

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION**

CAUSE NO: FAM 201 OF 2017

BETWEEN:

ALICIA MELONNIE MCKENZIE

AND

JEROME RAYON MCKENZIE



Petitioner

Respondent

Appearances: Mrs. Stacy Thompson for the Petitioner
Mrs. Cherry Bridges for the Respondent

Before: Hon. Mr. Justice Richard Williams

Heard: 4 September 2019

Draft transcript circulated: 5 September 2019

**Date of circulation of
transcript of Ruling:** 10 September 2019

HEADNOTE

Husband and Wife - Divorce - Wife's Amended Petition - Wife's divorce brought on consensual ground of parties living apart for two years – Respondent must affirmatively consent to the decree and it is not sufficient that he or she does not oppose it – Consent must still exist at time of proving of petition – Amendment of Petitions and requirement to seek leave of the court pursuant to the procedure set out in Rule 14 Matrimonial Causes Rules (2003 Revision) - The fact alleged under s.10(1) of the Law on which it is sought to satisfy the court that the marriage has broken down irretrievably must appear in the Petition - Petitions to be treated as one petition and 2 years living apart must immediately precede the filing date of the Petition and not of the Amended Petition.

EX TEMPORE RULING

Introduction and Procedural Background

1. I am sitting in my Chambers as Open Court. Although the parties at the outset of this hearing have agreed the way forward, an Ex Tempore Ruling is required to act as guidance for future cases when the same issues may arise. The issue about the nature of



the required consent requires clarification especially as this Court has seen a number of applications being made to prove petitions on the consensual ground of two years living apart despite there being an absence of expressed consent from the Respondent. A copy of the transcript of this Ex Tempore Ruling will be provided to the parties, hopefully tomorrow, after it has been perfected.

2. The Petitioner wife and the Respondent husband were married on 24 February 2007. There are two children of the marriage who are aged 12 and 13, and remain dependent on both of their parents. These proceedings were commenced by the Petition filed on 4 September 2017 in which the Petitioner states that the parties separated on “*about*” 19 April 2011. The Petitioner, who was unrepresented at the time, failed to properly plead the ground for divorce. Rather confusingly under the heading Particulars of Separation, she states that the parties “*have been separated for over two years, namely six years and four months prior to the filing of this Petition.*” The Particulars of Separation read like a hybrid between the ground of living apart for two years by consent and the ground of living apart for five years. It is evident from the conduct of the parties up until the mention hearing held on 29 June 2018 that they were both willing to approach the Petition as if it was one pleaded on the consensual ground of living apart for two years immediately preceding the presentation of the Petition.
3. An Affidavit of Service reports that the Respondent was served with a copy of the Petition and Verifying Affidavit on 4 September 2017. The Acknowledgment of Service signed by the then unrepresented Respondent dated the same day, was filed on 8

September 2017. In that Acknowledgment, it was stated that the Respondent did not intend to defend the case and that he consented to a decree being granted on the basis of the Petition alleging two-year separation. The Petition was then proved following administrative consideration on 8 September 2017.

4. When the matter came before this Court for the First Appointment hearing on 3 November 2017, it appeared that the parties were working towards a consent order to dispose of any s.10 Children Law and financial issues. To assist the parties with that process, I directed that they attend mediation.
5. The matter next came before the Court on 3 May 2018 when an issue was raised for the first time by the Respondent who now had legal representation. He contended that he had not been served with a proper copy of the Petition. The Respondent stated that he signed the Acknowledgment without understanding it and that the Petitioner was the one who wrote in all of the entries contained in the Acknowledgment, save for his signature. The Respondent stated at the hearing that the Petitioner served the pleadings on him, that she read the documents out to him and that he was at the time willing to sign them. At the hearing an interim child maintenance order was made. The matter was then adjourned to a mention hearing on 29 June 2018, with a direction that, if an application to set aside the proving of the Petition was going to be made by the Respondent, it should be filed and served with supporting affidavit evidence by or on 22 June 2018.



6. On 22 June 2018, the Summons to set aside the proving of the Petition and to dismiss the Petition was filed. The Summons was supported by an affidavit sworn by the Respondent on 22 June 2018 and filed on 25 June 2018. The Respondent was challenging the proving of the Petition on the grounds that he (i) had not been properly served with an issued or sealed copy of the Petition; (ii) had not been properly served with a Petition signed by the Petitioner; (iii) that if it were found that the Petitioner had properly signed and issued the Petition, the purported service of it was defective as personal service should not be effected by the Petitioner herself; (iv) that he did not consent to the divorce being granted on the basis of two-year separation and that, if he was deemed to have provided such consent in the Acknowledgment of Service form, then he would seek leave to withdraw that consent. For reasons I will explain later the Respondent would not have required such leave.

7. The Respondent's Summons came before the Court on 29 June 2018. At the hearing the Petitioner accepted that the Respondent had only been served with a draft of the Petition which had not been sealed, dated or signed. The Court set aside the proving of the Petition due to this fundamental procedural defect and reserved the costs. It was not felt necessary for the Court to go on to consider whether the Respondent had in fact given his consent to a divorce based on two-year separation and whether that consent could be withdrawn. At paragraph 11 of the Position Paper filed on behalf of the Petitioner she incorrectly states that on 29 June 2018 "*orders by this court were also made for the Petitioner to amend her Petition.*" My contemporaneous note of the hearing states that I ordered "*adjourn petition generally, for wife to consider whether she wishes to*





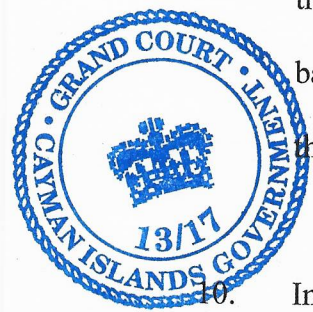
proceed/amend petition (with alternative ground).” No order to amend the Petition has been made by this Court post that hearing. The parties failed to submit a formal order setting out orders made by me on 29 June 2018.

8. On 3 December 2018, an Amended Petition for Dissolution of Marriage and Verifying Affidavit were filed. Again, the ground of separation was not properly pleaded in the Amended Petition. However, under the heading “*Particulars of Separation*” in the Amended Petition, the Petitioner pleads that the marriage had irretrievably broken down due to the continuous separation of the parties for a period in excess of two years “.... *at the time of filing hereof 4 years and 6 months immediately preceding the presentation of this petition. The petitioner and respondent have lived separate and apart since approximate May 30 2014.*”¹ There is no mention of the word “consent” as being a required part of the ground relied upon in the Amended Petition. If the date of separation pleaded in the Amended Petition is correct then the parties would have been living apart for over two years before the presentation of the Petition dated 4 September 2017. However, the husband contends that the date of separation was in September 2016 which is less than 2 years before the presentation of the original Petition in September 2017. Therefore, even if there were no procedural irregularities, the ground of living apart for two years could not be relied upon as it could not be consented to by the Respondent.

9. From the Court file, it is unclear how and why the Grand Court Registry permitted the Amended Petition dated 21 November 2018 to be presented. The Matrimonial Causes

¹ I note that in the original petition the Petitioner had contended that the parties had separated around 19 April 2011, just over 3 years earlier than the date now pleaded.

Rules (2003 Revision) (“the Rules”) clearly set out the procedure to be followed when there is an amendment. Rule 14 provides that “*Supplements to petitions and amendments to pleadings generally may be made at any time by leave of the Court, and applications therefor (sic) shall be supported by affidavit, unless the Court otherwise orders.*” This means that ordinarily a summons should be filed with supporting affidavit evidence. A Court may order that those procedural requirements are not necessary and, having regard to the principles set out in the Overriding Objective, that is frequently done in cases where both the parties have indicated at a hearing that the proposed amendment would not be opposed. I have not been asked to do that retrospectively today by the parties as they recognise that neither the Petition nor the Amended Petition could proceed on the basis of two years separation as the Respondent could not consent due to his belief that the date of separation was less than years before the presentation of the Petition.



10. In the matter before me, no summons applying for leave to amend the Petition with supporting affidavit has been filed and there exists no order from the Court permitting deviation from that course. The Petitioner should not have presented that Amended Petition without leave of the Court. The Registry should not have accepted the Amended Petition and it should have refused to issue it. Having heard from the Petitioner’s Counsel today, I am satisfied that she presented it as she genuinely, albeit mistakenly, felt that an order granting leave had been made. That said, as the Registry has to deal with a significant volume of filings, it would be good practice for the person at the time of presenting an amended petition to show the order containing the leave to file provision to the Registry Officer. Technically, as leave has not been given to file it, the Amended

Petition is not properly before this Court. For reasons touched on in this judgment the parties have rightly not asked me to now grant retrospective leave to file that Amended Petition pursuant to the procedural discretion given to me to do so under Rule 14 in the absence of a summons and affidavit.

11. On 4 January 2019 the Respondent filed an Acknowledgment of Service in relation to the Amended Petition making it clear that he intended to defend the divorce and that he did not consent to a decree being granted where the Petitioner was alleging two-year separation. The filing of the Acknowledgment does not enable a Petitioner to contend that there would then no longer be a requirement to comply with Rule 14.

12. In the absence of any consent from the Respondent to the ground relied upon in the Amended Petition, on 5 April 2019 the Petitioner submitted draft orders to prove the Petition on the ground that no Answer had been filed. Again, the order wrongly made no reference to the Amended Petition and simply referred to the Petition. If there are no procedural irregularities then the Court ordinarily proves a petition administratively. Upon considering the documents administratively I instructed my Personal Assistant to inform the Petitioner's Counsel that the Amended Petition would not be proved as it was obvious that the Respondent was at the time not consenting to a divorce on the ground of the parties living apart for two years. It was also made clear to Counsel, for reasons I will set out later herein that if consent is not given then there is no requirement to file an Answer.



13. On 25 June 2019 the Petitioner filed a “*Summons to prove Petition*”, which is the Summons now before me. Of course, the Summons should not be one seeking to prove the Petition but to prove the Amended Petition and the latter is the wording that should have been used. In a Listing Form dated 26 March 2019 in which a half day hearing time estimate is given, the Petitioner indicates that the legal issues to be argued are “*principles to be applied in cases of separation for two years and longer.*” Under the heading “*Type of application and Rule of Law pursuant to which*” the application is brought the Petitioner writes “*Proving of the divorce petition where the Respondent does not agree to the grant of divorce and other appropriate relief as under the Matrimonial Causes Law.*”
14. I hope that the parties will not be offended if from now on I refer to them, for convenience, as the husband and the wife.

Grounds for Pronouncing Decrees for Dissolution of Marriage

15. Jurisdiction to grant a decree depends on s.10(1) of the Law, which so far as material for present purposes provides:

“A decree of dissolution of marriage may be pronounced by the Court in respect of a marriage on the ground that since the celebration of the marriage-

- (a).....
(b) *the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;*
(c).....
(d) *the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the Respondent consents to the decree being pronounced²; or*
(e) *the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition,*



² My emphasis by underlining.

if the Court, after inquiring so far as it can into the facts of the case, is satisfied that-

- (i) the grounds for the petition have been established;*
- (ii) the marriage has broken down irretrievably; and*
- (iii) no material impediment under this law exists to the pronouncement of the decree.”*



16. Section 10(2) of the Law provides:

“For the purpose of subsection (1) –

- (a) Spouses shall be treated as living apart unless they are living with each other in the same household;*
- (b)”*

17. Subsection 10(3) of the Law provides:

“In considering whether a period of desertion or absence has been continuous for the purposes of paragraph (c), (d) or (e) of subsection (1), no account shall be taken of any one period (not exceeding three months) during which the parties may have resumed cohabitation with a view to reconciliation.”

18. The fact alleged under s.10(1) of the Law on which it is sought to satisfy the Court that the marriage has broken down irretrievably must appear in the petition. The fact should be pleaded along with brief particulars of the individual facts relied on, but not the evidence by which they are to be proved. In the case of behaviour, sufficient particulars of specific incidents which it is alleged support the charge should be provided. Stale conduct should not normally be pleaded unless it is necessary to show a course of conduct which cumulatively makes it unreasonable to expect the petitioner to continue living with the respondent. In light of these requirements the approach suggested by the Petitioner at paragraph 7 of her Position Paper, namely *“to lead live evidence of the unreasonable behaviour of the respondent leading to the breakdown of the marriage”*

when the behaviour ground at s.10(1)(b) of the Law has not been pleaded in the Petition, is flawed and would not be permitted. At the hearing Counsel for the Petitioner sensibly did not seek to pursue this avenue.

19. It is evident that the parties will not be reconciling. It became evident at the outset of the hearing that the husband was now willing to agree to the proving of a petition based on 2 years separation by consent. However, he felt unable to consent to the ground in the Amended Petition as the date he believed that they separated on was less than two years prior to the presentation of the Petition. Although the parties now agree that the way forward is for a fresh petition to be presented, the issue about the strict requirement for the Respondent's consent was not recognised until the outset of the hearing. This is an important issue, and despite the consent reached at the door of the Court, I see great merit in clarifying it to provide future guidance to other parties.



The Law

20. As highlighted earlier, the ground relied upon by the wife is that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the Petition. What is conspicuously absent in the wording in the Petition and the Amended Petition is the recognition therein that, for this ground to be made out, there is also a strict requirement for the Respondent to consent to it.
21. The relevant consent is not the consent to the parties being separated, but is the consent to a decree being granted on this particular ground. The Respondent must affirmatively



consent to the decree. There must be a positive act of consent and it is not sufficient that he does not oppose it. Therefore, the failure to file and serve an Acknowledgment of Service and/or an Answer cannot be relied upon by a Petitioner in support of a contention that there is consent. The usual way of proving the consent where the Petition alleges two years separation is by reference to the completed and signed Acknowledgment of Service Form if it, at paragraph 5³, contains the positive statement that the Respondent consents to the decree being granted. However, in appropriate cases, if an Acknowledgement of Service has not been filed or if the Respondent changes his mind from a non-consensual position set out in the Acknowledgment and later orally or in writing indicates to the Judge he now wishes to consent, then the Judge if satisfied that the consent is informed, true and voluntary can accept that. The relevant time for the consent to exist is at the time of the proving of the Petition and a Respondent may, even if he provides consent in his Acknowledgment, withdraw the consent at any time prior to the proving of the Petition. This means that if the parties had agreed that the date of separation was at least two years before the presentation of the original Petition (which is not the case), the Amended Petition could possibly have been proved today if the husband now consented despite him stating otherwise in his Acknowledgement of Service.

22. In the English High Court Family Division case of *McG (formerly R) v R* [1972] 1 All ER 362 the wife petitioned for divorce on an alternative ground of two years living apart contending that the husband consented. Pursuant to Rule 12(6) the Matrimonial Causes Rules 1968 (as amended) the wife was required to send to the husband to proceedings an acknowledgment of service in the prescribed form. This is identical to the requirement

³ See Form 2 in the Schedule to the Matrimonial Causes Law (2003 Revision).



under s.10(1) of the Rules where a Form 2 must be served personally on the Respondent at the same time that the Petition is served. Although the Matrimonial Causes Law (2005 Revision) does not contain a clause identical to s.2(7) in the English Matrimonial Causes Act⁴ and although the Rules do not contain the same wording found in the Notice Form 3 and attached Form 4 used in England and Wales pursuant their Matrimonial Causes Rules, I am satisfied that the intended “*machinery*” in our rules for ascertaining whether consent is given is by properly completing the Acknowledgement of Service.

23. In *McG* the solicitors for the wife served a recently outdated⁵ version of the acknowledgment form which contained no reference to the husband’s consent. There was no evidence that the husband was opposed to or consented to a decree on this ground, except a letter from his solicitor, stating that he ‘*simply wants this affair to be brought to finality as soon as possible.*’ The wife contended that compliance with the rules concerning the proper formal acknowledgment was not mandatory and that the letter from the husband’s solicitors amounted to a consent for the purposes of the ground.
24. Sir George Baker P held that whether or not compliance with the rules was mandatory⁶, it could not be inferred from the fact that the husband had not objected to a decree being granted that he had thereby consented within the meaning of the section of the Matrimonial Causes Act 1969. He stated at page 363 that:

⁴ Section 2(7) enacts that provision shall be made by rules of court. The purpose of ensuring that where a petition alleges that the respondent consents to decree being granted where the parties have lived apart for two years, the respondent has been given such information as will enable him to understand the consequences to him of his consenting to a decree being granted as well as the steps that he must take to indicate that he consents to the grant of a decree.

⁵ It was outdated due to the new forms introduced as a consequence of the Matrimonial Causes Act 1969 coming into force three days prior to the petition being filed.

⁶ Sir George Baker P at 364d reserved his position on the question of whether these rules were mandatory or not.



“‘Consents’ is a positive requirement, it may be contrasted with what I cannot help knowing was originally in the bill, i.e. the words ‘does not object to decree being granted.’”

The President added in relation to the letter:

“I agree that it may be an indication that the husband does not object to the wife having the alternative relief prayed for in this petition and being granted a decree of divorce, but, although I have the greatest sympathy for the wife and would help in any way I can, I am unable to find that there or anywhere else is a consent by the husband.”

25. I am satisfied that the approach to the issue of consent in *McG* is the correct approach for the Grand Court in the Cayman Islands to follow. If a petitioner is going to present or amend a petition alleging two years separation, there may be great merit in them contacting the proposed respondent prior to the drafting of the petition to see whether consent would be forthcoming.
26. I refer to my recent decision of *Tulloch v Tulloch* Fam 104 of 2018⁷, a case dealing with a petition on the ground of parties living apart for five years. The decision reached in that case equally applies to where a petition is brought relying on the ground of two-year separation with consent. A supplemental/amended petition is not a separate petition as it is itself part of the original petition and effects an amendment to that petition. So, where two years separation or five years separation has not been completed prior to the presentation of the original petition, it is not possible to rely on either of these grounds by way of amendment of the petition or by supplemental petition. I am satisfied that under

⁷ 31 July 2019.

the Matrimonial Causes Law (2005 Revision) the petition means the original petition and not the amended petition, so the period of separation is reckoned from the day that the original petition is presented.



Conclusion

27. The parties now recognise the above position and that is why they do not seek to persuade me to proceed under that Amended Petition. They have agreed that the wife will have to file a fresh petition based on any of the relevant grounds set out in s.10(1) of the Law. Having regard to paragraph 8 of the Petitioner's Position Paper this is clearly a course that, prior to the hearing, she recognised that she could take.
28. Accordingly, with the parties' agreement, I dismiss the Amended Petition and, for the avoidance of doubt, also the Petition.
29. If the wife issues a fresh petition alleging the ground of two years separation, the husband has indicated that he would consent to it. He would do so on the basis that he would make it clear in his Acknowledgement of Service that, although they have been living apart for over two years, he believes the date of separation to be September 2016.
30. The parties have indicated to me today that they are likely to reach a consent ancillary relief order. I am told that it will likely contain provisions along the lines that there be a residence order to the mother with flexible contact to the father in relation to their two children. I am told that there are no assets to divide and that the order will contain a

'clean break' provision with maintenance of \$200 per child per month being agreed. The parties indicate that there may be no issues about medical or educational orders in relation to the children. They are hopeful that that they will be able to submit a consent ancillary relief order within the soon-to-be brought new divorce proceedings commenced by a fresh petition. I can indicate that if a consent order, signed by both the parties, was submitted to the Court coupled with a Statement of Information for a Consent Order form with the declarations properly completed, I would likely be able to approve that order administratively.

Costs

31. As the parties have reached agreement on the way forward, they also agree that the appropriate order in relation to costs is no order for costs. They also agree that there should be no order for costs for the cost reserved at the hearing on 29 June 2018.

Accordingly, I make no orders for costs.


Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT

