgement of service in relation to the cross-petition that he did not intend to defend it. In an addendum attached to the acknowledgment, he set out the particulars of behaviour relied upon in the cross-petition which he admitted. Mr. McGrath submitted in ***M v M*** that the admitted facts were sufficient to establish the ground of behaviour and that the marriage had irretrievably broken down. Unlike in the matter before me, counsel for the wife agreed with that assertion. The wife in ***M v M*** did not accept that the unadmitted particulars in the cross-petition should be *"withdraw*n", but she indicated that it was a matter for the Court to determine which *"facts"* contained in the cross-petition it relied upon when proving the petition. The decision in ***Grenfell v Grenfell*** was considered and applied and I commented:

> *"I am satisfied that Mrs. (M) genuinely and sincerely holds the view in relation to all of the instances of behaviour which she sets out in her cross petition which are not admitted by the husband. However, the purpose of these proceedings is not to carry out a therapeutic process of enabling those to be heard at the contested hearing if there are admitted grounds[24]which are sufficient to enable her cross petition to be proved in a timely and cost effective manner. If, of course, the admitted grounds[25] are not sufficient to meet the threshold for establishing the ground of behaviour, then the factual allegations which are not admitted will have to be considered.*

[23]A copy of the extempore ruling was provided to the parties at the hearing - Mr McGrath appeared for the Petitioner husband in that case.
[24]The word "ground" was incorrectly used, it should have been "particulars".
[25]The word "ground" was incorrectly used, it should have been "particulars".

Accordingly, I prove the cross petition on the ground of the husband's behaviour and I make findings that the paragraphs admitted in the acknowledgment of the husband proved. I do not need to go on and seek to prove or adjudicate on the other paragraphs in the cross petition which he does not admit."

54. A copy of the Ex-Tempore Ruling was provided to the parties at this hearing and they were afforded the opportunity to comment on the same if they wished. I indicated to the parties that I did not feel fettered by that Ex-Tempore Ruling, as neither party had made comprehensive submissions concerning ***Grenfell***. Therefore, I now consider the effect and applicability of ***Grenfell*** afresh with the benefit of Counsels' helpful and full submissions.

55. I am cautious when considering the application of ***Grenfell***, as the word *"facts"* seems to be used in the MCA for what the Law refers to as being the *"grounds for divorce"*. In ***Grenfell***, as in the matter before me, both parties accepted that the marriage had irretrievably broken down, however the difference is that in ***Grenfell*** there was a statutory ground which was made out, with the consequence that the Court of Appeal accepted there was no need for the Court to consider the particulars pleaded in relation to the separate ground of behaviour alleged by the wife. I am conscious that in the matter before me, there is just one ground, the ground of behaviour which is in the wife's Cross-Petition, that I am being asked to consider.

56. Despite the difference between the situation in ***Grenfell*** and the current matter, I am satisfied that the Ormrod LJ's observations made back in 1978[26] about the best use of court time and the more modern general policy or philosophy behind the legislation and the Court's approaches to divorce where a marriage has clearly irretrievably broken down still have great force. I agree that if a marriage has irretrievably broken down, whilst of course applying the provisions in the Law correctly, Courts should endeavour to progress the matter in such a prompt, painless and economical manner. Such an approach is in the best interests of the children and of the spouses and it best assists a family unit that is already in a state of disarray due to marital breakdown.

57. These observations are consistent with the principles set out in the Overriding Objective. The approach that has been adopted in the Grand Court by Judges sitting in the Family Division whereby they have been content to prove behaviour petitions based on appropriate particulars of conduct admitted by a respondent in his Acknowledgment and not on the ones that he has not admitted in his Acknowledgment, again is consistent with the observations made by Ormrod LJ as well as with the Overriding Objective.

58. The principles contained in the Overriding Objective set out in the Preamble to the Grand Court Rules have been consistently applied in a wide range of family

[26]See in particular paragraph 50 above herein.

cases in the Grand Court. One example of such a case is ***KCP v JB*** FAM 245 of 2010[27] in which I commented at paragraph 22:

> *"The Court must actively case manage all cases that come before it. The Court has a duty when exercising its discretion to give effect to the Overriding Objective set out in the preamble to the Grand Court Rules. When considering the Overriding Objective the Court must deal with every matter in a "just, expeditious and economical way." The Court should ensure that the "normal advancement of the proceedings is facilitated rather than delayed." The Court should also deal with the matter in ways which are proportionate to the importance of the case and the complexity of the issues. The Court should allot an appropriate share of its resources when taking into account the needs of other court users and to ensure that valuable court time is properly used and not abused by parties. In addition, in a case such as this, in which a number of the issues delayed by the current applications are ones brought under the Children Law, I recognise that the child's welfare is a paramount consideration and the general principle that any delay in determining the question is likely to prejudice the welfare of the child."*

59. As already mentioned, the wife contends that the two of her particulars of behaviour which are accepted by the husband are not substantial enough. Reliance is placed by Ms. Desrosiers on the Supreme Court decision of ***Owens v Owens*** [2018] UKSC 41. The parties in ***Owens*** were married in 1978 and at the time of the hearing were aged 80 and 68. In February 2015 the parties separated when the wife left. The wife filed her petition in May 2015 based on the ground of behaviour. She alleged that due to her husband's behaviour, namely being argumentative, moody and disparaging her in front of others, she had felt

[27] Judgment dated 12 August 2015.

'unhappy, unappreciated, upset and embarrassed and had over many years grown apart' from him.

60. The husband defended the petition contending that the examples of his behaviour relied upon were not sufficient to satisfy the required test under s.1(2)(b) of the Matrimonial Causes Act (1973). The judge at first instance, a Recorder already having allowed the wife to amend her petition to include 27 individual examples of her husband's behaviour, found that the marriage had broken down and that the wife could not continue to live with her husband, but he accepted the husband's contention about the *"flimsy"* and exaggerated examples. Upon also concluding that those examples relied on at the hearing were isolated incidents, the judge dismissed the petition. The wife unsuccessfully appealed to the Court of Appeal and then to Supreme Court. The latter *"reluctantly"* dismissed the appeal and, at paragraph 45 of the judgment, the majority asked that Parliament consider whether to replace the law that prevented the wife from being granted a divorce. The Supreme Court recognised that the first-instance judge had many advantages in reaching the relevant conclusions, and that the wife's complaints about the judgment had already been rehearsed and dismissed by the Court of Appeal. In such circumstances, it would be most unlikely for it to be appropriate for the Supreme Court to intervene.

61. It is important to bear in mind (i) the fact that the petition was defended in ***Owens***; and (ii) the legal context to the dispute in the case, namely that defended suits for divorce are exceedingly rare. In both England and Wales and the Cayman Islands,

divorce petitions usually progress without any real issue or great scrutiny. In the last nine years as the Judge tasked with case managing the Family Division, I have only had to rule upon one contested divorce hearing. Almost every properly drafted petition under s.10(1)(b) of the Law will succeed. It is expected that the evidence before any contested hearing will be brief and that the judgment of the court in such a hearing will almost certainly result in the proving of the petition.

62. Lord Wilson aptly described in ***Owens*** how the Courts in England and Wales approach defended suits of divorce as follows:

> *"15. ...Defended suits are exceedingly rare. In his judgment the President noted that, in relation to the 114,000 petitions for divorce which were filed in England and Wales in 2016, fewer than 800 answers were filed; and he estimated that the number of suits which proceeded to a final, contested hearing was 0.015% of the petitions filed, which amounts to about 17 in that whole year. The degree of conflict between the parties which is evident in a fully defended suit will of itself suggest to the family court that in all likelihood their marriage has broken down. While it recognises that, unless and until repealed by Parliament, section 1 of the 1973 Act must conscientiously be applied, the family court takes no satisfaction when obliged to rule that a marriage which has broken down must nevertheless continue in being.*
>
> *16. In 'No Contest: Defended Divorce in England and Wales' published in 2018 by the Nuffield Foundation, Professor Trinder and Mark Sefton make a report on their detailed study of recently defended suits. In an admirable summary of the approach of the family court at pp 7-8, they say:*
>
> > *"While respondents are typically focused on defence as a means to establish their 'truth' of why the marriage broke down, the family justice system is predicated on settlement and compromise. <u>That</u>*

settlement orientation applies even in cases where a formal defence has been issued, with encouragement to settle at each stage of proceedings, up to and including, contested hearings. The very active promotion of settlement at each stage, with lawyers and judges working in concert, reflects the dominant family justice perspective that agreed outcomes are less costly and damaging, that trying to apportion blame is a fruitless and inherently non-justiciable task and that defence is futile where one party has decided that the marriage is over." [My emphasis]

17. For reasons which I will explain, the subsection nowadays sets at a low level the bar for the grant of a decree. The expectations therefore are that, even when defended to the bitter end, almost every petition under the subsection will succeed; that, in the interests again of minimising acrimony, the petitioner will be encouraged at the hearing to give no more than brief evidence in relation only to a few allegations of behaviour; and that then, after an equally short riposte on behalf of the respondent by cross-examination, oral evidence and submission, the court will deliver a brief judgment, almost certainly culminating in the pronouncement of a decree. As Mr Owens himself acknowledged when recounting the advice given to him, "Courts rarely stand in the way of a party seeking a divorce". Indeed the authors of the No Contest *report discovered no recent example, other than Mr Owens himself, of a respondent to a defended suit who successfully opposed the grant of a decree on some basis or other."*

63. In the vast majority of cases, the parties and their attorneys embrace the above approach highlighted by Lord Wilson at paragraph 15 in the Supreme Court Decision. Even if a petition alleging behaviour is initially defended, the parties invariably negotiate or compromise to see (i) whether the petition can be amended to *"water down"* the allegations or (ii) whether the proving of the petition can be grounded on specific allegations set out in the drafted particulars in the petition.

Lord Wilson noted that a few years prior to issuing the relevant petition the wife had provided the husband with a letter written by her solicitors, with which was enclosed a draft petition alleging behaviour. In the letter, the husband was asked whether, if a petition were to be issued in the terms of the draft, he would defend it. Lord Wilson stated:

> *"The judge at first instance remarked that, like the relevant petition, this initial draft "lacked beef". That should have been a compliment, not a criticism. Family lawyers are well aware of the damage caused by the requirement under the current law that, at the very start of proceedings based on the subsection, one spouse must make allegations of behaviour against the other. Such allegations often inflame their relationship, to the prejudice of any amicable resolution of the ensuing financial issues and to the disadvantage of any children. Thus for many years the advice of the Law Society, now contained in the second guideline of para 9.3.1 of the fourth edition (2015) of the Family Law Protocol, has been:*
>
> > *"Where the divorce proceedings are issued on the basis of unreasonable behaviour, petitioners should be encouraged only to include brief details in the statement of case, sufficient to satisfy the court ..."* [My emphasis]

64. The President mentioned, in the Court of Appeal Decision in ***Miller Smith v Miller Smith in the Court of Appeal*** [2009] EWCA Civ 1297, [2010] 1 FLR 1402, about *'consensual, collusive manipulation'* when referring to a practice of drafting anodyne particulars supporting a divorce petition which is actually an approach that is consistent with the abovementioned Law Society's Family Law Protocol. In ***Owens,*** Lord Wilson noted the President's observations and then stated that unless the particulars are untrue, there is no dishonesty by submitting them on behalf of a petitioner and no collusion on behalf of the respondent accepting them. He confirms that the subsection is not being abused; it is simply a *"legitimate enlargement"* of the application of it to reflect changing social norm.

65. At paragraph 28 in ***Owens***, following a review of *"six old authorities"*, Lord Wilson found that those cases and the decision of the Court of Appeal continued to provide a correct interpretation of the behaviour subsection. He referred to it as a three stage enquiry; firstly factual, determining what the respondent did or did not do by reference to the allegations of behaviour in the petition: secondly subjective, assessing the effect of the behaviour on this particular petitioner in all of the circumstances: and thirdly objective, evaluating whether as a result of the first and second, it would be unreasonable to expect the petitioner to continue to live with the respondent. He added that, although this test had been applied for many years, the application of the test to the facts of an individual case is likely to change over time, in line with changes in wider social and moral values.

66. I recognise that s.10 of the Law must be applied and I accept, as I stated in ***M v M***, that there must be some substance in allegations of behaviour even in cases where the petition is not defended by Respondent.

67. As already noted herein, in practice, Courts in England and Wales and in the Cayman Islands have tended to prove petitions on less serious allegations where the respondent indicates that he does not contest the petition, even if based on an acceptance of some but not all of the particulars pleaded. Often a petitioner will plead gentler and less serious allegations in a petition as a way to move a matter forward in a non-contentious manner. Such an approach is consistent with the Overriding Objective and with the observations of Ormrod J and Lord Wilson. It is not collusion.

68. The two headings of the types of behaviour which are pleaded by the wife in the Cross-Petition and elaborated upon in her verifying affidavit and which the husband accepts, albeit they are less serious than the other four which she pleads, are not as insignificant in nature as the wife's attorney now seeks to contend due to her opposition to the petition being proved on the basis sought by the husband. The cumulative effect:

(i) Of a husband, prioritising his own family members and isolating his wife from her own family and friends by refusing to spend time with them over the course of a marriage inevitably puts a strain on family friendships and would leave a wife feeling isolated;

(ii) Of a husband showing little kindness or regard for his wife and acting dismissively with regard to her views and showing little respect to her as an individual causing the parties to withdraw from each other; and

(iii) Of a husband prioritising his work and his own social needs over commitment to spend time with his wife[28], leaving the wife to suffer feelings of stress, loneliness and isolation

takes this beyond a mere complaint by a petitioner that a respondent was unable to give her demonstrative affection, or that the parties are incompatible or do not have anything left in common and cannot communicate or that one of them is bored with the marriage. As pleaded in the Verifying Affidavit, the impression is given that it is cumulative conduct which has affected the wife and I am of the

[28]The husband does not accept that he failed to prioritise the children's welfare above his own.

view that it is such that the wife cannot reasonably be expected to put up with the same.

69. I reach this conclusion, despite the Court being informed in the submissions made by Ms. Desrosiers that the wife would have *"continued to remain in the marriage"* and *"put up with it for the sake of the marriage….in circumstances where there was loss of love and affection and feelings of isolation"*. Ms. Desrosiers also informed the Court in her submissions that the wife and the children remain practicing Catholics and that the *"flimsy grounds"* accepted by the husband may not be sufficient for the Church to grant an annulment which was required to enable her to remarry as a Catholic. Unfortunately, none of these submissions were grounded on any oral or written evidence and amounted to Counsel giving evidence.

70. If this was an uncontested petition on an application made by a petitioner I would, as I and other Judges in the Grand Court have frequently done in the past, have proved the petition on the allegations of this nature. I have thought more carefully in this instance, as the wife has indicated that she does not agree to that approach being taken. However, the guidance from Ormrod LJ in ***Grenfell*** about the approach to be taken in divorce proceedings equally applies, especially having regard to the Overriding Objective.

Conclusion

71. In a case where the Respondent is not defending the Cross-Petition I am satisfied, consistent with the Overriding Objective, that if a Court is satisfied that there exist sufficient particulars to establish a ground, even if it is the only ground plead in the petition, that petition may be proved. I am satisfied that on the balance of probabilities, in the circumstances of this case and on the evidence before me, the test for s.10(1)(b) of the Law has been reached. I am satisfied that the ground for the Petition has been established, that the marriage has broken down irretrievably and that no material impediment under the Law exists to the pronouncement of the decree.

72. Accordingly, I prove the Cross-Petition based on the ground of behaviour and on the particulars set out paragraphs 7 (iv) and (vi) and which were elaborated on in the wife's Verifying Affidavit.

73. The wording in Form 9 is not rigid and it may be departed from to meet circumstances of each case and to reflect the Court's decision. This practice has developed, for example in cases where a respondent admits some but not all of the particulars pleaded in a petition. The proving order should be in the terms of the draft provided by the husband but also include in its preamble:

> *"Upon the Respondent, admitting in his Acknowledgment of Service dated 17 November 2020 that he accepts the unreasonable behaviour pleaded at paragraph 7(iv) and (vi) of the Cross-Petition and make no admissions to the other unreasonable behaviour pleaded in paragraph 7 ."*

Observations

74. Regrettably, and alarmingly in any case, let alone in a case which is still at an early stage because a petition has still not been proved, I note that the wife's costs as of 2 February 2021 are CI$75,404 and the husband's costs as of 4 February 2021 were CI$71,000[29]. With this in mind I see merit in yet again repeating observations shared by me in similar concerning circumstances in the past. As a great deal of money and time has been squandered on these proceedings, I again share the sentiments of Munby J. ***KSO v MJO & Ors*** [2008] EWHC (Fam) 3031 when he stated:

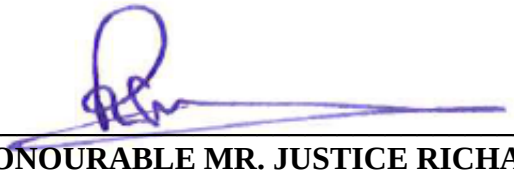
> *"The picture is deeply dispiriting. And it is not as if it is only the adults who suffer from the consequences of such folly. The luckless children do as well. The present case is a sobering, and for me deeply saddening, example. If, instead of spending – squandering – over £430,000 in costs, the wife and the husband had been able to resolve their differences at a more modest and, dare I say it, more seemly level of costs, there might very well have been enough left in the matrimonial 'pot' to house the wife and children and to enable the children to remain at their school, whilst still leaving something more than a mere consolation prize over for the husband.……the mother and the father, for that is what they are – are faced now with the wretched and thankless task of trying to explain to their daughters how it has all come to this."*

75. I also draw attention to the following remarks of Jackson J. in ***TF v FF*** [2013] EWHC (Fam):

> *"In my view, the court has a responsibility to discourage currently profligate wasted costs, particularly in a case with a track record like this.*

[29]Costs Estimates provided pursuant to Practice Direction 3/2019 Proceedings in the Family Division of the Grand Court: Cost Estimates.

It is a matter for each party to decide what they want to spend, but they cannot expect it to be recoverable if it exceeds that threshold."



THE HONOURABLE MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT